Montana Code Annotated

ANNOTATIONS

2024

Law Enforcement • Crimes

VOLUME 9

2024
ANNOTATIONS
to the
MONTANA CODE ANNOTATED

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(Annotations — September 2024)

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- public domain citation 2023 MT 177
- volume 413 Montana Reports page 356
- volume 535 Pacific Reporter (3rd Series) page 1133

Digests of Montana Attorney General's opinions through:
- volume 59 opinion number 1 of the Report and Official Opinions of Attorney General

Amendment notes listed under compiler's comments are intended to explain only amendments made in the year indicated and may not accurately reflect current statutory language because of subsequent amendment.

The annotations are provided as a convenience to the user and are not intended to be an exhaustive compilation of the law under a given statute or in a given area.

TITLE 44
LAW ENFORCEMENT

CHAPTER 1
HIGHWAY PATROL

Chapter Law Review Articles

The Highway Patrol Officer as an Expert Witness, Tanzer, 44 Mont. L. Rev. 251 (1983).

Part 1
General Provisions

44-1-101. Creation of highway patrol.

Compiler's Comments

1985 Amendment: Substituted reference to department of justice for reference to division of motor vehicles.

Section Not Codified: Section 82A-1206, R.C.M. 1947, transferring the functions of the Highway Patrol and the position of Chief to the Division of Motor Vehicles within the Department of Justice, was not codified in the MCA. This section has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 272, L. 1971. However, Ch. 503, L. 1985, abolished the Division of Motor Vehicles and substituted the Department of Justice for the Division throughout Title 44, ch. 1.

44-1-102. General duties of department of justice.

Compiler's Comments

1985 Amendment: Substituted reference to department of justice for reference to division of motor vehicles.

44-1-103. Authority to make rules.

Compiler's Comments

1985 Amendment: Substituted reference to department of justice for reference to division of motor vehicles.

Administrative Rules

Title 23, chapter 3, subchapter 1, ARM Driver Licensing.
ARM 23.3.148 Release of driving records for consumer reports.
Title 23, chapter 3, subchapter 2, ARM Driver improvement.
Title 23, chapter 3, subchapter 4, ARM Traffic.
ARM 23.3.402 Specific ambulance or tow car service requested.
ARM 23.3.403 Officer to request ambulance or tow car service.
ARM 23.3.404 Qualified tow car service.
ARM 23.3.405 Tow car service rotation system.
ARM 23.3.416 Uniform approval of motor vehicle safety equipment.

44-1-104. Duty to furnish governor with transportation.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1985 Amendment: Substituted reference to department of justice for reference to division of motor vehicles.

44-1-105. Department of justice to furnish equipment.

Compiler's Comments

1989 Amendment: In two places changed "patrolmen" to "patrol officers".

1985 Amendment: Substituted reference to department of justice for reference to division of motor vehicles in two places.

44-1-106. Authority of department of justice to dispose of equipment.

Compiler's Comments

1991 Amendment: Near middle of second sentence, after "state", substituted "treasury in the fund and to the credit of the accounting entity from which it was originally purchased" for "general fund"; and made minor changes in style. Amendment effective July 1, 1991.

1985 Amendment: Substituted reference to department of justice for reference to division of motor vehicles.

44-1-110. Highway patrol administration state special revenue account.

Compiler's Comments

2017 Amendment — Coordination: Section 11(2), Ch. 416, L. 2017, a coordination section, in (2) substituted "15-70-403(2)(b) and (3)(b)" for "15-70-403(8) and 60-3-201(1)(e)".

Effective Date: Section 39, Ch. 384, L. 2017, provided that this section is effective July 1, 2017.

Severability: Section 38, Ch. 384, L. 2017, was a severability clause.

44-1-111. Montana highway patrol headquarters named after Kris Hansen.

Compiler's Comments

Effective Date: This section is effective October 1, 2023.

Preamble: The preamble attached to Ch. 337, L. 2023, provided: "WHEREAS, Kris Hansen served the nation with the Central Intelligence Agency and as a member of the Montana National Guard; and

WHEREAS, Kris Hansen represented Montanans in both chambers of the Montana State Legislature; and

WHEREAS, Kris Hansen continued to work for Montana as Deputy State Auditor and Lieutenant Attorney General; and

WHEREAS, Kris Hansen was a mentor and friend to many legislators, elected officials, and staff; and

WHEREAS, Kris Hansen held the Montana Highway Patrol, its troopers, and their public safety mission in high regard, and as Lieutenant Attorney General she was instrumental in establishing the headquarters in Boulder, Montana."

Part 2
Highway Patrol Chief

44-1-201. Appointment and tenure.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 3
Powers and Duties of Chief Relating to Patrol Officers

44-1-301. General supervisory powers.

Compiler's Comments

1989 Amendment: Changed "patrolmen" to "patrol officers".

44-1-302. Powers relating to supervisory personnel — quotas prohibited.

Compiler's Comments

2007 Amendment: Chapter 244 inserted second sentence concerning quotas; and made minor changes in style. Amendment effective April 25, 2007.

44-1-303. Duties.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 2 in (7) near middle after "motor" substituted "vehicles" for "equipment"; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

1989 Amendment: In (2) changed "patrolmen" to "patrol officers"; and in (6) changed "patrolman" to "patrol officer".

Part 4
Appointment of Patrol Officers

44-1-401. Qualifications of patrol officers.

Compiler's Comments

1991 Amendment: In (3), after "Montana", deleted "for at least 1 year immediately prior to appointment"; in (5), after "United States", deleted "and state of Montana"; and made minor change in style. Amendment effective April 15, 1991.

1989 Amendment: At beginning changed "Patrolmen" to "Patrol officers".

44-1-402. Appointment of supervisory personnel.

Compiler's Comments

1989 Amendment: In two places changed "patrolmen" to "patrol officers".

44-1-404. Status of replacements for patrol officers who enter the armed forces.

Compiler's Comments

1989 Amendment: In two places changed references to patrolmen to references to patrol officers.

Part 5
Salaries and Expenses

44-1-501. Payment of expenses.

Compiler's Comments

2017 Amendments — Composite Section: Chapter 384 at beginning substituted "A portion of" for "All" (rendered void by Ch. 414) and at end substituted "highway patrol administration account established in 44-1-110" for "transportation department's account in the state special revenue fund"; and made minor changes in style. Amendment effective July 1, 2017.

Chapter 414 substituted "The highway patrol must be partially funded from" for "All expenses of the highway patrol shall be paid out of". Amendment effective May 22, 2017.

The amendments to this section made by sec. 14, Ch. 267, L. 2017, were rendered void by sec. 32, Ch. 384, L. 2017, a coordination section.

Preamble: The preamble attached to Ch. 414, L. 2017, provided: "WHEREAS, the Legislature created the Montana Highway Patrol to protect and serve the people of Montana and to ensure their safety when traveling on Montana's roadways; and

WHEREAS, the 2005 Legislature enacted House Bill No. 35, which created a fund to address the recruitment and retention issues within the Highway Patrol; and

WHEREAS, in 2005, the projections for the fund created from House Bill No. 35 predicted the fund to become insolvent in 2014; however, due to the subsequent enactment of permanent registration, the fund was projected to become insolvent by 2010; and

WHEREAS, the Montana Highway Patrol has been a good steward of the fund and has prudently managed it to be solvent longer than initially projected despite the fund receiving reduced revenue due to permanent registration; and

WHEREAS, the fund created by House Bill No. 35 will become insolvent in fiscal year 2017; and

WHEREAS, this act is intended to increase the revenue for the fund created by House Bill No. 35 to allow the Montana Highway Patrol to continue to hire, train, and retain competent officers to ensure that Montana roadways are kept safe for all travelers."

Severability: Section 38, Ch. 384, L. 2017, was a severability clause.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

1986 Amendment: At beginning substituted "All expenses" for "All salaries of members".

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

44-1-503. Salary upon permanent appointment.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: In two places changed "patrolman" to "patrol officer".

44-1-504. Special revenue account to partially fund highway patrol officers' salaries.

Compiler's Comments

2021 Amendment: Chapter 472 inserted (3) concerning transfers from the account to the highway patrol officers' retirement pension trust fund in 2021 and 2022; and inserted (4) concerning transfers from the account to the highway patrol officers' retirement pension trust fund in 2023 and each fiscal year thereafter. Amendment effective July 1, 2021, and terminates on occurrence of contingency.

2017 Amendment: Chapter 414 deleted former (3) that read: "(3) For the purposes of this section, the term "associated operating costs" does not include the state employer contribution provided for in 19-6-404." Amendment effective May 22, 2017.

Preamble: The preamble attached to Ch. 414, L. 2017, provided: "WHEREAS, the Legislature created the Montana Highway Patrol to protect and serve the people of Montana and to ensure their safety when traveling on Montana's roadways; and

WHEREAS, the 2005 Legislature enacted House Bill No. 35, which created a fund to address the recruitment and retention issues within the Highway Patrol; and

WHEREAS, in 2005, the projections for the fund created from House Bill No. 35 predicted the fund to become insolvent in 2014; however, due to the subsequent enactment of permanent registration, the fund was projected to become insolvent by 2010; and

WHEREAS, the Montana Highway Patrol has been a good steward of the fund and has prudently managed it to be solvent longer than initially projected despite the fund receiving reduced revenue due to permanent registration; and

WHEREAS, the fund created by House Bill No. 35 will become insolvent in fiscal year 2017; and

WHEREAS, this act is intended to increase the revenue for the fund created by House Bill No. 35 to allow the Montana Highway Patrol to continue to hire, train, and retain competent officers to ensure that Montana roadways are kept safe for all travelers."

2013 Amendment: Chapter 272 inserted (3) regarding associated operating costs. Amendment effective July 1, 2013.

Preamble: The preamble attached to Ch. 272, L. 2013, provided: "WHEREAS, Article VIII, section 15, of the Montana Constitution requires that "Public retirement systems shall be funded on an actuarially sound basis"; and

WHEREAS, Article VIII, section 15, of the Montana Constitution also requires that "Public retirement system assets, including income and actuarially required contributions, shall not be encumbered, diverted, reduced, or terminated and shall be held in trust to provide benefits to participants and their beneficiaries and to defray administrative expenses"; and

WHEREAS, the unprecedented collapse of the financial markets in 2008 and 2009 and the subsequent slow rate of economic recovery has resulted in little or no prospect that current statutory contribution rates together with future market returns will be sufficient to fund the Highway Patrol Officers' Retirement System on an actuarially sound basis, and current contributions remain insufficient to pay the past and future accruals of retirement benefits for current members of the system; and

WHEREAS, failure to return the system to a position of actuarially sound funding places the benefits to be paid to the current system members in jeopardy and results in collection of employee contributions for which future benefits may not be guaranteed; and

WHEREAS, because reasonable increases in employer contributions and future employee contributions and reasonable reductions in benefits for future members alone will not be sufficient to return the system to a position of actuarially sound funding, increased contributions for current and future members and reduced benefits for future members are necessary to return the system to a position of actuarially sound funding; and

WHEREAS, during the past two legislative sessions and interims, the Legislature, interim committees, the retirement system board and staff, and the Governor's office have analyzed a range of alternatives for returning all public employee retirement systems to a position of actuarially sound funding without raising contract impairment issues for current members, but recent actuarial analysis continues to show that several of the systems, including the Highway Patrol Officers' Retirement System remain actuarially unsound; and

WHEREAS, due to significant strains on the Montana economy and taxpayers, a modest supplemental contribution rate increase applied to current Highway Patrol Officers' Retirement System members, phased in over a 4-year period, in conjunction with additional employer and state contributions, is reasonable and necessary pursuant to the language of U.S. Trust Company of New York v. New Jersey, 431 U.S. 1 (1977), concerning contract impairment and is the least impairing alternative available to the Legislature as it seeks to fulfill its constitutional obligation to ensure the Highway Patrol Officers' Retirement System is funded in an actuarially sound manner; and

WHEREAS, the defined benefit Highway Patrol Officers' Retirement System is integral to the successful recruitment and retention of qualified Montana highway patrol officers."

2009 Amendments — Composite Section: Chapter 7 in (2) at end substituted "2-18-303(5)" for "2-18-303(6)". Amendment effective July 1, 2009.

Chapter 426 in (2) near middle following "account is" deleted "statutorily appropriated, as provided in 17-7-502"; and made minor changes in style. Amendment effective July 1, 2009.

2007 Amendments — Composite Section: Chapter 44 in (2) at end of introductory clause substituted "2-18-303(9)" for "2-18-303(10)"; deleted former (2)(a) that read: "(a) an increase in the base salary for the number of highway patrol officer positions existing on June 30, 2006"; in (2)(a) at end after "positions" deleted "created after June 30, 2006"; in (2)(b) after "increases" deleted "after June 30, 2006"; and made minor changes in style. Amendment effective October 1, 2007.

Chapter 81 in (2) at end substituted "2-18-303(6)" for "2-18-303(10)"; deleted former (2)(a) that read: "(a) an increase in the base salary for the number of highway patrol officer positions existing on June 30, 2006"; in (2)(a) after "costs for" deleted "new"; and made minor changes in style. Amendment effective July 1, 2007.

Preamble: The preamble attached to Ch. 421, L. 2005, provided: "WHEREAS, it is in the best interests of the citizens of Montana to travel safely on the streets and highways of Montana; and

WHEREAS, the Legislature created the Montana Highway Patrol to protect and serve the people of Montana and to ensure their safety when traveling on Montana's roadways; and

WHEREAS, the population of the State of Montana has increased by 223,412 persons (by 32%) in the past 30 years; and

WHEREAS, the total number of vehicles registered in the State of Montana has increased from 668,717 to 1,059,565 (by 53%) in the past 30 years; and

WHEREAS, economic loss to the citizens of the State of Montana associated with motor vehicle crashes increased from $106.6 million in 1973 to $780 million in 2003 (by 732%); and

WHEREAS, the Montana Highway Patrol had 220 uniformed officers 30 years ago and has only 206 today, despite an increase of 5 billion highway miles a year driven over that same period and despite being given additional statutory law enforcement obligations; and

WHEREAS, the standing House and Senate State Administration Committees of the 58th Legislature, recognizing the unique nature of law enforcement services and the importance of retaining qualified law enforcement personnel, directed the Attorney General to report to the State Administration and Veterans' Affairs Interim Committee on recruitment and retention efforts, to conduct a salary survey, and to develop draft legislation to implement recommendations; and

WHEREAS, in addition to the salary survey conducted by the Attorney General, the Montana Legislative Audit Division conducted a separate salary survey of the Sheriff departments in the eight counties where the Montana Highway Patrol district offices are located, including the headquarters in Helena; and

WHEREAS, an entry-level officer for the Montana Highway Patrol is paid $4.50 an hour ($9,360 a year) less than the average entry-level officer in those eight county Sheriff's departments; and

WHEREAS, the Montana Highway Patrol continues to lose officers to other law enforcement agencies after absorbing the cost of training those officers, which places additional hardships on the patrol; and

WHEREAS, in the past 11 years, 62 of the 80 officers (78%) that left the Montana Highway Patrol for nonretirement purposes went to other law enforcement agencies for higher salaries; and

WHEREAS, Montana Highway Patrol officer positions have been placed into the alternative pay and classification plan, which allows market-based salary survey adjustments, to recruit and retain officers; and

WHEREAS, market-based salary information from county Sheriff departments, which are recruiting and hiring Montana Highway Patrol officers because of higher salaries, is readily available to establish market-based salary rates to compensate Montana Highway Patrol officers and reduce attrition in these positions; and

WHEREAS, this act is intended to allow the Montana Highway Patrol to be in a position to hire, train, and retain competent officers to ensure that Montana roadways are kept safe for all travelers."

Effective Date: Section 10(2), Ch. 421, L. 2005, provided that this section is effective January 1, 2006.

44-1-511. Payment of salary benefit to officers injured in performance of duty.

Compiler's Comments

2007 Amendment: Chapter 12 deleted former (2) that read: "(2) The department of justice shall set off the amount of any workers' compensation award actually received against the salary benefit payable under this section"; and made minor changes in style. Amendment effective March 16, 2007.

44-1-512. Determination of eligibility for salary benefit.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

44-1-513. Periodic medical examinations — waiver of right to salary benefit.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

44-1-515. Assignment to light duty or another position within department of justice.

Compiler's Comments

2005 Amendment: Chapter 329 in (1) in first sentence near middle after "light" deleted "police"; in (2) in first sentence substituted "position covered under the highway patrol officers' retirement system" for "highway patrol" and at end inserted "that is not covered under the highway patrol officers' retirement system"; and made minor changes in style. Amendment effective July 1, 2005.

44-1-516. Effect on probationary status.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

44-1-518. Contribution for retirement — length of service credit — transfer of retirement contributions.

Compiler's Comments

2005 Amendment: Chapter 329 in (3) near middle before "of the officer's" inserted "or any portion" and at end substituted "according to 19-2-715" for "in the officer's credit and the officer's accumulated contributions and the state's adjusted contributions, with accrued interest, credited to the officer in the Montana highway patrol officers' retirement account must be transferred to the public employees' retirement account in the officer's credit. The state's "adjusted contributions" means an amount equal to the amount that would have been contributed by the state had the transferred service been employment covered under the public employees' retirement system"; and made minor changes in style. Amendment effective July 1, 2005.

1993 Amendment: Chapter 265 at end of (2) substituted reference to 19-2-701 for reference to 19-6-302; and made minor changes in style. Amendment effective July 1, 1993.

1989 Amendment: In two places in (3) changed "patrolmen's" to "patrol officers'".

Part 6
Probationary Status and Tenure

44-1-601. Probationary training and service — patrol officers.

Compiler's Comments

1989 Amendment: In two places changed "patrolman" to "patrol officer".

44-1-611. Tenure.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: Changed "patrolman" to "patrol officer".

44-1-612. Cause for suspension, demotion, or discharge.

Compiler's Comments

1985 Amendment: In (9) substituted reference to department of justice for reference to division of motor vehicles.

Case Notes

Sufficient Grounds for Dismissal of Patrol Officer Based on Combination of Behaviors Discovered in Single Investigation: Tuttle was dismissed as a highway patrol officer based on several incidents of misconduct discovered during an investigation, including misappropriation of state resources, sexual harassment, lying to investigators and cadets, and a general lack of integrity and honesty necessary to serve in the patrol. The District Court concluded that substantial evidence supported the findings of fact and that the decision to terminate Tuttle was correct. Tuttle appealed on several grounds, arguing that pursuant to administrative rules, he should have been subjected to progressive discipline rather than immediate termination, that the rules required a single incident of egregious behavior rather than combinations of behavior before termination proceedings could be instituted, and that the legal conclusion that he sexually harassed another trooper was incorrect. Nevertheless, the Supreme Court affirmed. Tuttle's interpretation of the administrative rules was unsupported by the plain language of the regulations, and any one of the offenses could have constituted grounds for dismissal. Tuttle v. Dept. of Justice, 2007 MT 203, 338 M 437, 167 P3d 864 (2007).

Assertion of Immunity as Ground for Discharging Public Officer: As a matter of federal constitutional law, a public officer (policeman) cannot be discharged solely because he asserts his self-incrimination privilege or refuses to sign a waiver of immunity. Gardner v. Broderick, 392 US 273, 20 L Ed 2d 1082, 88 S Ct 1913 (1968).

44-1-613. Recognition of meritorious service on retirement.

Compiler's Comments

Effective Date: Section 3, Ch. 504, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 18, 2023.

Part 7
Disciplinary Action — Preliminary Procedure

44-1-701. Authority of department of justice to suspend or demote.

Compiler's Comments

1991 Amendment: At end, after "discharge", substituted "it may impose a suspension without pay for up to 10 days without filing charges and conducting a hearing under part 8" for "or his conduct has warranted reprimanding, it may suspend, demote, or reprimand the member".

1985 Amendment: Substituted reference to department of justice for reference to division of motor vehicles.

44-1-702. Preferring charges.

Compiler's Comments

1985 Amendment: In (2) substituted reference to department of justice for reference to division of motor vehicles.

44-1-703. When charges dismissed.

Compiler's Comments

1985 Amendment: Substituted reference to department of justice for reference to division of motor vehicles.

44-1-704. When department of justice to order hearing.

Compiler's Comments

1985 Amendment: Substituted reference to department of justice for reference to division of motor vehicles.

Section Not Codified: Subsection (7)(f) of section 31-105, R.C.M. 1947, is no longer applicable law because "chief" has been changed to "division", rendering the section meaningless. Therefore, the subsection was not codified in the MCA. The subsection has not been repealed and is still valid law. Citation may be made to sec. 5, Ch. 199, L. 1943, as last amended by sec. 4, Ch. 343, L. 1977. Chapter 503, L. 1985, abolished the "division" (of motor vehicles) and substituted the Department of Justice for the Division.

44-1-705. Suspension pending hearing and decision.

Compiler's Comments

1989 Amendment: Changed "patrolman" to "patrol officer".

1985 Amendment: Substituted reference to department of justice for reference to division of motor vehicles.

Part 8
Disciplinary Action — Hearing and Decision

44-1-801. Notice of hearing.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: In four places changed "patrolman" to "patrol officer".

1985 Amendment: In (1) substituted reference to department of justice for reference to division of motor vehicles.

44-1-802. Authority of department of justice — conduct of hearing.

Compiler's Comments

1985 Amendment: In (1) and (2) substituted reference to department of justice for reference to division of motor vehicles.

44-1-803. Rights of accused.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: Near end, after "counsel", inserted "at his own expense".

1989 Amendment: Changed "patrolman" to "patrol officer".

44-1-804. Rendering and filing of decision.

Compiler's Comments

1991 Amendment: Increased time from 15 days to 30 days and after "hearing" inserted "or within the additional time to which the accused patrol officer consents".

1989 Amendment: Changed "patrolman" to "patrol officer".

1985 Amendment: Substituted reference to department of justice for reference to division of motor vehicles.

44-1-805. Reinstatement and backpay upon exoneration.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1989 Amendment: In two places changed "patrolman" to "patrol officer".

1985 Amendment: Substituted reference to department of justice for reference to division of motor vehicles in two places.

44-1-806. Disciplinary action.

Compiler's Comments

2009 Amendment: Chapter 90 in (1) near middle after "punish the" substituted "patrol officer" for "offending party"; inserted (2) providing that a discharge after a hearing is exempt from the Wrongful Discharge From Employment Act; and made minor changes in style. Amendment effective March 25, 2009.

1991 Amendment: Before "suspension" deleted "reprimand".

1989 Amendment: Changed "patrolman" to "patrol officer".

1985 Amendment: Substituted reference to department of justice for reference to division of motor vehicles.

44-1-808. Demotion pay status.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 9
Disciplinary Action — Appeal to Court

44-1-901. Right to appeal.

Compiler's Comments

1991 Amendment: In (1)(a) inserted reference to District Court of county in which the claim arose; inserted (1)(b) regarding right to appeal pursuant to a grievance procedure contained in a collective bargaining agreement; in (2), after "appeal", inserted "to the district court"; and made minor changes in style.

1989 Amendment: In (1) changed "patrolman" to "patrol officer".

1985 Amendment: In (2) substituted reference to department of justice for reference to division of motor vehicles.

44-1-902. Action by court.

Compiler's Comments

2009 Amendment: Chapter 90 near middle after "44-1-901(1)(a)" substituted "under the standard of review provided in 2-4-704" for "in a summary manner". Amendment effective March 25, 2009.

1991 Amendment: Near middle, after "determination", inserted "appealed pursuant to 44-1-901(l)(a)"; and made minor changes in style.

44-1-903. Reinstatement and backpay upon reversal or modification.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: In first sentence, after "modified", deleted "by the district court" and near end of second sentence, after "directed by", inserted "resolution of the grievance procedure or".

1989 Amendment: In two places changed "patrolman" to "patrol officer".

1985 Amendment: Substituted reference to department of justice for reference to division of motor vehicles in two places.

44-1-909. Exemption.

Compiler's Comments

Effective Date: Section 5, Ch. 90, L. 2009, provided: "[This act] is effective on passage and approval." Approved March 25, 2009.

44-1-910. Waiver.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 10
Jurisdiction of Patrol Officers

44-1-1001. Offenses for which patrol officers may make arrests.

Compiler's Comments

2003 Amendment: Chapter 215 deleted former (2)(h) that read: "(h) illegal transportation of narcotics"; inserted (2)(h) and (2)(i) providing that patrol officers may make arrests for possession of dangerous drugs and for possession of drug paraphernalia; and made minor changes in style. Amendment effective October 1, 2003.

1989 Amendment: In (1) changed "patrolmen" to "patrol officers"; and in (1)(a) changed "patrolman" to "patrol officer".

Collateral References

National Motor Vehicle Theft Act, 18 U.S.C. §§ 2311 through 2313.

44-1-1002. No authority in labor disputes.

Compiler's Comments

1989 Amendment: Changed "patrolmen" to "patrol officers".

44-1-1003. Offenses on highways, rest areas, and state highway properties adjacent to the highway or involving motor vehicles.

Compiler's Comments

1989 Amendment: Changed "Patrolmen" to "Patrol officers".

Case Notes

Territorial Jurisdiction Not Controlling on Officer's Right to Make Arrest: Williams argued that Krausz, a Miles City police officer, did not have the authority to arrest him for driving under the influence because he was not stopped in Miles City or within 5 miles of the city limits. The Supreme Court held that Krausz was acting at the request of a highway patrol officer who did have jurisdiction over the incident and that therefore Krausz did have the authority to arrest Williams. St. v. Williams, 273 M 459, 904 P2d 1019, 52 St. Rep. 1085 (1995).

44-1-1004. Authority concerning livestock or livestock products in transit.

Compiler's Comments

1989 Amendment: In two places changed references to patrolmen to references to patrol officers.

44-1-1005. Motor carriers safety — enforcement — violations.

Compiler's Comments

2005 Amendments — Composite Section: Chapter 366 deleted former (1) and (2) that read: "(1) The department of justice shall adopt, by rule, standards for safety of operations of:

(a) any for-hire motor carrier or any private motor carrier;

(b) any motor vehicle or vehicle combination used in interstate commerce that has a gross vehicle weight rating, gross combination weight rating, gross vehicle weight, or gross combination weight, whichever is greater, of 10,001 pounds or more;

(c) any motor vehicle or vehicle combination used in intrastate commerce that has a gross vehicle weight rating, gross combination weight rating, gross vehicle weight, or gross combination weight, whichever is greater, of 26,001 pounds or more and that is not a farm vehicle operating solely in Montana;

(d) any motor vehicle that is designed or used to transport at least 16 passengers, including the driver, and is not used to transport passengers for compensation;

(e) any motor vehicle that is designed or used to transport at least nine passengers, including the driver, for compensation; or

(f) any motor vehicle that is used to transport hazardous materials of a type or quantity that requires the vehicle to be marked or placarded in accordance with federal hazardous materials regulations in 49 CFR, part 172.

(2) Standards of safety adopted under this section must substantially comply, within allowed tolerance guidelines, to the federal motor carrier safety regulations and the federal hazardous material regulations as applied to motor carriers and vehicles transporting passengers or property in commerce"; in (1) at end substituted "to enforce the provisions of Title 61, chapters 5, 8, and 9, as they apply to motor carriers and shall assist the department of transportation in the enforcement of safety standards adopted pursuant to 61-10-154" for "for enforcement of standards adopted pursuant to this section" and deleted former second through fourth sentences that read: "Inspection of a vehicle based in Montana may, at the request of the carrier, be made at the place of business or domicile of the vehicle owner or, if that is not a practicable inspection site, at a designated location and at a mutually agreeable time. After inspection, a vehicle found to conform to the standards adopted pursuant to this section is entitled to certification and identification to exempt it from further safety inspection until the next required periodic inspection or until a nonconformity with standards is apparent. This section does not prohibit the inspection of a motor vehicle, as provided for by this section, at a safe location on a public road"; at beginning of (2) substituted "The highway patrol" for "The department" and at end substituted "of the provisions of Title 61 as they apply to motor carriers" for "effort"; deleted former (5) through (7) that read: "(5) The department may designate and train civilian employees as inspectors within the motor carrier safety assistance program. Each civilian inspector is a peace officer whose jurisdiction is limited to enforcement of violations of Title 61, chapters 5 and 9, and any standards adopted pursuant to this section. Each employee designated as a peace officer may:

(a) issue citations and make arrests;

(b) issue summonses;

(c) accept bail;

(d) serve warrants of arrest;

(e) make reasonable inspections of cargo carried by commercial motor vehicles;

(f) make reasonable safety inspections of commercial motor vehicles; and

(g) require production of documents relating to the cargo, driver, routing, maintenance, or ownership of commercial motor vehicles.

(6) Violations of the standards adopted pursuant to this section are punishable as provided in 61-9-512, and the court, upon conviction or forfeiture of bail that is not vacated, shall forward a record of conviction or forfeiture to the department within 5 days in accordance with 61-11-101.

(7) As used in this section, the terms "for-hire motor carrier", "private motor carrier", "gross vehicle weight rating", and "gross combination weight rating" have the same meaning as provided in 49 CFR 390.5"; and made minor changes in style. Amendment effective October 1, 2005.

Chapter 428 in (6) near middle after first "conviction" substituted "as defined in 61-5-213" for "or forfeiture of bail that is not vacated" and near end after second "conviction" deleted "or forfeiture"; and made minor changes in style. Amendment effective October 1, 2005. The amendment by Ch. 366 rendered the amendment by Ch. 428 void.

Severability: Section 39, Ch. 428, L. 2005, was a severability clause.

2001 Amendment: Chapter 207 substituted language in (1)(a) requiring adoption of rules for safe operation of any for-hire motor carrier or private motor carrier for "motor carriers, each of whom is considered to consent impliedly to reasonable safety inspections of its motor vehicles used in furtherance of its business as a motor carrier"; substituted language in (1)(b) requiring safety rules for motor vehicle or vehicle combination used in interstate commerce with gross vehicle weight of 10,001 pounds or more for "provide standards for the safe operation of all motor vehicles used in commerce that exceed 26,000 pounds gross vehicle weight, except farm vehicles"; inserted (1)(c) requiring safety rules for motor vehicle or vehicle combination used in intrastate commerce with gross vehicle weight of 26,001 pounds or more that is not farm vehicle operating solely in Montana; substituted language in (1)(d) requiring safety rules for motor vehicle designed or used to transport at least 16 passengers without compensation for "provide for the safe operation of vehicles of less than 26,000 pounds gross vehicle weight that are designed to transport more than 15 passengers, including the driver"; inserted (1)(e) requiring safety rules for any motor vehicle designed or used to transport at least nine passengers, including the driver, for compensation; in (1)(f) at end substituted language requiring adoption of safety rules in accordance with federal hazardous materials regulations for "rules adopted by the department"; in (2) after "adopted" substituted language requiring substantial compliance to federal motor carrier safety regulations for "pursuant to subsections (1)(b) and (1)(c) must be the same as prescribed for motor carriers, and the same inspection standards and procedures apply"; in three places in (3) substituted "this section" for "subsection (1)(a)"; at end of second sentence in (5) substituted "pursuant to this section" for "pursuant to subsections (1) and (2) of this section"; in (6) after "pursuant to" substituted "this section" for "subsection (1)" and after "61-9-512" inserted requirement that court forward conviction or forfeiture record to department within 5 days; inserted (7) providing that certain terms have same meaning as defined in federal regulation; and made minor changes in style. Amendment effective October 1, 2001.

Applicability: Section 16, Ch. 207, L. 2001, provided: "[This act] applies to driver's licenses issued or renewed and to offenses committed after September 30, 2001."

1995 Amendment: Chapter 80 in (1)(c), after "weight", substituted "that are designed to transport more than 15 passengers, including the driver" for "if they are used to transport passengers for hire"; and made minor changes in style. Amendment effective March 7, 1995.

1991 Amendments: Chapter 226 in (2) deleted second sentence providing that standards relating to drivers, other than drivers for motor carriers, do not apply to vehicles operated exclusively within a 200-mile radius of their work reporting location.

Chapter 512 substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

1987 Amendments: Chapter 370 near end of last sentence of (3) substituted "provided for" for "defined".

Chapter 386 inserted (5) relating to authority of Department to designate and train civilian employees as motor carrier safety inspectors; and inserted (6) relating to penalty for violation of motor carrier safety standards.

1985 Amendments: Chapter 503 in introductory clause of (1), (1)(c), and (4) substituted reference to department of justice for reference to division of motor vehicles.

Chapter 686 substituted subsections concerning enumerated duties of various entities relating to safety standards for former section that read: "A highway patrolman has the same authority to enforce provisions of the motor carriers law as that granted the public service commission under 69-12-203, except that the highway patrol has primary responsibility for enforcement of standards adopted pursuant to 69-12-201(1)(f) with regard to vehicles based in Montana and for making inspections thereof at the request of the carrier. Inspection of a vehicle based in Montana may be made at the place of business or domicile of the vehicle owner or, if that is not a practicable inspection site, at a designated location and at a mutually agreeable time. After inspection, a vehicle found to conform to the standards adopted pursuant to 69-12-201(1)(f) is entitled to certification and identification to exempt it from further safety inspection until the next required periodic inspection or until a nonconformity with standards is apparent. Nothing in this section shall prohibit the inspection of a motor vehicle as defined by 69-12-201(1)(f) at a safe location on a public road. The division shall cooperate with the public service commission and the department of highways to assure minimum duplication and maximum coordination of enforcement effort".

Statement of Intent: The statement of intent attached to Ch. 686, L. 1985, provided: "A statement of intent is required for this bill because it requires [in an amendment to 44-1-1005] that the motor vehicle division adopt motor carrier safety standards and provide for their implementation. The intention of the legislature is that the division adopt standards substantially similar to those promulgated by the public service commission pursuant to 69-12-201 and 69-12-203, prior to amendment by this bill, with such modifications as the division from time to time considers appropriate and in conformance with those and other applicable sections.

It is appropriate to quote the statement of intent that accompanied Chapter 227, Laws of 1981, which granted the public service commission its authority to adopt motor carrier safety standards:

"A statement of intent is required for this bill because it grants the Public Service Commission the authority to provide safety standards for motor vehicles used in commerce.

All interstate motor carriers, interstate private carriers, and carriers hauling unregulated commodities in interstate commerce must now meet equipment safety requirements and inspections as established by the Federal Motor Carrier Safety Regulations of the Department of Transportation. In addition, regulated intrastate motor carriers must also meet the same safety standards.

The Legislature intends to include large over-the-road trucks, in excess of 26,000 pounds GVW, used in commerce operating on Montana's highways to adhere to safety equipment standards. It is the intent of the Legislature to establish by regulation uniform safety standards and a safety inspection program that will focus on mechanical factors most often blamed for accidents involving trucks, passenger carriers, and hazardous material transporters. Included would be detailed inspections of brakes, steering components, tires, and driver logs where required.

It is intended that rules promulgated by PSC incorporate the "Critical Item Truck Inspection" program and that the rules include a procedure for conducting the inspection program as well as providing for a vehicle identification program acknowledging the inspection. The rules shall provide that safety infractions posing no imminent threat to public safety shall not result in an "out of service" order. Such a vehicle shall be allowed to proceed to obtain repairs before final inspection and issuance of inspection acknowledgment. It is recognized that repairing or parking large over-the-road trucks on the roadway is extremely dangerous.""

Initial Adoption of Standards: Section 5, Ch. 686, L. 1985, provided: "The division shall initiate proceedings before July 1, 1985, to adopt standards for safety of operations of motor carriers and motor vehicles pursuant to 44-1-1005(1). The standards may include those previously adopted by the public service commission, but the division may modify or expand the standards as necessary to conform to 44-1-1005(1) and other applicable sections. The division shall make the standards pursuant to 44-1-1005(1) effective on July 1, 1985."

Transfer of Personnel: Section 7, Ch. 686, L. 1985, provided: "It is the intention of the legislature that, for the continuity of an ongoing truck safety program, persons employed by the public service commission solely for truck safety under the motor carrier safety assistance program on January 1, 1985, must be employed by the department of justice, division of motor vehicles, in the performance of duties similar to those they performed before January 1, 1985."

1983 Amendment: Substituted language quoted in Ch. 686, L. 1985, amendment note for former section, which read: "A highway patrolman has the same authority to enforce provisions of the motor carriers law as that granted the public service commission under 69-12-203. The division shall cooperate with the public service commission and the department of highways to assure minimum duplication and maximum coordination of enforcement effort."

1981 Amendment: Deleted "licensing" after "motor carriers".

Statement of Purpose: Section 1, Ch. 280, L. 1977 (section 8-132, R.C.M. 1947, not codified in the MCA), states the purpose of the 1977 amendment.

Administrative Rules

ARM 18.8.1501 Motor carrier safety definitions.

ARM 18.8.1502 Federal motor carrier safety rules and state modifications.

ARM 18.8.1505 Safety inspection program — purpose and out-of-service criteria.

Part 11
Procedure for Arrests

Part Administrative Rules

ARM 23.3.406 through 23.3.409 Acceptance and posting of bail bonds.

44-1-1101. Duty of patrol officer upon making arrest.

Compiler's Comments

2003 Amendment: Chapter 465 inserted (3)(b) allowing driver to post driver's license in lieu of bail for traffic offenses; and made minor changes in style. Amendment effective October 1, 2003.

1989 Amendment: At beginning changed "patrolman" to "patrol officer".

Administrative Rules

ARM 23.3.406 Accepting automobile club cards in lieu of bond.
ARM 23.3.407 Accepting personal items in lieu of bond.
ARM 23.3.408 Posting bond monies with court.
ARM 23.3.409 Out-of-state violators.

Case Notes

Failure to Post Appearance Bond: Where driver stopped for speeding late at night had an out-of-state license, had no Montana address except "General Delivery", and could not post an appearance bond, arresting officer had no duty to sit with the driver until his friend arrived with money for bond, and commitment to jail was proper. (See 2003 amendment allowing driver to post driver's license in lieu of bail.) State ex rel. Kotwicki v. District Court, 166 M 335, 532 P2d 694 (1975).

44-1-1102. Procedure when patrol officer accepts bail or driver's license in lieu of bail.

Compiler's Comments

2005 Amendment: Chapter 130 in (3) at beginning substituted "justice of the peace" for "judge". Amendment effective October 1, 2005.

2003 Amendment: Chapter 465 inserted (2) providing for procedure for valid temporary driving permit when driver's license is posted in lieu of bail; inserted (3) providing for return of driver's license accepted in lieu of bail; and made minor changes in style. Amendment effective October 1, 2003.

1989 Amendment: In three places changed "patrolman" to "patrol officer".

Administrative Rules

ARM 23.3.406 Accepting automobile club cards in lieu of bond.
ARM 23.3.407 Accepting personal items in lieu of bond.
ARM 23.3.408 Posting bond monies with court.
ARM 23.3.409 Out-of-state violators.

44-1-1103. Check in lieu of cash.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: In (1) changed "patrolmen" to "patrol officers"; and in (2) changed "patrolman" to "patrol officer".

CHAPTER 2
INVESTIGATION, COMMUNICATION, AND IDENTIFICATION

Part 1
Criminal Investigation

44-2-111. Definition of agent.

Compiler's Comments

1991 Amendment: After "appointed" inserted "by the attorney general" and at end substituted "department of justice" for "attorney general's office".

1985 Amendment: Substituted "person appointed to conduct criminal investigations and perform related duties" for "person appointed to the bureau of criminal investigation".

Case Notes

Justice Department Investigator Not Entitled to Prosecutorial Immunity for Administrative Acts in Gambling License Application Investigation: Kelman applied to the Department of Justice for a gambling operator's license in connection with her contractual interest in two casinos. The Department assigned Losleben to investigate and report on the application. Losleben filed a 37-page "offense report" recommending that the Department deny the application and prosecute Kelman and others listed in the report for alleged criminal violations. Kelman filed suit against Losleben, alleging invasion of privacy, injurious falsehood, wrongful use of civil proceedings, tortious interference with contract, and actual fraud. The District Court dismissed the claims, concluding that Losleben was a government official entitled to absolute prosecutorial immunity. On appeal, the Supreme Court focused on whether the alleged wrongful conduct occurred in the course of filing and maintaining criminal charges, in accord with Smith v. Butte-Silver Bow County, 266 M 1, 878 P2d 870 (1994), and whether the conduct was intimately associated with the judicial phase of the criminal process, as set out in Imbler v. Pachtman, 424 US 409, 47 L Ed 2d 128, 96 S Ct 984 (1976). A review of the record showed that Losleben was acting in an administrative capacity while investigating and reporting on Kelman's application as an agent of the Department, rather than in a prosecutorial capacity of filing and maintaining criminal charges. As such, Losleben was not entitled to prosecutorial immunity, and the District Court's dismissal of the claim of civil liability constituted reversible error. Kelman v. Losleben, 271 M 156, 894 P2d 955, 52 St. Rep. 387 (1995).

Attorney General's Opinions

Definition of "Agent" — Not Restricted to Employees in Department of Justice: The definition of "agent" under this section does not restrict the Attorney General from appointing a state employee to serve as an agent who is not an employee of the Department of Justice. 56 A.G. Op. 2 (2016).

44-2-113. Qualifications of agents.

Compiler's Comments

1991 Amendment: Substituted second sentence regarding agent requirements for former second sentence that read: "Qualifications shall be equal to those of similarly assigned federal bureau of investigation personnel".

Case Notes

Report of State Chemist: A written report of the State Chemist, whose qualifications are described under 44-2-113, showing a substance to be marijuana has been held admissible hearsay in a criminal proceeding. St. v. Snider, 168 M 220, 541 P2d 1204 (1975).

44-2-115. Powers and duties of agents.

Compiler's Comments

Name Change — Directions to Code Commissioner: Section 14, Ch. 630, L. 1993, provided: "Wherever the name "state compensation mutual insurance fund", meaning the fund established in 39-71-2313, appears in the Montana Code Annotated or in legislation enacted by the 1993 legislature, the code commissioner is directed to change the name to "state compensation insurance fund"." The phrase appeared in this section and was changed by the Code Commissioner as directed.

1991 Amendment: In introductory clause, after "agent", inserted "appointed by the attorney general pursuant to this part is a peace officer and"; in (1), at beginning, substituted "provide investigative assistance to" for "assist" and after "request" substituted "in accordance with rules adopted by the department of justice" for "by providing expert and immediate aid in investigation and solution of felonies committed in the state"; inserted (2) regarding concurrent jurisdiction; inserted (3) requiring investigation of gambling activities; inserted (4) requiring investigation of apparent violations disclosed by audit; inserted (5) requiring investigation of apparent workers' compensation violations; in (6), after "assist", inserted "whenever possible"; deleted former (3) that read: "(3) act as a peace officer, as defined in the laws of Montana, when engaged in assisting or acting under the direction of city, county, state, and federal law enforcement agencies as provided in this section"; and made minor changes in style.

Administrative Rules

Title 23, chapter 2, subchapter 2, ARM Investigative protocol.

44-2-117. Racial profiling prohibited — definitions — policies — complaints — training.

Compiler's Comments

2013 Amendment: Chapter 6 in (9) substituted "make available to the public information" for "make periodic reports to the law and justice interim committee". Amendment effective October 1, 2013.

Preamble: The preamble attached to Ch. 6, L. 2013, provided: "WHEREAS, House Bill No. 142 [Chapter 126, Laws of 2011] required interim committees to "review statutorily established advisory councils and required reports of assigned agencies to make recommendations to the next legislature"; and

WHEREAS, following the required review, the Law and Justice Interim Committee voted to make the recommendation contained in this bill."

2007 Amendment: Chapter 287 inserted (3) requiring a policy on race-based traffic stops; in (4) at end of second sentence substituted reference to subsection (3) for "the agency's standard policies and procedures"; inserted (6) concerning counseling and training for certain peace officers; in (8) inserted definition of minority group; inserted (10) concerning used of federal funds for video cameras and voice-activated microphones; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendment: Chapter 243 in (3)(a) at end after "profiling" inserted language requiring each agency's policy to require that all stops are lawful under 46-5-401 and are documented according to agency's standard policies and procedures; in (3)(b) in first sentence before "complaints" inserted "written" and inserted second sentence and (3)(b)(i) through (3)(b)(iv) outlining requirements of complaint procedure; inserted (4) requiring each municipal, county, consolidated local government, and state law enforcement agency to require cultural awareness and racial profiling training for peace officers and requiring training program to be certified by peace officers' standards and training advisory council; inserted (7) requiring department of justice to make periodic reports to law and justice interim committee on degree of compliance by local, county, and state law enforcement agencies; and made minor changes in style. Amendment effective October 1, 2005.

Effective Date: Section 3, Ch. 302, L. 2003, provided: "[This act] is effective July 1, 2003."

Case Notes

Claim of Racial Profiling Without Merit: The defendant moved to dismiss the charges against him on the grounds of outrageous government conduct, claiming that he was racially profiled by law enforcement officers when they mistakenly believed he was a white supremacist and a member of an outlaw biker gang. The District Court denied the motion and the Supreme Court affirmed, concluding that white supremacist groups or biker gangs are not protected minority groups under 44-2-117 and that the defendant failed to demonstrate that law enforcement's conduct was so grossly shocking and so outrageous as to violate the universal sense of justice. St. v. LeMay, 2011 MT 323, 363 Mont. 172, 266 P.3d 1278.

Part 2
State System of Criminal Identification

44-2-201. Establishment of state system.

Administrative Rules

Title 23, chapter 12, subchapter 1, ARM Criminal history records program.

Part 3
Criminal Justice Information Network

44-2-301. Establishment — inclusion of other state agencies.

Compiler's Comments

2013 Amendment: Chapter 5 in (1) substituted "criminal justice information network" for "permanent law enforcement communications system"; inserted (2) defining criminal justice information network; and made minor changes in style. Amendment effective October 1, 2013.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Section Not Codified: Section 82A-1202, R.C.M. 1947, abolishing the State Law Enforcement Teletype Communications Committee established by Ch. 145, L. 1969, and transferring its functions to the Department of Justice, was not codified in the MCA, as the purpose of that section has been accomplished. However, the section has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 272, L. 1971, as amended by sec. 7, Ch. 250, L. 1973.

44-2-302. Powers of attorney general.

Compiler's Comments

2013 Amendment: Chapter 5 in introduction substituted current language regarding funds from participating agencies for "To carry out the provisions of this part, the attorney general is authorized to"; in (2) substituted "the network" for "such facilities within the framework of any funds budgeted or prorated on a charge basis against participating agencies as herein identified"; and made minor changes in style. Amendment effective October 1, 2013.

Case Notes

Limitations on State Contracts Inapplicable to Leases: Where the state executed a 6-year lease of certain communications equipment in 1973 and unilaterally terminated the lease in 1977, the trial court did not err in holding that the lease was not subject to the provisions of section 82-1918, R.C.M. 1947 (18-4-102, MCA, now repealed), limiting the terms of certain contracts to 3 years. In determining the intent of the Legislature, the court may look to the context and plain meaning of the statute, the title of certain codified provisions, and the legislative history of the law. These indicia of legislative intent show that the Legislature did not intend section 82-1918, R.C.M. 1947, to apply to the Attorney General's leasing power under 44-2-302. Leaseamerica Corp. of Wis. v. St., 191 M 462, 625 P2d 68, 38 St. Rep. 398 (1981).

44-2-303. Federal cost sharing.

Compiler's Comments

2013 Amendment: Chapter 5 in first sentence substituted "regarding" for "relative to federal" and substituted "criminal justice information network" for "teletypewriter communications system", in second sentence substituted "enter into cost-sharing" for "sign", and in third sentence substituted "network's" for "system's"; and made minor changes in style. Amendment effective October 1, 2013.

44-2-304. Report by attorney general.

Compiler's Comments

2013 Amendment: Chapter 5 substituted "criminal justice information network" for "communications network" and at end substituted "network" for "system"; and made minor changes in style. Amendment effective October 1, 2013.

1993 Amendment: Chapter 349 near beginning, after "shall", substituted "submit, as a part of the information required by 17-7-111" for "prepare" and deleted second sentence that read: "As provided in 5-11-210, he shall submit the report to the legislature"; and made minor changes in style.

1991 Amendment: Substituted second sentence regarding submission of reports under 5-11-210 for former sentence that read: "He shall submit such report to the appropriations committee of every legislature at the time funds are requested for the administration of this part". Amendment effective March 20, 1991.

44-2-311. Participation by local and other agencies.

Compiler's Comments

2013 Amendment: Chapter 5 substituted "criminal justice information network" for "system"; and made minor changes in style. Amendment effective October 1, 2013.

44-2-312. Authorization of operational charge.

Compiler's Comments

2013 Amendment: Chapter 5 substituted "an operational charge for the criminal justice information network" for "a monthly operational charge for the teletypewriter communications network" and at end substituted "network" for "system"; and made minor changes in style. Amendment effective October 1, 2013.

44-2-313. Payment of charge.

Compiler's Comments

2013 Amendment: Chapter 5 at beginning inserted exception for federal agencies that require quarterly billing and near middle substituted "annually" for "monthly"; and made minor changes in style. Amendment effective October 1, 2013.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

44-2-314. Use of money — records.

Compiler's Comments

2013 Amendment: Chapter 5 inserted "provided for in 44-2-313", substituted "criminal justice information network operational" for "system operative", and at end deleted "as they may require in the performance of their duties"; and made minor changes in style. Amendment effective October 1, 2013.

1995 Amendment: Chapter 325 near beginning substituted "state treasurer" for "state auditor"; and made minor changes in style. Amendment effective July 1, 1995.

44-2-315. Removal from network upon nonpayment.

Compiler's Comments

2013 Amendment: Chapter 5 substituted "120 days" for "90 days" and near end before "network" inserted "criminal justice information"; and made minor changes in style. Amendment effective October 1, 2013.

Part 4

Missing Persons — Unidentified Bodies

44-2-401. Missing persons — dental records.

Compiler's Comments

2005 Amendment: Chapter 36 in (1) near beginning of first sentence substituted "sheriff's office" for "sheriff's department"; and made minor changes in style. Amendment effective October 1, 2005.

44-2-402. Dental examination — records — report.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

44-2-407. Department of justice missing persons response — missing persons specialist.

Compiler's Comments

Effective Date: Section 6, Ch. 273, L. 2019, provided: "[This act] is effective July 1, 2019."

Preamble: The preamble attached to Ch. 273, L. 2019, provided: "WHEREAS, this act is to be known as "Hanna's Act" in remembrance of Hanna Harris, a Lame Deer woman who was murdered in 2013 on the Northern Cheyenne Reservation."

44-2-408. Missing person reports.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

44-2-411. Missing indigenous persons task force — membership — duties — reporting.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 624, L. 2023. Amendment effective May 19, 2023.

Extension of Termination Date: Section 2, Ch. 624, L. 2023, amended sec. 8, Ch. 373, L. 2019, and sec. 3, Ch. 624, L. 2023, amended sec. 3, Ch. 243, L. 2021, by extending the termination dates imposed by those sections to June 30, 2033. Effective May 19, 2023.

Section 4, Ch. 624, L. 2023, amended sec. 2, Ch. 268, L. 2021, by extending the termination date imposed by Ch. 268 to June 30, 2033. Effective May 19, 2023.

2021 Amendments — Composite Section — Coordination: Chapter 243 in (2)(b) substituted "federally recognized Indian tribe in Montana" for "tribal government located on the seven Montana reservations and the Little Shell Chippewa tribe"; inserted (3)(b) to include work to identify causes that contribute to missing and murdered indigenous persons among duties of task force; in (4) substituted current language for former (4) (see 2021 Session Law for former text); in (5) inserted current text providing for a biennial report for former text providing for a one-time report (see 2021 Session law for former text); inserted (5)(a) through (5)(j) identifying what must be included in the report for the state-tribal relations committee; and made minor changes in style. Amendment effective April 19, 2021.

Chapter 268 in (2)(b) at end substituted "each federally recognized Indian tribe in Montana" for "each tribal government located on the seven Montana reservations and the Little Shell Chippewa tribe"; deleted former (3)(a) that read: "(a) administer the looping in native communities network grant program provided for in 44-2-412; inserted (3)(b) concerning working to identify causes of and reduce cases of missing and murdered indigenous persons; in (4) substituted current text for former text (see 2021 Session Law for former text); in (5) at beginning substituted "By July 1 prior to each regular legislative session, the task force shall, in accordance with 5-11-210, prepare" for "The task force shall prepare", near middle after "state-tribal relations" deleted "interim", and at end after "5-5-229" deleted "no later than September 1, 2020. The report must include a recommendation to the 67th legislature as to whether the task force should continue in existence"; and made minor changes in style. Amendment effective April 22, 2021.

The amendments to this section made by sec. 7, Ch. 240, L. 2021, were rendered void by sec. 12, Ch. 240, L. 2021, a coordination section.

Extension of Termination Date: Section 3, Ch. 243, L. 2021, amended sec. 8, Ch. 373, L. 2019, by extending the termination date imposed by Ch. 373 to June 30, 2023. Effective April 19, 2021.

Section 2, Ch. 268, L. 2021, amended sec. 8, Ch. 373, L. 2019, by extending the termination date imposed by Ch. 373 to June 30, 2023. Effective April 22, 2021.

Effective Date: Section 7, Ch. 373, L. 2019, provided: "[This act] is effective on passage and approval." Approved May 8, 2019.

Termination: Section 8, Ch. 373, L. 2019, provided: "[This act] terminates June 30, 2021."

Preamble: The preamble attached to Ch. 373, L. 2019, provided: "WHEREAS, Montana is home to eight recognized tribes with over 55,000 enrolled members; and

WHEREAS, Native women and children experience violent crime at significantly higher rates than other American women and children, including being 10 times more likely to be murdered and 9 times more likely to be sexually assaulted; and

WHEREAS, there are more than 5,600 Native women and children in the United States who are currently listed as missing or abducted; and

WHEREAS, there is no comprehensive data collection system for reporting or tracking missing Native American women and children, creating a reporting and investigation gap that makes Native Americans even more vulnerable to violence; and

WHEREAS, 85% of the Native women and children who went missing between 1900 and 2017 were not listed in the Department of Justice's official database; and

WHEREAS, in 2018, at least 25 Native women and children went missing in Montana, and only 1 was found alive; and

WHEREAS, the likelihood of finding a missing person decreases rapidly after the first 24 hours and falls to less than 4% after 72 hours; and

WHEREAS, families of missing Native women and children often encounter layers of jurisdictional bureaucracy that delay or prevent the filing of official reports for days or weeks; and

WHEREAS, a lack of timely action by law enforcement forces families to use social media and community groups to begin looking for missing Native women and children; and

WHEREAS, Montana's U.S. Senators and Representative are leading the charge to combat this bureaucratic inaction, but are encountering resistance from the government agencies who handle tribal and federal law enforcement; and

WHEREAS, in the absence of a federal solution the Legislature of the state of Montana should take steps to identify and track Native men, women, and children who are currently missing, establish a task force to break down jurisdictional barriers, and provide Montana's native communities with the ability to file missing persons reports in a timely manner."

44-2-412. Looping in native communities network grant program.

Compiler's Comments

Extension of Termination Date: Section 2, Ch. 624, L. 2023, amended sec. 8, Ch. 373, L. 2019, and sec. 3, Ch. 624, L. 2023, amended sec. 3, Ch. 243, L. 2021, by extending the termination dates imposed by those sections to June 30, 2033. Effective May 19, 2023.

2021 Amendment: Chapter 243 in (2) in two places substituted "tribal entity" for "tribal college"; in (2)(d) substituted "alerts to law enforcement agencies and tribal" for "alerts pursuant to law enforcement, tribal"; and made minor changes in style. Amendment effective April 19, 2021.

Extension of Termination Date: Section 3, Ch. 243, L. 2021, amended sec. 8, Ch. 373, L. 2019, by extending the termination date imposed by Ch. 373 to June 30, 2023. Effective April 19, 2021.

Effective Date: Section 7, Ch. 373, L. 2019, provided: "[This act] is effective on passage and approval." Approved May 8, 2019.

Termination: Section 8, Ch. 373, L. 2019, provided: "[This act] terminates June 30, 2021."

Preamble: The preamble attached to Ch. 373, L. 2019, provided: "WHEREAS, Montana is home to eight recognized tribes with over 55,000 enrolled members; and

WHEREAS, Native women and children experience violent crime at significantly higher rates than other American women and children, including being 10 times more likely to be murdered and 9 times more likely to be sexually assaulted; and

WHEREAS, there are more than 5,600 Native women and children in the United States who are currently listed as missing or abducted; and

WHEREAS, there is no comprehensive data collection system for reporting or tracking missing Native American women and children, creating a reporting and investigation gap that makes Native Americans even more vulnerable to violence; and

WHEREAS, 85% of the Native women and children who went missing between 1900 and 2017 were not listed in the Department of Justice's official database; and

WHEREAS, in 2018, at least 25 Native women and children went missing in Montana, and only 1 was found alive; and

WHEREAS, the likelihood of finding a missing person decreases rapidly after the first 24 hours and falls to less than 4% after 72 hours; and

WHEREAS, families of missing Native women and children often encounter layers of jurisdictional bureaucracy that delay or prevent the filing of official reports for days or weeks; and

WHEREAS, a lack of timely action by law enforcement forces families to use social media and community groups to begin looking for missing Native women and children; and

WHEREAS, Montana's U.S. Senators and Representative are leading the charge to combat this bureaucratic inaction, but are encountering resistance from the government agencies who handle tribal and federal law enforcement; and

WHEREAS, in the absence of a federal solution the Legislature of the state of Montana should take steps to identify and track Native men, women, and children who are currently missing, establish a task force to break down jurisdictional barriers, and provide Montana's native communities with the ability to file missing persons reports in a timely manner."

44-2-413. Looping in native communities network state special revenue account.

Compiler's Comments

Extension of Termination Date: Section 2, Ch. 624, L. 2023, amended sec. 8, Ch. 373, L. 2019, and sec. 3, Ch. 624, L. 2023, amended sec. 3, Ch. 243, L. 2021, by extending the termination dates imposed by those sections to June 30, 2033. Effective May 19, 2023.

Extension of Termination Date: Section 3, Ch. 243, L. 2021, amended sec. 8, Ch. 373, L. 2019, by extending the termination date imposed by Ch. 373 to June 30, 2023. Effective April 19, 2021.

Effective Date: Section 7, Ch. 373, L. 2019, provided: "[This act] is effective on passage and approval." Approved May 8, 2019.

Termination: Section 8, Ch. 373, L. 2019, provided: "[This act] terminates June 30, 2021."

Preamble: The preamble attached to Ch. 373, L. 2019, provided: "WHEREAS, Montana is home to eight recognized tribes with over 55,000 enrolled members; and

WHEREAS, Native women and children experience violent crime at significantly higher rates than other American women and children, including being 10 times more likely to be murdered and 9 times more likely to be sexually assaulted; and

WHEREAS, there are more than 5,600 Native women and children in the United States who are currently listed as missing or abducted; and

WHEREAS, there is no comprehensive data collection system for reporting or tracking missing Native American women and children, creating a reporting and investigation gap that makes Native Americans even more vulnerable to violence; and

WHEREAS, 85% of the Native women and children who went missing between 1900 and 2017 were not listed in the Department of Justice's official database; and

WHEREAS, in 2018, at least 25 Native women and children went missing in Montana, and only 1 was found alive; and

WHEREAS, the likelihood of finding a missing person decreases rapidly after the first 24 hours and falls to less than 4% after 72 hours; and

WHEREAS, families of missing Native women and children often encounter layers of jurisdictional bureaucracy that delay or prevent the filing of official reports for days or weeks; and

WHEREAS, a lack of timely action by law enforcement forces families to use social media and community groups to begin looking for missing Native women and children; and

WHEREAS, Montana's U.S. Senators and Representative are leading the charge to combat this bureaucratic inaction, but are encountering resistance from the government agencies who handle tribal and federal law enforcement; and

WHEREAS, in the absence of a federal solution the Legislature of the state of Montana should take steps to identify and track Native men, women, and children who are currently missing, establish a task force to break down jurisdictional barriers, and provide Montana's native communities with the ability to file missing persons reports in a timely manner."

44-2-416. Missing persons response team training grant program — reporting.

Compiler's Comments

Effective Date: Section 7, Ch. 160, L. 2023, provided: "[This act] is effective July 1, 2023."

44-2-417. Missing persons response team training grant account.

Compiler's Comments

Effective Date: Section 7, Ch. 160, L. 2023, provided: "[This act] is effective July 1, 2023."

Part 5
Missing Children

44-2-502. Definitions — legislative intent.

Compiler's Comments

2019 Amendment: Chapter 275 inserted (2) concerning legislative intent; and made minor changes in style. Amendment effective October 1, 2019.

2015 Amendment: Chapter 79 in (1)(a) substituted "21 years" for "18 years"; and made minor changes in style. Amendment effective October 1, 2015.

44-2-504. Reports to missing children information program — custodial interference.

Compiler's Comments

2019 Amendments — Composite Section: Chapter 23 in (1) substituted current text for former text that read: "All law enforcement authorities shall submit to the missing children information program provided for in 44-2-503 any missing child report and other information required by 44-2-401"; in (2) at end after "law enforcement authority" deleted "within the county in which the child became missing"; and inserted (4) concerning custodial interference. Amendment effective October 1, 2019.

Chapter 275 in (1) at beginning substituted current text for former text (see Ch. 23 note); in (2) at end after "law enforcement authority" deleted "within the county in which the child became missing"; in (3) near end substituted "if the child's location" for "of any child whose location"; and made minor changes in style. Amendment effective October 1, 2019.

44-2-505. Duties of law enforcement authority.

Compiler's Comments

2019 Amendment: Chapter 250 inserted (4) concerning a missing child's directory photograph; and made minor changes in style. Amendment effective July 1, 2019.

2015 Amendment: Chapter 79 in first sentence after "shall" inserted "within 2 hours of the report"; and in (1) and (3) at beginning deleted "immediately". Amendment effective October 1, 2015.

44-2-506. List of missing Montana school children.

Compiler's Comments

2019 Amendment: Chapter 250 in (1)(c) near end substituted "a directory photograph of the child if available pursuant to 20-7-1317" for "if possible a recent photograph of the child". Amendment effective July 1, 2019.

Part 6
Escape or Release From Confinement — Notification

44-2-601. Notification of escape or release from confinement.

Compiler's Comments

1995 Amendments: Chapter 125 inserted (2)(e) requiring notification to a victim; and made minor changes in style.

Chapter 372 in (1)(b), near end after "violence", deleted "or after being designated as a dangerous offender under 46-18-404"; in (1)(c), near end after "violence", deleted "or after being designated as a dangerous offender under 46-18-404"; and inserted (3) regarding notification concerning an escape or a pending release. Amendment effective April 12, 1995.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

1993 Amendment: Chapter 374 at end of (1), after "if", deleted "any of the following persons escapes or is released from confinement"; at end of (1)(a) and (1)(b) inserted "escapes or is released from confinement"; at beginning of (1)(b) substituted "a person confined in an institution other than a jail" for "a person confined in a jail or other institution", near middle, before "prison", deleted "jail", and before "institution" inserted "state"; inserted (1)(c) requiring notice be given of escape of a person confined in jail pending or during trial for or after conviction for a criminal offense involving use or threat of physical violence or after being designated a dangerous offender; and made minor changes in style.

Part 8
Blue Alert Program

44-2-801. Blue alert program.

Compiler's Comments

2019 Amendment: Chapter 95 inserted (2)(b) concerning a missing peace officer; inserted (2)(c) concerning an imminent and credible threat regarding potential injury or death of a peace officer; inserted (4)(b) concerning a peace officer who is no longer missing or a blue alert that will no longer assist in locating the missing peace officer; inserted (4)(c) concerning a threat that no longer exists or a blue alert that will no longer alleviate the threat; and made minor changes in style. Amendment effective October 1, 2019.

Effective Date: This section is effective October 1, 2011.

CHAPTER 3
MONTANA FORENSIC SCIENCE SYSTEM ACT

Chapter Administrative Rules

Title 23, chapter 4, subchapter 2, ARM Drug and alcohol analysis.

Part 1
General Provisions
Forensic Science

Part Compiler's Comments

Temporary Provisions Not Codified: Sections 82-432 through 82-435, R.C.M. 1947, establishing the Board of Forensic Sciences, the powers and duties of the Board, and providing for its termination, were not codified in the MCA, as the object of these provisions has been accomplished and the Board has ceased to exist. However, these sections have never been repealed and are still valid law. Citation may be made to sec. 6 through 9, Ch. 530, L. 1977.

44-3-102. Purpose.

Compiler's Comments

1989 Amendment: In introductory clause inserted "authorize the attorney general to"; and made minor changes in phraseology and form. Amendment effective May 18, 1989.

Law Review Articles

The Montana Coroner System — An Archaic Inadequacy in Need of Reform, Pfaff and MacKenzie, 36 Mont. L. Rev. 1 (1975).

44-3-104. Functions of department.

Compiler's Comments

1989 Amendment: Substituted "operation of a division of forensic sciences" for "operation of:

(1) a laboratory of criminalistics; and

(2) an office of forensic pathology". Amendment effective May 18, 1989.

1985 Amendment: Inserted "forensics" and substituted "department of justice" for reference to division of forensic science.

44-3-105. Authority to accept grants.

Compiler's Comments

1985 Amendment: Substituted "department of justice" for "division of forensic science".

44-3-106. Power of attorney general to employ personnel.

Compiler's Comments

1989 Amendment: Substituted "employ personnel necessary to perform the functions authorized under this chapter" for "employ such personnel as may be necessary to perform the functions of this chapter". Amendment effective May 18, 1989.

1985 Amendment: Substituted "perform the functions of this chapter" for "conduct the affairs of the division of forensic science".

Temporary Provision Not Codified: Section 82-435, R.C.M. 1947, providing for the termination of the Board of Forensic Sciences, was not codified in the MCA, as the objective of that section has been accomplished and the Board has ceased to exist. As originally passed by the Legislature, section 82-435, R.C.M. 1947, provided that "following dissolution of the board, the attorney general is authorized to employ such personnel as may be necessary to conduct the affairs of the division of forensic sciences" (abolished by Ch. 503, L. 1985). The section has not been repealed and is still valid law. Citation may be made to sec. 9, Ch. 530, L. 1977.

Part 2

Medical Examiners

44-3-201. State chief medical examiner.

Compiler's Comments

2021 Amendment: Chapter 123 throughout section in three places substituted "state chief medical examiner" for "state medical examiner". Amendment effective October 1, 2021.

2017 Amendment: Chapter 194 in first sentence inserted "and serves at the pleasure of"; in second sentence inserted "and must be board-certified in forensic pathology"; inserted third sentence concerning supervision by director; and inserted last sentence requiring freedom from certain influences. Amendment effective October 1, 2017.

1989 Amendment: In first sentence, after "attorney general", deleted "to administer department functions assigned by 44-3-104"; and in second sentence, after "state medical examiner", substituted "must be a physician licensed to practice medicine in Montana" for "may perform such other duties as may be assigned by the attorney general. The state medical examiner must be a forensic pathologist qualified and certified by the American board of pathology." Amendment effective May 18, 1989.

1985 Amendment: Substituted language setting forth duties and qualifications of medical examiner for ""State medical examiner" means the state medical examiner provided for in 2-15-2004".

44-3-203. Associate medical examiners — qualifications.

Compiler's Comments

2021 Amendment: Chapter 123 in first sentence after "medical examiners" inserted "including but not limited to locum tenens and per diem examiners"; in second sentence after "the pleasure of the state" inserted "chief"; and made minor changes in style. Amendment effective October 1, 2021.

2017 Amendment: Chapter 194 in first sentence inserted "must be board-certified in forensic pathology"; inserted last sentence concerning appointment and supervision of associate medical examiners; and made minor changes in style. Amendment effective October 1, 2017.

44-3-204. Associate medical examiners — compensation.

Compiler's Comments

2021 Amendment: Chapter 123 near middle substituted "state chief medical examiner" for "state medical examiner"; deleted former (2) that read: "(2) The costs of services performed by associate medical examiners are chargeable to the county for which the service is performed"; and made minor changes in style. Amendment effective October 1, 2021.

44-3-205. Deputy state medical examiner.

Compiler's Comments

Effective Date: This section is effective October 1, 2017.

44-3-211. Duties of state chief medical examiner and deputy medical examiner.

Compiler's Comments

2021 Amendment: Chapter 123 in introductory clause substituted "state chief medical examiner and deputy medical examiner" for "state medical examiner". Amendment effective October 1, 2021.

1989 Amendment: Inserted (5) relating to appointment of associate medical examiners; and inserted (6) relating to performance of autopsies. Amendment effective May 18, 1989.

44-3-213. Report to county attorney.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 3
Laboratory of Criminalistics

Part Administrative Rules

Title 23, chapter 4, subchapter 2, ARM Drug and alcohol analysis.

44-3-301. Laboratory of criminalistics.

Compiler's Comments

2015 Amendment: Chapter 450 inserted (3) concerning Yellowstone County branch. Amendment effective July 1, 2015.

1989 Amendment: In (1) inserted first sentence relating to a laboratory of criminalistics within the Department of Justice. Amendment effective May 18, 1989.

Case Notes

No Discovery Violation for Withholding of Evidence by Prosecution — Evidence Under Control of State Crime Lab, Not Prosecution: The District Court did not err by denying the defendant's motion to exclude evidence because of an asserted discovery violation by the state. The defendant argued that the District Court erred by denying his motion to exclude his blood test results from the state crime lab because the prosecution willfully withheld additional crime lab records and information, violating its discovery duties under 46-15-322. According to the statute's plain language, the discovery obligation extends to information, identified in the statute, that is in "the prosecutor's possession or control." However, the state crime lab is under the control of a different government agency, separate from the County Attorney's office, and is not located at or within a County Attorney's office. The crime lab is not supervised by the County Attorney's office, does not report to or take direction from the County Attorney's office, is not funded by the County Attorney's office, and is not administratively connected to any County Attorney's office. Further, County Attorneys must comply with the same procedures to obtain evidence from the crime lab that are applicable to the defense. Under the state crime lab's policy, of which the defendant's counsel was aware, certain kinds of information sought from the crime lab require a court order, whether requested by the prosecution or the defendant, illustrating that "control" of such information was exercised solely by the crime lab, not the County Attorney. Thus, for purposes of 46-15-322, the evidence sought by the defendant was not in the "possession or control" of the prosecution. St. v. Hudon, 2019 MT 31, 394 Mont. 226, 434 P.3d 273.

Law Review Articles

Face to Face: The Crime Lab Exception of Rule 803(8) of the Montana Rules of Evidence and the Montana Confrontation Clause, Weilhammer, 60 Mont. L. Rev. 167 (1999).

44-3-302. Fees for laboratory services.

Compiler's Comments

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

44-3-303. Duties of laboratory director.

Compiler's Comments

1989 Amendment: Inserted first sentence relating to the director of the laboratory of criminalistics; in (1), after "be responsible", deleted "to the state medical examiner"; and in (2), before "laboratory personnel", substituted "assist the department in the appointment of" for "appoint". Amendment effective May 18, 1989.

1985 Amendment: In (4) substituted "department" for reference to the division of forensic science.

Part 4
Provisions Relating to Corpses

44-3-401. Exemption from liability for autopsy.

Compiler's Comments

1985 Amendment: After "this chapter", inserted remainder of sentence prohibiting liability action against medical examiner performing autopsy on request of federal officer within federal jurisdiction.

Case Notes

State Immune From Negligence Claim — Probable Cause to Arrest Uncle in Niece's Death — Summary Judgment Affirmed: The plaintiff had been charged with deliberate homicide of his 3-year-old niece and spent 2 months in jail before evidence revealed instead that a school bus had caused her death. The plaintiff sued Butte-Silver Bow County and the state, claiming that law enforcement had negligently investigated his niece's death and that the state medical examiner was negligent in reporting her death as a homicide. The District Court granted the defendants' motions for summary judgment and the plaintiff appealed. The Supreme Court agreed that summary judgment in favor of the state was proper because the state has statutory immunity under 44-3-401 and 46-4-104 and that summary judgment in favor of the county was proper because there was probable cause to arrest the plaintiff. The plaintiff had told investigators that he was holding the niece's hand at the time she collapsed, and therefore the investigators ruled out her being hit by the bus. Because the girl had suffered violent injuries while in the uncle's care and there was no other apparent reason for the injuries, the county had probable cause to arrest and imprison the plaintiff. Kichnet v. Butte-Silver Bow County, 2012 MT 68, 364 Mont. 347, 274 P.3d 740.

44-3-404. Criminal penalty.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: In (1), at end, inserted "including a fetal death"; in (3), at end after "corpse", deleted "under investigation with the intent to alter the evidence or circumstances surrounding the death"; inserted (4) relating to disobeying a cessation order; and made minor changes in style.

CHAPTER 4
MISCELLANEOUS FUNCTIONS OF DEPARTMENT OF JUSTICE

Part 1
Training Coordinator for County Attorneys

44-4-101. Position established — salary.

Compiler's Comments

1995 Amendment: Chapter 455 inserted last two sentences regarding exemption and salary for position of training coordinator. Amendment effective April 14, 1995.

44-4-103. Functions.

Compiler's Comments

1983 Amendments: Chapter 7 inserted (6) allowing Attorney General to appoint training coordinator as special counsel.

Chapter 291, in (1), inserted "city attorneys" after "county attorneys" and inserted last sentence allowing training coordinator to require city attorneys to pay training costs.

44-4-111. Request for special counsel services.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Interim Committee Bill: House Bill 10 (Ch. 7, L. 1983) was introduced by the interim Joint Subcommittee on Judiciary. See committee report, The District Courts, Indigent Defense, and Prosecutorial Services in Montana, 1982, Montana Legislative Council.

44-4-115. Fish, wildlife, and parks enforcement program.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

Part 2
Confidential License Plates and Registrations

44-4-201. Authorization to issue confidential plates and registrations.

Compiler's Comments

1989 Amendment: In (1), after "issue", inserted "confidential license plates and certificates of registration"; inserted (2) regarding issuance of confidential license plates and certificates of registration for purposes other than law enforcement; at beginning of (3) inserted "Confidential"; and made minor changes in phraseology and form. Amendment effective May 11, 1989.

44-4-203. Registration records.

Compiler's Comments

1999 Amendment: Chapter 416 at end of (2) inserted "when there is a legitimate law enforcement purpose for disclosure"; and made minor changes in style. Amendment effective October 1, 1999.

44-4-205. Use of confidential plates and registrations.

Compiler's Comments

1989 Amendment: At end of (1) inserted "or for purposes as authorized in 44-4-201(2)". Amendment effective May 11, 1989.

44-4-206. Revocation.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 4
Montana Public Safety Officer Standards and Training Council

Part Compiler's Comments

Transition: Section 21, Ch. 506, L. 2007, provided: "(1) The peace officers' standards and training advisory council under the board of crime control, established in 2-15-2006 [renumbered 2-15-2008], must become the Montana public safety officer standards and training council, established in [section 1] [2-15-2029], on [the effective date of this act] [July 1, 2007].

(2) Appointment pursuant to [section 3] [44-4-402] to replace a member of the peace officers' standards and training advisory council who was a member on the day before [the effective date of this act] [July 1, 2007] may be made immediately upon the expiration of the member's term.

(3) All members of the Montana public safety officer standards and training council are entitled to compensation pursuant to 2-15-124 beginning [the effective date of this act] [July 1, 2007]."

Saving Clause: Section 24, Ch. 506, L. 2007, was a saving clause.

Effective Date: Section 25, Ch. 506, L. 2007, provided that this part is effective July 1, 2007.

44-4-402. Membership — composition.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 684, L. 2023. Amendment effective May 19, 2023.

44-4-403. Council duties — determinations — appeals.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 544, L. 2023. Amendment effective October 1, 2023.

2021 Amendment: Chapter 83 in (3) in first sentence after "Title 2, chapter 4, part 6" deleted "except that a decision by the council may be appealed to the board of crime control, as provided for in 44-7-101" and in last sentence substituted "council" for "board of crime control"; and made minor changes in style. Amendment effective July 1, 2021.

2015 Amendment: Chapter 196 inserted (4) concerning confidential criminal justice information. Amendment effective April 8, 2015.

Administrative Rules

Title 23, chapter 14, subchapter 10, ARM POST appeals.

44-4-404. Appointing authority responsible for applying standards.

Compiler's Comments

2023 Amendments — Composite Section: Section 1, Ch. 9, L. 2023, inserted (2) regarding extensions to complete the minimum training standards; and made minor changes in style. Amendment effective February 16, 2023.

Section 1, Ch. 10, L. 2023, inserted (3) regarding military duty; and made minor changes in style. Amendment effective February 16, 2023.

Retroactive Applicability: Section 3, Ch. 10, L. 2023, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to a public safety office within 1 year of the officer's hire date who was ordered to state or federal military duty on or after July 1, 2022."

44-4-408. Investigations report.

Compiler's Comments

Effective Date: Section 6, Ch. 531, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 18, 2023.

Part 9

Railroad Corporation Special Peace Officers

Part Compiler's Comments

Source: Based on Wash. Rev. Code, § 81.60.

44-4-902. Application for appointment.

Compiler's Comments

2007 Amendment: Chapter 506 in third sentence at end substituted "pursuant to Title 44, chapter 4, part 4" for "under 44-4-301"; and made minor changes in style. Amendment effective July 1, 2007.

44-4-903. Limitations on special peace officer.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Attorney General's Opinions

Authority of Railroad Peace Officers to Carry Concealed Weapons: Special peace officers of a class I railroad are exempt from the prohibition in 45-8-316 against carrying concealed weapons, but they may carry a concealed weapon only when on duty and when necessary for protection of the property of the class I railroad by which they are employed. The special peace officer shall follow the permit procedure of 45-8-319 (now repealed) in order to carry a concealed weapon at any other time. 43 A.G. Op. 12 (1989).

44-4-904. Responsibility of corporation.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 10

Methamphetamine Watch Program

Part Compiler's Comments

Effective Date: Section 9, Ch. 572, L. 2005, provided that this part is effective July 1, 2005.

Part 11
Water Right Enforcement

44-4-1101. Water right enforcement account — statutory appropriation.

Compiler's Comments

Effective Date: Section 8, Ch. 103, L. 2009, provided: "[This act] is effective on passage and approval." Approved April 1, 2009.

44-4-1102. Water right enforcement program.

Compiler's Comments

Effective Date: Section 8, Ch. 103, L. 2009, provided: "[This act] is effective on passage and approval." Approved April 1, 2009.

Part 12
Montana 24/7 Sobriety and Drug Monitoring Program Act

Part Compiler's Comments

Preamble: The preamble attached to Ch. 309, L. 2013, provided: "WHEREAS, a Rand Corporation study published in the American Journal of Public Health concluded that the 24/7 Sobriety Program's frequent alcohol testing combined with swift, certain, and modest sanctions for violations can reduce problem drinking and improve public health outcomes and public safety; and

WHEREAS, the Rand Corporation analysis provides strong evidence that the 24/7 Sobriety Program, when applied to repeat DUI offenders and offenders of other crimes in which the abuse of alcohol or dangerous drugs is a factor such as domestic violence, is successful in reducing arrests for those crimes; and

WHEREAS, as a result of the success of the 24/7 Sobriety Program, the program is an authorized program for which impaired driving countermeasure incentive grant funding is available under federal law."

Effective Date: This part is effective October 1, 2011.

Saving Clause: Section 11, Ch. 318, L. 2011, was a saving clause.

Severability: Section 12, Ch. 318, L. 2011, was a severability clause.

Part Administrative Rules

Title 23, chapter 18, subchapter 3, ARM Montana 24/7 Sobriety Program Act.

Part Case Notes

24/7 Sobriety and Drug Monitoring Program Fees Not Violation of Due Process — Individualized Assessment Required Prior to Participation in Program: After the defendant was charged with DUI, a second offense, he was ordered by the Justice's Court to participate in the 24/7 Sobriety and Drug Monitoring Program as a condition of his release on bond. While enrolled in the program, the defendant missed three tests and was charged with three counts of contempt for the missed tests. The District Court dismissed the contempt charges, concluding that the program fees constituted pretrial punishment in violation of the defendant's right to due process. On appeal, the Supreme Court concluded that fees required under the program do not have a punitive effect on pretrial criminal defendants and that the imposition of the program can be an appropriate condition of release. However, enrollment in the program is discretionary and prior to imposing the testing requirement, a court must conduct an individualized assessment of the defendant, including considering prior alcohol-related arrests, whether the defendant's history and circumstances suggest an increased risk to the community, and whether the defendant is financially able to pay the fees associated with testing. Because the Justice's Court did not conduct an individualized assessment of the defendant before imposing the testing requirement, it was proper to dismiss the defendant's contempt charges. St. v. Spady, 2015 MT 218, 380 Mont. 179, 354 P.3d 590.

24/7 Sobriety and Drug Monitoring Program Testing Fee — Permissible Delegation of Legislative Authority: The District Court held that 44-4-1204 of the Montana 24/7 Sobriety and Drug Monitoring Program Act unconstitutionally delegated legislative power to the executive branch because it lacked any objective criteria to guide the Attorney General in imposing fees, other than requiring that the fees be reasonable. On appeal, the Supreme Court reversed, concluding that 44-4-1204 is a permissible delegation of legislative authority because the section limits fees to reasonable amounts necessary to pay for the administration of the program and does not give the Attorney General unfettered discretion when implementing fees. St. v. Spady, 2015 MT 218, 380 Mont. 179, 354 P.3d 590.

24/7 Sobriety and Drug Monitoring Program Testing Requirements — Not Unreasonable Search or Violation of Privacy: Requiring a defendant who is a repeat DUI arrestee to provide twice daily breath samples as a condition of release under the Montana 24/7 Sobriety and Drug Monitoring Program Act does not constitute an unreasonable search and does not infringe upon a significant privacy interest. The state's compelling interest in keeping the public safe by preventing repeat DUI arrestees from driving while drunk outweighs any privacy concerns. St. v. Spady, 2015 MT 218, 380 Mont. 179, 354 P.3d 590.

44-4-1201. Short title.

Compiler's Comments

2013 Amendment: Chapter 309 after "Sobriety" inserted "and Drug Monitoring". Amendment effective April 26, 2013.

44-4-1202. Purpose — definitions.

Compiler's Comments

2019 Amendment: Chapter 374 in (3) in definition of sobriety program or program deleted former (f)(ii)(A) through (f)(ii)(C) (see 2019 Session Law for former text), in definition of testing near middle of first sentence after "combination of the use of" inserted "in person or remote" and near end of first sentence after "saliva testing, or continuous remote" deleted "sensing"; and made minor changes in style. Amendment effective October 1, 2019.

2015 Amendment: Chapter 312 inserted (2)(d) related to ensuring participation in judicial proceedings; and made minor changes in style. Amendment effective April 27, 2015.

2013 Amendment: Chapter 309 inserted (2)(b) regarding repeat offenders when alcohol or drug abuse was a contributing factor; at end of (2)(c) after "DUI offenders" inserted language regarding repeat offenders when alcohol or drug abuse was a contributing factor; in (3) inserted definitions of core components, dangerous drug, immediate sanction, law enforcement agency, and timely sanction; in definition of sobriety program or program after "24/7 sobriety" inserted "and drug monitoring" and after "44-4-1203" inserted remainder of subsection regarding condition of sentence; in definition of testing in first sentence after "dangerous drug" deleted "as defined in 50-32-101", after "individual's" substituted "breath or body fluid, including blood, urine, saliva, or perspiration" for "blood, breath, or urine", after "urinalysis" inserted "testing, saliva testing", after "continuous" inserted "remote sensing", and inserted second sentence regarding testing alternate body fluids; and made minor changes in style. Amendment effective April 26, 2013.

44-4-1203. Sobriety and drug monitoring program created.

Compiler's Comments

2019 Amendment: Chapter 374 inserted (2)(b) regarding primary testing methods for alcohol; in (2)(c) inserted second and third sentences regarding hardship testing methodologies and permitted usage by the court or an agency; deleted former (6) (see 2019 Session Law for former text); in (6) inserted second, third, and fourth sentences regarding alcohol or drug testing ordered by a court, ownership and maintenance of the data, and electronically transferring data; in (7) substituted current text for former text that read: "Alcohol or drug testing required by the department of corrections pursuant to this part must utilize the data management technology plan provided for in 44-4-1204(4)"; and made minor changes in style. Amendment effective October 1, 2019.

2015 Amendment: Chapter 312 in (2)(a)(ii) inserted "is available"; inserted (7) and (8) concerning use of data management technology plan; and made minor changes in style. Amendment in (2) effective April 27, 2015. Subsections (7) and (8) effective October 1, 2015.

2013 Amendment: Chapter 309 in (1) after "sobriety" inserted "and drug monitoring"; inserted (2) regarding testing methodology; inserted (3) regarding sobriety program effectiveness; in (4) substituted "law enforcement agency" for "county sheriff", in first sentence after "the program" deleted "in the county", and in second sentence after "assist" substituted "entities participating in the program" for "counties in which a sobriety program exists"; in (5)(a) at beginning substituted "If a law enforcement agency" for "if a county"; in (5)(a) in three places and (5)(b) substituted references to law enforcement agency for references to sheriff; inserted (6) regarding modification of core components; and made minor changes in style. Amendment effective April 26, 2013.

44-4-1204. Rulemaking — testing fee.

Compiler's Comments

2013 Amendment: Chapter 309 in (4) after "participating" substituted "law enforcement agencies" for "counties". Amendment effective April 26, 2013.

Administrative Rules

Title 23, chapter 18, subchapter 3, ARM Montana 24/7 Sobriety Program Act.

Case Notes

24/7 Sobriety and Drug Monitoring Program Testing Fee — Permissible Delegation of Legislative Authority: The District Court held that 44-4-1204 of the Montana 24/7 Sobriety and Drug Monitoring Program Act unconstitutionally delegated legislative power to the executive branch because it lacked any objective criteria to guide the Attorney General in imposing fees, other than requiring that the fees be reasonable. On appeal, the Supreme Court reversed, concluding that 44-4-1204 is a permissible delegation of legislative authority because the section limits fees to reasonable amounts necessary to pay for the administration of the program and does not give the Attorney General unfettered discretion when implementing fees. St. v. Spady, 2015 MT 218, 380 Mont. 179, 354 P.3d 590.

44-4-1205. Authority of court to order participation in sobriety and drug monitoring program — probationary license — imposition of conditions.

Compiler's Comments

2021 Amendment: Chapter 498 in (1)(b) near beginning after first reference to driving under the influence substituted "as defined in 61-8-1001" for "in violation of 61-8-465", after second reference to driving under the influence substituted "61-8-1002" for "61-8-401", and after reference to driving with excessive alcohol concentration substituted "61-8-1002(1)(b), (1)(c), or (1)(d)" for "61-8-406"; in (2)(a), (2)(b), (2)(c), (2)(d), (4)(a), (4)(b)(i), (4)(b)(ii)(A), (4)(b)(ii)(B), and (4)(b)(ii)(C) substituted current text for former text (see 2021 Session Law for former text); and made minor changes in style. Amendment effective January 1, 2022.

Applicability: Section 48, Ch. 498, L. 2021, provided: "[This act] applies to DUI incidents taking place on or after [the effective date of this act]." Effective January 1, 2022.

Saving Clause: Section 45, Ch. 498, L. 2021, was a saving clause.

2019 Amendment: Chapter 374 in (1)(b) near middle after "the individual's" substituted "obtaining proof of insurance" for "successful completion of a court-approved chemical dependency treatment program and proof of insurance". Amendment effective October 1, 2019.

2015 Amendment: Chapter 312 inserted (4) concerning participation in sobriety program; and inserted (5) defining conviction. Amendment effective April 27, 2015.

2013 Amendment: Chapter 309 inserted (1)(a) regarding staying sanctions; in (1)(b) after "convicted of" inserted "the offense of aggravated driving under the influence in violation of 61-8-465"; in (2) at beginning inserted introductory clause regarding participation in sobriety program; in (2)(a), (2)(b), and (2)(c) inserted "a violation of 61-8-465" and at end after "61-8-406" substituted language regarding second or subsequent violations for "upon participation in the sobriety program and payment of the fees required by 44-4-1204"; inserted (2)(d) regarding conditions for conditional release; inserted (3) regarding imposing conditions on individuals violating domestic abuse or neglect of minor statutes; and made minor changes in style. Amendment effective April 26, 2013.

Case Notes

24/7 Sobriety and Drug Monitoring Program Testing Requirements — Not Unreasonable Search or Violation of Privacy: Requiring a defendant who is a repeat DUI arrestee to provide twice daily breath samples as a condition of release under the Montana 24/7 Sobriety and Drug Monitoring Program Act does not constitute an unreasonable search and does not infringe upon a significant privacy interest. The state's compelling interest in keeping the public safe by preventing repeat DUI arrestees from driving while drunk outweighs any privacy concerns. St. v. Spady, 2015 MT 218, 380 Mont. 179, 354 P.3d 590.

44-4-1206. Collection, distribution, and use of testing fees.

Compiler's Comments

2013 Amendment: Chapter 309 in four places substituted reference to law enforcement agency for reference to sheriff and near middle after "proper" substituted "entity" for "county". Amendment effective April 26, 2013.

Part 15
Human Trafficking

44-4-1501. Human trafficking hotline — creation of poster — rulemaking.

Compiler's Comments

2021 Amendment: Chapter 14 in (1)(b) substituted "52 U.S.C. 10503" for "42 U.S.C. 1973aa-1a". Amendment effective October 1, 2021.

Effective Date: This section is effective October 1, 2013.

44-4-1502. Eligibility for benefit or service.

Compiler's Comments

Effective Date: Section 30, Ch. 285, L. 2015, provided: "[This act] is effective July 1, 2015."

44-4-1503. Law enforcement protocol.

Compiler's Comments

Effective Date: Section 30, Ch. 285, L. 2015, provided: "[This act] is effective July 1, 2015."

44-4-1504. Human trafficking education account.

Compiler's Comments

Effective Date: Section 30, Ch. 285, L. 2015, provided: "[This act] is effective July 1, 2015."

44-4-1505. Emergency lodging program for victims of domestic violence or human trafficking — grants — rulemaking — definitions.

Compiler's Comments

Effective Date: Section 8, Ch. 758, L. 2023, provided: "[This act] is effective July 1, 2023."

Applicability: Section 9, Ch. 758, L. 2023, provided: "[This act] applies to sales of accommodations or campgrounds that occur on or after [the effective date of this act] and to the use of accommodations or campgrounds on or after [the effective date of this act], even if the sale occurred before [the effective date of this act]." Effective July 1, 2023.

Termination: Section 10, Ch. 758, L. 2023, provided that this section terminates June 30, 2027.

44-4-1506. Emergency lodging for victims of domestic violence or human trafficking account.

Compiler's Comments

Effective Date: Section 8, Ch. 758, L. 2023, provided: "[This act] is effective July 1, 2023."

Applicability: Section 9, Ch. 758, L. 2023, provided: "[This act] applies to sales of accommodations or campgrounds that occur on or after [the effective date of this act] and to the use of accommodations or campgrounds on or after [the effective date of this act], even if the sale occurred before [the effective date of this act]." Effective July 1, 2023.

Termination: Section 10, Ch. 758, L. 2023, provided that this section terminates June 30, 2027.

Part 16
Statewide Public Safety Communications System Act

Part Compiler's Comments

Effective Date: Section 14, Ch. 346, L. 2017, provided: "[This act] is effective July 1, 2017."

Preamble: The preamble attached to Ch. 346, L. 2017, provided: "WHEREAS, it is necessary and it is the policy of the state of Montana to promote and encourage coordination of the statewide public safety communications system among state and local agencies, efficient planning and development of the system, cost-effective deployment of the system, and the sustainability of public safety communications technology and infrastructure in the state to provide for the safety of its citizens and emergency responders and for the protection of public and private property; and

WHEREAS, the legislature recognizes that consistency, continuity, and cost-effectiveness is needed to sustain the existing statewide public safety communications system to protect public and private property and to promote the safety of Montana's citizens and emergency responders; and

WHEREAS, it is necessary to ensure cost-effective, long-term solutions for delivering efficient statewide public safety communications."

Saving Clause: Section 12, Ch. 346, L. 2017, was a saving clause.

Severability: Section 13, Ch. 346, L. 2017, was a severability clause.

44-4-1606. Duties of department.

Compiler's Comments

2021 Amendment: See 2021 Session Law for amendment made by sec. 75, Ch. 261, L. 2021. Amendment effective April 20, 2021.

44-4-1607. Statewide public safety communications system account.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 4, Ch. 48, L. 2023. Amendment effective March 13, 2023.

Retroactive Applicability: Section 10, Ch. 48, L. 2023, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to funds collected pursuant to 17-6-202(2) on or after July 1, 2022."

Preamble: The preamble attached to Ch. 48, L. 2023, provided: "WHEREAS, there is a benefit to the citizens of Montana to pay off debts and be debt free in 2023; and

WHEREAS, paying off debts and other financial liabilities of the State of Montana is a responsible use of one-time funds; and

WHEREAS, issuing and paying off public debt when prudent is and should remain a standard function of state government; and

WHEREAS, paying off debt now allows more capacity to responsibly pay for capital expenditures via financing in the future, when desired by the Executive and Legislature."

Severability: Section 7, Ch. 48, L. 2023, was a severability clause.

2019 Amendment — Coordination: Pursuant to sec. 2, Ch. 486, L. 2019, a coordination section, in (2)(a) inserted "and general fund transfers"; inserted (4) concerning fund transfers; and made minor changes in style. Amendment effective July 1, 2019.

Part 17
Sexual Assault Response

Part Compiler's Comments

Effective Date: Section 12, Ch. 165, L. 2023, provided: "[This act] is effective July 1, 2023."

CHAPTER 5
CRIMINAL JUSTICE INFORMATION

Chapter Administrative Rules

Title 23, chapter 12, subchapter 1, ARM Criminal history records program.

Chapter Case Notes

Release of Police Records to Insurance Company: When an insurer sought access to police files pertaining to the police department's investigation of the death of an insured for use during the insurer's investigation of policy coverage, the police department objected to release of its records. The insurer then filed an application with the District Court, seeking production of the records. The court denied the application, holding that the insurer was not authorized by law to receive the documents and therefore was not entitled to their production under the Montana Criminal Justice Information Act of 1979. The trial court interpreted 44-5-303 to mean that in order to be "authorized by law", one must be specifically authorized by statute to receive criminal justice information. The Supreme Court held that this interpretation does not take into consideration basic tenets of our constitutional system of government and statutory construction. Under its commonly understood meaning, the word "law" includes constitutional as well as statutory law. Accordingly, one is authorized to receive criminal justice information by the "right to know" provision of the constitution. The only limitation on the right to receive this information is the constitutional right of privacy. Any interpretation of 44-5-303 that requires specific legislative authorization to review criminal justice information would render the statute unconstitutional. In this instance, the District Court shall conduct an in camera inspection of the documents at issue to determine what material could properly be released, balancing the competing interests of the right to know and the right of privacy. Allstate Ins. Co. v. Billings, 239 M 321, 780 P2d 186, 46 St. Rep. 1716 (1989), followed in Bozeman Daily Chronicle v. Bozeman Police Dept., 260 M 218, 859 P2d 435, 50 St. Rep. 1014 (1993).

Request of Law Enforcement Records for School Project — Information Beyond Public Reach: The District Court properly refused the request of a student who sought Sheriff's department information for a school project. Information requested included: (1) records of the daily log of phone calls; (2) case files of criminal investigations; (3) preemployment investigation reports; and (4) lists of arrested persons. Persons involved had an actual expectation of privacy, and the interests of society were furthered by recognition of the privacy interest as reasonable. The student had the right to view and record statistical information pursuant to 44-5-103, but the requested information was protected by the Montana Constitution and the Montana Criminal Justice Information Act of 1979 and was beyond the reach of the public sector. Engrav v. Cragun, 236 M 260, 769 P2d 1224, 46 St. Rep. 344 (1989), followed in Bozeman Daily Chronicle v. Bozeman Police Dept., 260 M 218, 859 P2d 435, 50 St. Rep. 1014 (1993).

Chapter Law Review Articles

Comments on Government Censorship and Secrecy, Elison & Elison, 55 Mont. L. Rev. 175 (1994).

Whose Privacy?, Work, 55 Mont. L. Rev. 209 (1994).

Privacy, Law Enforcement and Public Interest — Computerized Criminal Records, Uda, 36 Mont. L. Rev. 60 (1975).

Part 1
General Provisions

44-5-101. Short title.

Compiler's Comments

Saving Clause: Section 25, Ch. 525, L. 1979, was a saving clause.

Severability: Section 26, Ch. 525, L. 1979, was a severability section.

44-5-102. Purpose.

Compiler's Comments

1985 Amendment: At end of section substituted "confidential and nonconfidential criminal justice information collection, storage, and dissemination" for "criminal justice information recordkeeping".

Case Notes

Newspaper Entitled to Information Regarding Officer's Resignation: As a result of an investigation concerning sexual misconduct, a police officer resigned but was not charged with a crime. The Bozeman Daily Chronicle sued for release of the investigative documents. The Supreme Court, affirming its decision in Citizens to Recall Mayor v. Whitlock, 255 M 517, 844 P2d 74 (1992), held that the newspaper was entitled to the information because the officer's alleged misconduct went directly to a breach of his public trust and therefore his conduct was a proper matter for public scrutiny. Bozeman Daily Chronicle v. Bozeman Police Dept., 260 M 218, 859 P2d 435, 50 St. Rep. 1014 (1993), followed in Billings Gazette v. Billings, 2011 MT 293, 362 Mont. 522, 267 P.3d 11, and distinguished in Billings Gazette v. Billings, 2013 MT 334, 372 Mont. 409, 313 P.3d 129.

44-5-103. Definitions.

Compiler's Comments

2021 Amendment: Chapter 369 in definition of confidential criminal justice information in (c) inserted "investigative or intelligence"; in definition of public criminal justice information in (e)(ii) at end inserted "including booking photographs"; and made minor changes in style. Amendment effective April 30, 2021.

Nonseverability: Section 3, Ch. 369, L. 2021, was a nonseverability clause.

2015 Amendment: Chapter 161 in definition of disposition in (b)(iii) substituted "mental disease or disorder" for "mental disease or defect". Amendment effective April 1, 2015.

2007 Amendment: Chapter 449 in definition of criminal justice agency after "including a" inserted "governmental" and after "agency" inserted "organized under Title 7, chapter 33"; and made minor changes in style. Amendment effective June 1, 2007.

2003 Amendment: Chapter 253 in definition of criminal justice agency in (b) at end after "justice" inserted "including a fire agency or fire marshal that conducts criminal investigations of fires"; and made minor changes in style. Amendment effective October 1, 2003.

Applicability: Section 3, Ch. 253, L. 2003, provided: "[This act] applies to any request for confidential criminal justice information made on or after [the effective date of this act]." Effective October 1, 2003.

1999 Amendment: Chapter 147 inserted definition of fingerprints; and made minor changes in style. Amendment effective March 23, 1999.

1993 Amendment: Chapter 431 in definition of criminal justice agency inserted (d) to include an agency of a foreign nation; in definition of criminal justice information system, in first sentence after "operated by", inserted "foreign"; and made minor changes in style. Amendment effective April 20, 1993.

1991 Amendment: In definition of criminal justice agency, in (b) before "state", inserted "federal"; in definition of public criminal justice information, after "information", deleted "except confidential criminal justice information"; and made minor changes in style.

Code Commissioner Correction: The Code Commissioner has substituted the department of justice for the division of motor vehicles in this section, because sec. 14, Ch. 503, L. 1985, repealed 2-15-2002, which had statutorily created the division, and sec. 1, Ch. 503 amended Title 61, Motor Vehicles, to substitute "department" for "division" throughout that title. The apparent intent was to eliminate the statutory status of the division, and therefore the Code Commissioner has changed statutory references accordingly (see 1-11-101(2)(g)).

Case Notes

Prosecution Completed for Purposes of 44-5-303 Even Though Deferred Sentence Not Finished — 44-5-303 Requires Reasonable Notice to Persons With Protected Privacy Interest in Confidential Criminal Justice Information (CCJI), Not Formal Service — District Court Appropriately Balanced Public Right to Know With Individual Right to Privacy Before Releasing Legislator's CCJI With Portions Restricted or Redacted. Broadwater County v. Ellsworth, 2023 MT 112, 412 Mont. 426, 530 P.3d 843.

Failure to Order Release of Prerelease Center Records Reversible Error in Victim's Negligence Case Against County: Prindel requested the records of a county prerelease center where his assailant Russell had resided, contending that the records may have been relevant to the question of foreseeability in the context of causation or have led to evidence relevant to the issue. Without ever seeing the records, the District Court denied the request for the records on grounds that the information could not have had a bearing on the foreseeability of Russell's act of violence against Prindel. The District Court impermissibly conjectured that the information was irrelevant and abused its discretion by refusing Prindel access to the confidential criminal justice information. The individual right to privacy in the records by Russell, who was serving a life sentence for attempting to kill Prindel, did not outweigh the merits of disclosing the records to Prindel, who was seeking legal redress against the county. Failure to disclose the prerelease center records was reversible error. Prindel v. Ravalli County, 2006 MT 62, 331 M 338, 133 P3d 165 (2006).

Failure to Release County Attorney's Files Concerning Attempted Homicide Assailant Reversible Error in Victim's Negligence Case Against County: Prindel requested the records of the County Attorney in order to prepare a case against the county for negligently failing to lawfully incarcerate Russell, even though Russell had been ordered to report to jail but was turned away, after which Russell attempted to kill Prindel. Although the parties had stipulated to the production of the files and the District Court had twice ordered production of the files, the District Court determined after in camera review that the files were not relevant to Prindel's case or admissible at trial. The District Court abused its discretion in declining to order release of the County Attorney's files containing criminal justice information, and to the extent that Prindel's request covered more than criminal justice information, the District Court should have weighed the demands of individual privacy against the merits of public disclosure and ordered the release of the County Attorney's files on Russell, except those that failed to satisfy statutory criteria. The District Court therefore committed reversible error by making an ad hoc, ex parte assessment of relevance of the contents of the files and deciding that they were not relevant and abused its discretion by employing the admissibility standard in lieu of criminal justice information, discovery, or work product standards. Prindel v. Ravalli County, 2006 MT 62, 331 M 338, 133 P3d 165 (2006).

No Right to Expectation of Privacy in Public Criminal Records or Negligence in Use of Records: In 1998, Barr applied for a part-time airport security officer position and consented to a background check. A 10-year check revealed no arrests, and Barr was hired. About 1 month later, another security officer requested a criminal background check on Barr, which revealed a 1968 arrest in Alaska for criminal nonsupport. Prior to the end of Barr's probationary period, his employment was terminated, and he sued the airport authority. Barr's claim was summarily dismissed. On appeal, the Supreme Court held that under this section, Barr's Alaska arrest was public information that anyone could access and its dissemination was not improper and that coupled with Barr's consent to the background check, Barr had no constitutional expectation of privacy in the criminal record. Barr's negligence claims also failed because he failed to offer proof of all elements of common-law negligence. Summary judgment for defendants was affirmed. Barr v. Great Falls Int'l Airport Authority, 2005 MT 36, 326 M 93, 107 P3d 471 (2005).

Possible Deferred Prosecution Agreement Not Considered Confidential Criminal Justice Information — Discussion by Prosecutor With Newspaper of Possible Deferred Prosecution Agreement Not Privacy Violation or Breach of Duty: Plaintiff alleged that the County Attorney negligently breached a legal duty and violated the Montana Criminal Justice Information Act of 1979 when the County Attorney told a local newspaper that plaintiff was considering a deferred criminal prosecution agreement. Plaintiff asserted that the information was confidential and that dissemination of the information was tortious. The District Court granted summary judgment to defendant. On appeal, the Supreme Court noted that criminal justice information is defined as information relating to criminal justice that is collected, processed, or preserved by a criminal justice agency and held that mere discussion of a possible deferred criminal prosecution agreement does not constitute a discussion of criminal justice information. Although there may be circumstances in which a person suspected of having committed a crime has a reasonable expectation that the person's privacy will not be violated by the release of details of an investigation, plaintiff here could not seriously claim a privacy violation when it was already public knowledge that the allegations were against her, what the allegations were, who was involved as complainants, that she was the subject of a school board investigation concerning the allegations, and that her intended retirement from teaching was connected to the allegations. There was no material issue of fact concerning whether the County Attorney negligently breached a duty owed to plaintiff by discussing a possible deferred criminal prosecution agreement with the newspaper or by releasing a copy of the initial offense report, and summary judgment was affirmed. Svaldi v. Anaconda-Deer Lodge County, 2005 MT 17, 325 M 365, 106 P3d 548 (2005), following Great Falls Tribune Co., Inc. v. Sheriff, 238 M 103, 775 P2d 1267(1989), and Citizens to Recall Mayor James Whitlock v. Whitlock, 255 M 517, 844 P2d 74 (1992).

Right of Media to Confidential Criminal Justice Information — Balance of Public Right to Know With Individual Right to Privacy — Personal Information Properly Shielded: A Beaverhead County Commissioner was arrested in Jefferson County for DUI. Defendant newspaper requested that Jefferson County release information regarding the arrest, and the District Court ordered the release. The County Commissioner appealed, claiming that the release violated the right to privacy, but the Supreme Court affirmed. Under Art. II, sec. 9, Mont. Const., any person, including a media entity, is entitled to receive confidential criminal justice information. However, that right is not absolute and must be balanced against the individual's right to privacy. The conflict between the public's right to know and the individual's right to privacy is dealt with by requiring the party requesting the information to show that it is entitled to the information, and once that showing is made, the request must be balanced against the privacy interest of the individual in question. To determine if an individual has a protected privacy interest under Art. II, sec. 10, Mont. Const., the test set out in Bozeman Daily Chronicle v. Bozeman Police Dept., 260 M 218, 859 P2d 435 (1993), is applied, namely whether: (1) the individual has a subjective or actual expectation of privacy; and (2) society is willing to recognize that expectation as reasonable. Pursuant to Citizens to Recall Mayor James Whitlock v. Whitlock, 255 M 517, 844 P2d 74 (1992), the public has the right to be informed of the actions and conduct of elected public officials and information related to the official's ability to perform public duties should not be withheld from public scrutiny. Because the information sought by the newspaper related to the County Commissioner's ability to perform public duties, any privacy expectation that the County Commissioner had was unreasonable, and the arrest information was properly released. However, the County Commissioner did retain a privacy interest in personal information unrelated to status as a public official, such as Social Security and driver's license numbers, and it was proper for the District Court to shield that personal information from public scrutiny. Jefferson County v. Mont. Standard, 2003 MT 304, 318 M 173, 79 P3d 805 (2003). See also Broadwater County v. Ellsworth, 2023 MT 112, 412 Mont. 426, 530 P.3d 843.

In Camera Review of Criminal Justice Information Required to Balance Privacy Interests Against Right to Know: As part of its complaint, the Lincoln County Board of County Commissioners requested an evidentiary hearing, seeking the release of criminal justice system information related to an investigation of the Commission by the state. The state Criminal Investigation Bureau contended that the investigative file contained confidential information, the release of which would compromise both the investigation and the privacy interests of informants and witnesses. The District Court canceled the hearing, denied the request for dissemination of the investigative materials, and dismissed the complaint with prejudice. On appeal, the Supreme Court reversed, noting that an analysis of potentially competing privacy interests of the parties was necessary in order to balance those interests against the Commission's right to know. On remand, the District Court was instructed to conduct an in camera inspection of the investigative file in order to determine what material could be released to the Commission while maintaining the privacy of witnesses and informants and was instructed to limit the release of any investigative information by protective order. Lincoln County Comm'n v. Nixon, 1998 MT 298, 292 M 42, 968 P2d 1141, 55 St. Rep. 1222 (1998).

Attorney General's Opinions

Insurance Carrier Entitled to Copy of Accident Report and Supplemental Information: A traffic accident report is confidential and may be disseminated only to those authorized by law to receive it. Under 61-7-114, the insurance carrier of a person involved in a traffic accident is entitled to copies of the accident report and supplemental information, including witness statements, whether or not the insurance carrier is referred to or named in the accident report. 51 A.G. Op. 8 (2005). See also 37 A.G. Op. 112 (1978).

What Crime Victim Information Not Subject to Dissemination — Crime Scene Information Subject to Disclosure: If a crime victim requests confidentiality, the plain language of 44-5-311 prohibits a criminal justice agency from disseminating the address, telephone number, or place of employment of the victim or a member of the victim's family unless an exception in 44-5-311(1) applies, nor may information directly or indirectly disclosing the identity of victims of certain sex crimes be publicly disseminated unless an exception in 44-5-311(1) applies. However, disclosure of crime scene location information by a law enforcement agency is generally required, even if the victim has requested confidentiality or is the victim of a sex crime and disclosure may inadvertently implicate the identity of the victim. 50 A.G. Op. 6 (2004).

Initial Offense Report — Initial Arrest Record — Release — Deletion of Confidential Information: Under this section, an initial offense report is the first record of a criminal justice agency that indicates that a criminal offense may have been committed, including the initial facts associated with that offense. An initial arrest record is the first record made by a criminal justice agency indicating the fact of a particular person's arrest, including the initial facts associated with that arrest. If an initial offense report or initial arrest record contains information defined as confidential by the Act, that information may have to be deleted prior to public dissemination. 42 A.G. Op. 119 (1988).

Recordings of Phone Calls Reporting Offenses and Dispatch Recordings — Deletion of Confidential Information: Recordings of phone calls reporting offenses and dispatch recordings should be considered public criminal justice information if they fall within the definition of public criminal justice information, except that if those recordings contain information defined as confidential, deletion of that information may be required prior to public dissemination. 42 A.G. Op. 119 (1988).

44-5-105. Department of justice — powers.

Compiler's Comments

1993 Amendment: Chapter 603 deleted second sentence of (3) that read: "The function authorized in this subsection may not be assigned to any subagency that has supervisory authority over any criminal justice information system."

Statement of Intent: The statement of intent attached to SB 271 (Ch. 525, L. 1979) provided in part: "Section 23(1) allows, but does not require, the department of justice to adopt rules necessary to carry out the purposes of the act. With the exception of section 9, discussed above, the legislature intends that this act be self-implementing. This grant of discretionary rulemaking authority is limited, therefore, to the adoption of: (1) rules establishing procedures and forms necessary for the efficient operation of a state repository of criminal history record information, (2) interpretive rules necessary to avoid constructions that would defeat the purposes of the act, listed in section 2, or (3) model procedural guidelines which other criminal justice agencies may or may not adopt for their own use."

Administrative Rules

Title 23, chapter 12, subchapter 1, ARM Criminal history records program.
Title 23, chapter 12, subchapter 2, ARM Criminal justice information.
Title 23, chapter 12, subchapter 3, ARM Criminal intelligence information.

Part 2
Collection and Processing

44-5-202. Photographs and fingerprints.

Compiler's Comments

2019 Amendment: Chapter 22 in (5) near beginning substituted "An individual who is issued a notice to appear or who is arrested for a misdemeanor traffic, regulatory, or fish and game offense" for "An individual arrested for a traffic, regulatory, or fish and game offense" and inserted (b) concerning sentences including a term of incarceration; in (8) in second sentence substituted "shall expunge all copies" for "shall return all copies to the individual from whom they were taken"; and made minor changes in style. Amendment effective October 1, 2019.

2017 Amendment: Chapter 321 in (3)(a) inserted "or a misdemeanor except as provided in subsection (5)"; in (4) in first sentence inserted "or a misdemeanor" and inserted last sentence concerning the charging document, information, or citation; in (5) at beginning deleted "A criminal justice agency described in subsection (1)(a) may photograph and fingerprint an accused if the accused has been arrested for the commission of a misdemeanor, except that"; in (8) at end of first sentence inserted "the court having jurisdiction in the criminal action shall report the disposition to the state repository as required in 44-5-213(2) within 14 business days", near beginning of second sentence inserted "of the individual", at end of second sentence after "the individual from whom they were taken" deleted "in the following circumstances:

(a) upon order of the court that had jurisdiction; or

(b) upon the request of the individual", and inserted last sentence concerning copies of the individual's fingerprints or photographs"; and made minor changes in style. Amendment effective July 1, 2017.

Applicability: Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

2007 Amendment: Chapter 141 in (8) at beginning of introductory clause inserted "If an individual is released without the filing of charges, if the charges did not result in a conviction, or if a conviction is later invalidated"; in (8)(b) at end deleted "when the individual was released without the filing of charges or when the charges did not result in a conviction"; and made minor change style. Amendment effective October 1, 2007.

1995 Amendment: Chapter 546 in (1)(b) and (2) substituted "department of corrections" for "department of corrections and human services"; and made minor changes in style. Amendment effective July 1, 1995.

1991 Amendments — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Chapter 804 at end of (8) inserted "in the following circumstances"; in (8)(a) substituted "upon order of the court that had jurisdiction" for "if a court so orders"; and in (8)(b) substituted "when he was released without the filing of charges or when the charges did not result in a conviction" for former (8)(b)(i) through (8)(b)(iii) that provided for return of copies of photographs and fingerprints upon request to individual if no charges were filed, if a misdemeanor charge did not result in a conviction, or if the individual was found innocent of the offense charged.

Case Notes

File Fingerprints Considered Properly Authenticated Public Record: Part of DuBray's defense in a homicide trial was to cast suspicion on others for the crime, including Clark. During its investigation, the state compared fingerprints at the crime scene with various people, including Clark, and to refute DuBray's defense sought to introduce evidence of Clark's fingerprints on file with the County Sheriff. The trial court allowed the fingerprints into evidence, but DuBray objected on grounds that the fingerprints were not authenticated pursuant to Rule 901, M.R.Ev. (Title 26, ch. 10). The Supreme Court noted that under this section, the fingerprints were a public record and were thus properly authenticated, so admission of the fingerprints was not an abuse of discretion. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003).

44-5-213. Procedures to ensure accuracy of criminal history records.

Compiler's Comments

1995 Amendment: Chapter 546 in (4) substituted "department of corrections" for "department of corrections and human services"; and made minor changes in style. Amendment effective July 1, 1995.

1991 Amendment — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Statement of Intent: The statement of intent attached to SB 271 (Ch. 525, L. 1979) provided in part: "Section 9(7) requires the department of justice to adopt rules to implement that section, entitled 'Procedures To Ensure Accuracy Of Criminal History Records.' The section provides that the department of justice is required to maintain a centralized state repository of criminal history record information; that criminal justice agencies are required to report dispositions of criminal cases to that state repository; that, where time allows, criminal justice agencies are required to check their records against the state repository's to assure their completeness before disseminating them; and that criminal justice agencies are responsible for the completeness and accuracy of their own files. The intent of the legislature in granting rulemaking authority with respect to this provision is to require the state repository to establish uniform procedures for the reporting of dispositions to it. These rules should include clear-cut directives regarding the format and nature of the information to be reported. For example, the rules could require the uses of standard forms for reporting. Or, these rules could provide for a unique tracking number to facilitate the linking of dispositions to specific arrests."

Administrative Rules

Title 23, chapter 12, subchapter 1, ARM Criminal history records program.

Title 23, chapter 12, subchapter 2, ARM Criminal justice information.

44-5-214. Inspection or transfer of criminal history records.

Compiler's Comments

1993 Amendment: Chapter 603 in (3)(b), near beginning of third sentence after "charge", deleted "not to exceed the cost of labor and materials" and at end substituted "the cost of supplying the copies" for "machine-produced copies"; and made minor changes in style.

44-5-215. Challenge and correction.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 3
Dissemination

Part Law Review Articles

A Growing Awareness of Privacy in America, Towe, 37 Mont. L. Rev. 55 (1976).

44-5-301. Dissemination of public criminal justice information.

Compiler's Comments

2021 Amendment: Chapter 369 inserted (2)(b) requiring a clerking fee for release of a book photograph, providing for a waiver, and providing an exception; and made minor changes in style. Amendment effective April 30, 2021.

Nonseverability: Section 3, Ch. 369, L. 2021, was a nonseverability clause.

1999 Amendment: Chapter 416 deleted former (1)(a) and (1)(b) that read: "except for the following:

(a) Whenever a record or index is compiled by name or universal identifier from a manual or automated system, only information about convictions, deferred prosecutions, or deferred sentences is available to the public.

(b) Whenever the conviction record reflects only misdemeanors or deferred prosecutions and whenever there are no convictions except for traffic, regulatory, or fish and game offenses for a period of 5 years from the date of the last conviction, no record or index may be disseminated pursuant to subsection (1)(a). However, the original documents are available to the public from the originating criminal justice agency"; in first sentence in (2) inserted "the department or"; and made minor changes in style. Amendment effective October 1, 1999.

Administrative Rules

Title 23, chapter 12, subchapter 2, ARM Criminal justice information.

Case Notes

Possible Deferred Prosecution Agreement Not Considered Confidential Criminal Justice Information — Discussion by Prosecutor With Newspaper of Possible Deferred Prosecution Agreement Not Privacy Violation or Breach of Duty: Plaintiff alleged that the County Attorney negligently breached a legal duty and violated the Montana Criminal Justice Information Act of 1979 when the County Attorney told a local newspaper that plaintiff was considering a deferred criminal prosecution agreement. Plaintiff asserted that the information was confidential and that dissemination of the information was tortious. The District Court granted summary judgment to defendant. On appeal, the Supreme Court noted that criminal justice information is defined as information relating to criminal justice that is collected, processed, or preserved by a criminal justice agency and held that mere discussion of a possible deferred criminal prosecution agreement does not constitute a discussion of criminal justice information. Although there may be circumstances in which a person suspected of having committed a crime has a reasonable expectation that the person's privacy will not be violated by the release of details of an investigation, plaintiff here could not seriously claim a privacy violation when it was already public knowledge that the allegations were against her, what the allegations were, who was involved as complainants, that she was the subject of a school board investigation concerning the allegations, and that her intended retirement from teaching was connected to the allegations. There was no material issue of fact concerning whether the County Attorney negligently breached a duty owed to plaintiff by discussing a possible deferred criminal prosecution agreement with the newspaper or by releasing a copy of the initial offense report, and summary judgment was affirmed. Svaldi v. Anaconda-Deer Lodge County, 2005 MT 17, 325 M 365, 106 P3d 548 (2005), following Great Falls Tribune Co., Inc. v. Sheriff, 238 M 103, 775 P2d 1267(1989), and Citizens to Recall Mayor James Whitlock v. Whitlock, 255 M 517, 844 P2d 74 (1992).

Request of Law Enforcement Records for School Project — Information Beyond Public Reach: The District Court properly refused the request of a student who sought Sheriff's department information for a school project. Information requested included: (1) records of the daily log of phone calls; (2) case files of criminal investigations; (3) preemployment investigation reports; and (4) lists of arrested persons. Persons involved had an actual expectation of privacy, and the interests of society were furthered by recognition of the privacy interest as reasonable. The student had the right to view and record statistical information pursuant to 44-5-103, but the requested information was protected by the Montana Constitution and the Montana Criminal Justice Information Act of 1979 and was beyond the reach of the public sector. Engrav v. Cragun, 236 M 260, 769 P2d 1224, 46 St. Rep. 344 (1989), followed in Bozeman Daily Chronicle v. Bozeman Police Dept., 260 M 218, 859 P2d 435, 50 St. Rep. 1014 (1993).

Attorney General's Opinions

Information That May Be Disseminated — Traffic Offense Records: Under this section, if a person's conviction record reflects only misdemeanors or deferred prosecutions and reflects no convictions of any kind for a period of 5 years from the last conviction, excluding convictions for traffic, regulatory, or fish and game offenses, then no record or index information of any kind, including traffic offense records, may be publicly disseminated. However, the Act specifically provides that records of traffic offenses maintained by the Department of Justice are not considered criminal history record information, and those records are publicly available by operation of 61-6-107. 42 A.G. Op. 119 (1988).

Recordings of Phone Calls Reporting Offenses and Dispatch Recordings — Deletion of Confidential Information: Recordings of phone calls reporting offenses and dispatch recordings should be considered public criminal justice information if they fall within the definition of public criminal justice information, except that if those recordings contain information defined as confidential, deletion of that information may be required prior to public dissemination. 42 A.G. Op. 119 (1988).

Right of Privacy — Right to Know — Balancing Test: The interests of the public's right to know and an individual's right of privacy must be balanced on a case-by-case basis by the custodian of the criminal justice information sought in determining whether criminal investigative information contained in an initial offense report or an initial arrest record should be publicly disseminated. 42 A.G. Op. 119 (1988).

Meaning of "Misdemeanor": The word "misdemeanor", as used in this section, should be assigned the meaning given the word in 45-2-101. 40 A.G. Op. 35 (1984).

Information That Is Available to Public: This section makes publicly available from the originating criminal justice agency all "public criminal justice information", as that term is defined in 44-5-103. 40 A.G. Op. 35 (1984).

Documents or Information to Which Section Applies: In this section, the term "record or index" refers to any record or index "compiled by name or universal identifier from a manual or automated system". The only information publicly available from such a "record or index" is entries concerning convictions, deferred prosecutions, or deferred sentences, and the dissemination restrictions in this section apply to that information. 40 A.G. Op. 35 (1984).

Conditions of Nondissemination of Information: Under this section, there are two conditions precedent to nondissemination of "record or index" information otherwise available to the public. These are: (1) the involved conviction record must reflect only misdemeanors or deferred prosecutions; and (2) the conviction record must reflect no convictions of any kind for a period of 5 years from the last conviction, excluding convictions for traffic, regulatory, or fish and game offenses. 40 A.G. Op. 35 (1984).

44-5-302. Dissemination of criminal history record information that is not public criminal justice information.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 398, L. 2023. Amendment effective October 1, 2023.

2003 Amendment: Chapter 229 near end of (2) substituted "the Montana supreme court and its commission on character and fitness" for "the state bar". Amendment effective April 3, 2003.

1989 Amendment: Inserted (2) concerning fingerprints of applicants for admission to State Bar.

Case Notes

Sentencing Condition Requiring Posting of Warning Signs at Entrances to Sex Offender's Residence Not Reasonably Related to Objectives of Rehabilitation and Protection: Muhammad was convicted of sexual intercourse without consent with a minor. One condition of sentencing was that Muhammad post a prominent sign at every entrance to his residence stating that children under age 18 were not allowed by court order. Muhammad argued that the sentencing condition violated his constitutional right to privacy and exceeded the statutory parameters regarding the dissemination of information concerning sexual offenders. The state contended that even if the signs revealed confidential criminal justice information, the District Court was allowed to disseminate the information if necessary under this section or after finding that the demands of individual privacy did not clearly exceed the merits of public disclosure under 44-5-303. In a case of first impression, the Supreme Court declined to address the constitutional argument, but concluded that the posting requirement was not reasonably related to the goals of rehabilitation and the protection of the victim and society, as required in 46-18-202. The condition was unduly severe and punitive to the point of being unrelated to rehabilitation, such a scarlet letter condition tending to overshadow any rehabilitative potential that it might generate. Thus, the posting condition was vacated. St. v. Muhammad, 2002 MT 47, 309 M 1, 43 P3d 318 (2002).

44-5-303. Dissemination of confidential criminal justice information — procedure for dissemination through court — notice and objection to disclosure.

Compiler's Comments

2021 Amendment: Chapter 540 in both versions in (5)(a) in first sentence near middle inserted "or if the disclosure may be in the public interest"; in (5)(a)(ii) after "criminal justice information" deleted "and anyone affected by release of the information"; inserted (5)(a)(iii) regarding a prosecutor's notice obligations and the ability of certain persons to object to disclosure of private information; in (5)(a)(v)(A) at beginning inserted "no sooner than 30 calendar days following the filing of the declaratory judgment action to ensure an opportunity for a person seeking to protect a privacy interest"; and made minor changes in style. Amendment effective October 1, 2021.

2017 Amendment: Chapter 235 in (4) in first sentence after "cooperating with" inserted "the child abuse and neglect review commission established in 2-15-2019 and", in second sentence after "goals of the" inserted "the review commission or", and in third sentence near beginning inserted "review commission" and before "designee" inserted "county attorney's"; and made minor changes in style. Amendment effective April 25, 2017, and terminates September 30, 2021.

Effective Date — Applicability: Section 11, Ch. 235, L. 2017, provided: "[This act] is effective on passage and approval and applies to child abuse and neglect cases resulting in a fatality or near fatality that occurred on or after [the effective date of this act]." Approved April 25, 2017.

Code Commissioner Correction: Chapter 67, L. 2013, changed references to a fetal, infant, and child mortality review team to a fetal infant, child, and maternal mortality review team. The code commissioner has changed the references to the review team in this section to reflect the changes made by Ch. 67.

2007 Amendment: Chapter 449 in (1) in second sentence after "with a" substituted "chief of a governmental fire agency organized under Title 7, chapter 33" for "fire service agency"; and made minor changes in style. Amendment effective June 1, 2007.

2003 Amendment: Chapter 253 in (1) inserted second sentence authorizing receiving and sharing confidential criminal justice information with fire service agencies or fire marshals investigating a fire; inserted (5) providing procedures for county and city attorneys and district courts for handling requests for the release of confidential criminal justice information with respect to certain terminated criminal investigations or criminal prosecutions; and inserted (6) providing that the procedures established for county and city attorneys and district courts are not the exclusive remedy for obtaining confidential criminal justice information. Amendment effective October 1, 2003.

Applicability: Section 3, Ch. 253, L. 2003, provided: "[This act] applies to any request for confidential criminal justice information made on or after [the effective date of this act]." Effective October 1, 2003.

1997 Amendment: Chapter 519 in (1), near beginning after "provided in", substituted "subsections (2) through (4)" for "subsection (2)"; and inserted (4) allowing the County Attorney to receive and disclose certain confidential criminal justice information. Amendment effective May 2, 1997

1995 Amendment: Chapter 125 at beginning of (1) inserted exception clause; inserted (2) allowing dissemination to a victim; at beginning of (3) inserted "Unless otherwise ordered by a court, a person or"; and made minor changes in style.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

1991 Amendment: At end of first sentence inserted "and to those authorized to receive it by a district court upon a written finding that the demands of individual privacy do not clearly exceed the merits of public disclosure".

Case Notes

Prosecution Completed for Purposes of 44-5-303 Even Though Deferred Sentence Not Finished — 44-5-303 Requires Reasonable Notice to Persons With Protected Privacy Interest in Confidential Criminal Justice Information (CCJI), Not Formal Service — District Court Appropriately Balanced Public Right to Know With Individual Right to Privacy Before Releasing Legislator's CCJI With Portions Restricted or Redacted. Broadwater County v. Ellsworth, 2023 MT 112, 412 Mont. 426, 530 P.3d 843.

Denial of Petition for Release of Confidential Criminal Justice Information Without Conducting In Camera Review — No Error When Criminal Investigation Active and Ongoing: Seven years after the decedent was murdered, his estate filed a petition in District Court seeking the release of confidential criminal justice information (CCJI) relating to the decedent. The District Court declined to conduct an in camera review and denied the request. On appeal, the Supreme Court found that, although the District Court had incorrectly determined that it was barred from conducting an in camera review due to the prosecutor's determination that dissemination would jeopardize an ongoing investigation, the District Court had still reached the correct result. The Supreme Court affirmed, holding that the decedent's estate's right to know as it related to the CCJI must yield to the state's police power to continue conducting its active murder investigation. Crites v. Lewis & Clark County, 2019 MT 161, 396 Mont. 336, 444 P.3d 1025.

Dissemination of Confidential Criminal Justice Information — Videos of Workers' Compensation Claimant — Release to Montana State Fund Upheld: After the respondent was injured in the course and scope of his employment, Montana State Fund (MSF), which provided workers' compensation insurance to the respondent's employer, accepted the respondent's claim, settled with the respondent, and continued to pay the respondent's medical benefits. While performing a routine verification of the respondent's disabilities, MSF investigators recorded multiple videos of the respondent that indicated that the respondent may have faked or exaggerated his injuries and that were classified as confidential criminal justice information. MSF petitioned the District Court for the release of the videos pursuant to 44-5-303, and the District Court granted the petition. The respondent appealed, arguing that MSF lacked standing to bring the petition and that the District Court erred when balancing the demands of individual privacy against the merits of disclosure. The Supreme Court affirmed, concluding that MSF had standing to bring the petition under 44-5-303(6), which allows an organization to file any action for the release of information that the organization believes is appropriate and permissible. The Supreme Court examined the two-part balancing test to determine whether the respondent's right to privacy clearly exceeded the merits of disclosure and concluded that the District Court adequately engaged in the balancing of competing concerns. The respondent's actions that were documented in the videos took place in public locations in which the respondent did not have a subjective or actual expectation of privacy and in which society would not view the respondent's expectation of privacy as reasonable, and the proper operation of the workers' compensation system constitutes a substantial interest. Mont. St. Fund v. Simms, 2012 MT 22, 364 Mont. 14, 270 P.3d 64.

Failure to Order Release of Prerelease Center Records Reversible Error in Victim's Negligence Case Against County: Prindel requested the records of a county prerelease center where his assailant Russell had resided, contending that the records may have been relevant to the question of foreseeability in the context of causation or have led to evidence relevant to the issue. Without ever seeing the records, the District Court denied the request for the records on grounds that the information could not have had a bearing on the foreseeability of Russell's act of violence against Prindel. The District Court impermissibly conjectured that the information was irrelevant and abused its discretion by refusing Prindel access to the confidential criminal justice information. The individual right to privacy in the records by Russell, who was serving a life sentence for attempting to kill Prindel, did not outweigh the merits of disclosing the records to Prindel, who was seeking legal redress against the county. Failure to disclose the prerelease center records was reversible error. Prindel v. Ravalli County, 2006 MT 62, 331 M 338, 133 P3d 165 (2006).

Failure to Release County Attorney's Files Concerning Attempted Homicide Assailant Reversible Error in Victim's Negligence Case Against County: Prindel requested the records of the County Attorney in order to prepare a case against the county for negligently failing to lawfully incarcerate Russell, even though Russell had been ordered to report to jail but was turned away, after which Russell attempted to kill Prindel. Although the parties had stipulated to the production of the files and the District Court had twice ordered production of the files, the District Court determined after in camera review that the files were not relevant to Prindel's case or admissible at trial. The District Court abused its discretion in declining to order release of the County Attorney's files containing criminal justice information, and to the extent that Prindel's request covered more than criminal justice information, the District Court should have weighed the demands of individual privacy against the merits of public disclosure and ordered the release of the County Attorney's files on Russell, except those that failed to satisfy statutory criteria. The District Court therefore committed reversible error by making an ad hoc, ex parte assessment of relevance of the contents of the files and deciding that they were not relevant and abused its discretion by employing the admissibility standard in lieu of criminal justice information, discovery, or work product standards. Prindel v. Ravalli County, 2006 MT 62, 331 M 338, 133 P3d 165 (2006).

Possible Deferred Prosecution Agreement Not Considered Confidential Criminal Justice Information — Discussion by Prosecutor With Newspaper of Possible Deferred Prosecution Agreement Not Privacy Violation or Breach of Duty: Plaintiff alleged that the County Attorney negligently breached a legal duty and violated the Montana Criminal Justice Information Act of 1979 when the County Attorney told a local newspaper that plaintiff was considering a deferred criminal prosecution agreement. Plaintiff asserted that the information was confidential and that dissemination of the information was tortious. The District Court granted summary judgment to defendant. On appeal, the Supreme Court noted that criminal justice information is defined as information relating to criminal justice that is collected, processed, or preserved by a criminal justice agency and held that mere discussion of a possible deferred criminal prosecution agreement does not constitute a discussion of criminal justice information. Although there may be circumstances in which a person suspected of having committed a crime has a reasonable expectation that the person's privacy will not be violated by the release of details of an investigation, plaintiff here could not seriously claim a privacy violation when it was already public knowledge that the allegations were against her, what the allegations were, who was involved as complainants, that she was the subject of a school board investigation concerning the allegations, and that her intended retirement from teaching was connected to the allegations. There was no material issue of fact concerning whether the County Attorney negligently breached a duty owed to plaintiff by discussing a possible deferred criminal prosecution agreement with the newspaper or by releasing a copy of the initial offense report, and summary judgment was affirmed. Svaldi v. Anaconda-Deer Lodge County, 2005 MT 17, 325 M 365, 106 P3d 548 (2005), following Great Falls Tribune Co., Inc. v. Sheriff, 238 M 103, 775 P2d 1267(1989), and Citizens to Recall Mayor James Whitlock v. Whitlock, 255 M 517, 844 P2d 74 (1992).

Right of Media to Confidential Criminal Justice Information — Balance of Public Right to Know With Individual Right to Privacy — Personal Information Properly Shielded: A Beaverhead

County Commissioner was arrested in Jefferson County for DUI. Defendant newspaper requested that Jefferson County release information regarding the arrest, and the District Court ordered the release. The County Commissioner appealed, claiming that the release violated the right to privacy, but the Supreme Court affirmed. Under Art. II, sec. 9, Mont. Const., any person, including a media entity, is entitled to receive confidential criminal justice information. However, that right is not absolute and must be balanced against the individual's right to privacy. The conflict between the public's right to know and the individual's right to privacy is dealt with by requiring the party requesting the information to show that it is entitled to the information, and once that showing is made, the request must be balanced against the privacy interest of the individual in question. To determine if an individual has a protected privacy interest under Art. II, sec. 10, Mont. Const., the test set out in Bozeman Daily Chronicle v. Bozeman Police Dept., 260 M 218, 859 P2d 435 (1993), is applied, namely whether: (1) the individual has a subjective or actual expectation of privacy; and (2) society is willing to recognize that expectation as reasonable. Pursuant to Citizens to Recall Mayor James Whitlock v. Whitlock, 255 M 517, 844 P2d 74 (1992), the public has the right to be informed of the actions and conduct of elected public officials and information related to the official's ability to perform public duties should not be withheld from public scrutiny. Because the information sought by the newspaper related to the County Commissioner's ability to perform public duties, any privacy expectation that the County Commissioner had was unreasonable, and the arrest information was properly released. However, the County Commissioner did retain a privacy interest in personal information unrelated to status as a public official, such as Social Security and driver's license numbers, and it was proper for the District Court to shield that personal information from public scrutiny. Jefferson County v. Mont. Standard, 2003 MT 304, 318 M 173, 79 P3d 805 (2003). See also Broadwater County v. Ellsworth, 2023 MT 112, 412 Mont. 426, 530 P.3d 843.

Judicial Standards Commission Proceedings Not Violative of Constitutional Confidentiality Provisions: Records of the Judicial Standards Commission are confidential until the filing of a formal complaint. After a formal complaint is filed, certain papers, proceedings, and records of proceedings become accessible to the public. In order to protect the reputation of innocent judges wrongfully accused of misconduct, to maintain confidence in the judiciary by avoiding premature disclosure of alleged misconduct, and to encourage retirement as an alternative to costly lengthy formal proceedings and to protect Commission members from outside pressures, a complaint against a judicial officer is confidential until the Commission finds good cause to order a hearing, at which time the Legislature has determined that the public's right to know outweighs the individual judge's right to privacy. In this case, defendant argued that the Commission unlawfully provided copies of an investigation file to its members and the prosecutor, who in turn filed it as an exhibit during the formal hearing, making the matter a public record. The investigation file was never admitted into evidence during the hearing; however, it was included in the bound volume of prosecution exhibits. Defendant did not object at the hearing to inclusion of the file with other admitted exhibits, and thus waived any argument on appeal concerning a breach of privacy. Harris v. Smartt, 2002 MT 239, 311 M 507, 57 P3d 58 (2002).

Sentencing Condition Requiring Posting of Warning Signs at Entrances to Sex Offender's Residence Not Reasonably Related to Objectives of Rehabilitation and Protection: Muhammad was convicted of sexual intercourse without consent with a minor. One condition of sentencing was that Muhammad post a prominent sign at every entrance to his residence stating that children under age 18 were not allowed by court order. Muhammad argued that the sentencing condition violated his constitutional right to privacy and exceeded the statutory parameters regarding the dissemination of information concerning sexual offenders. The state contended that even if the signs revealed confidential criminal justice information, the District Court was allowed to disseminate the information if necessary under 44-5-302 or after finding that the demands of individual privacy did not clearly exceed the merits of public disclosure under this section. In a case of first impression, the Supreme Court declined to address the constitutional argument, but concluded that the posting requirement was not reasonably related to the goals of rehabilitation and the protection of the victim and society, as required in 46-18-202. The condition was unduly severe and punitive to the point of being unrelated to rehabilitation, such a scarlet letter condition tending to overshadow any rehabilitative potential that it might generate. Thus, the posting condition was vacated. St. v. Muhammad, 2002 MT 47, 309 M 1, 43 P3d 318 (2002).

Sheriff Entitled to Consider Confidential Criminal Justice Information in Deciding Whether to Grant Permit for Concealed Weapon: Smith was involved in an incident in 1993 resulting in charges for a number of felonies to which he pleaded guilty. Smith received a deferred imposition of sentence, and after satisfying the conditions of the sentence, the charges were dismissed. In

1995 and 1997, Smith applied for a permit to carry a concealed weapon, but each request was denied by the County Sheriff because of the 1993 incident and because of Smith's criminal history. Smith contended that the Sheriff improperly relied on evidence from Smith's criminal file to establish reasonable cause to deny the applications, because the District Court had dismissed the 1993 charges and ordered the records expunged. However, 46-18-204 does not provide for record expungement when a charge is dismissed, but rather provides that the record be considered confidential criminal justice information. Pursuant to this section, the Sheriff was entitled to receive the information and to consider it when exercising the discretion in 45-8-321 regarding whether or not to grant a concealed weapon permit. Smith v. Missoula County, 1999 MT 330, 297 M 368, 992 P2d 834, 56 St. Rep. 1318 (1999).

In Camera Review of Criminal Justice Information Required to Balance Privacy Interests Against Right to Know: As part of its complaint, the Lincoln County Board of County Commissioners requested an evidentiary hearing, seeking the release of criminal justice system information related to an investigation of the Commission by the state. The state Criminal Investigation Bureau contended that the investigative file contained confidential information, the release of which would compromise both the investigation and the privacy interests of informants and witnesses. The District Court canceled the hearing, denied the request for dissemination of the investigative materials, and dismissed the complaint with prejudice. On appeal, the Supreme Court reversed, noting that an analysis of potentially competing privacy interests of the parties was necessary in order to balance those interests against the Commission's right to know. On remand, the District Court was instructed to conduct an in camera inspection of the investigative file in order to determine what material could be released to the Commission while maintaining the privacy of witnesses and informants and was instructed to limit the release of any investigative information by protective order. Lincoln County Comm'n v. Nixon, 1998 MT 298, 292 M 42, 968 P2d 1141, 55 St. Rep. 1222 (1998).

Admission of Criminal Justice Information as Evidence in Tort Action Upheld: David, his wife Susan, their minor child, and the parties' defunct business sued Pierce Flooring and others for damages, including damages for emotional distress, stemming from criminal acts of vandalism taken against the plaintiffs' competing business. In the course of the trial, the District Court allowed the defendants to inspect, copy, and introduce evidence in police records concerning domestic violence complaints made by Susan against David. The Supreme Court held that the evidence was relevant because it showed that there may have been another cause for the Blacks' emotional distress other than the acts of vandalism. The Supreme Court also held that the record showed that the District Court properly exercised its discretion under Rule 403, M.R.Ev. (Title 26, ch. 10), in allowing the admission of some of the evidence but excluding other evidence because the Blacks' right to privacy exceeded the public's right to know. The Supreme Court held that the District Court's failure to make the written finding required by subsection (1) of this section was harmless error. Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997).

Release of Police Records to Insurance Company: When an insurer sought access to police files pertaining to the police department's investigation of the death of an insured for use during the insurer's investigation of policy coverage, the police department objected to release of its records. The insurer then filed an application with the District Court, seeking production of the records. The court denied the application, holding that the insurer was not authorized by law to receive the documents and therefore was not entitled to their production under the Montana Criminal Justice Information Act of 1979. The trial court interpreted this section to mean that in order to be "authorized by law", one must be specifically authorized by statute to receive criminal justice information. The Supreme Court held that this interpretation does not take into consideration basic tenets of our constitutional system of government and statutory construction. Under its commonly understood meaning, the word "law" includes constitutional as well as statutory law. Accordingly, one is authorized to receive criminal justice information by the "right to know" provision of the constitution. The only limitation on the right to receive this information is the constitutional right of privacy. Any interpretation of this section that requires specific legislative authorization to review criminal justice information would render the statute unconstitutional. In this instance, the District Court shall conduct an in camera inspection of the documents at issue to determine what material could properly be released, balancing the competing interests of the right to know and the right of privacy. Allstate Ins. Co. v. Billings, 239 M 321, 780 P2d 186, 46 St. Rep. 1716 (1989), followed in Bozeman Daily Chronicle v. Bozeman Police Dept., 260 M 218, 859 P2d 435, 50 St. Rep. 1014 (1993).

Attorney General's Opinions

Insurance Carrier Entitled to Copy of Accident Report and Supplemental Information: A traffic accident report is confidential and may be disseminated only to those authorized by law to receive it. Under 61-7-114, the insurance carrier of a person involved in a traffic accident is entitled to copies of the accident report and supplemental information, including witness statements, whether or not the insurance carrier is referred to or named in the accident report. 51 A.G. Op. 8 (2005). See also 37 A.G. Op. 112 (1978).

What Crime Victim Information Not Subject to Dissemination — Crime Scene Information Subject to Disclosure: If a crime victim requests confidentiality, the plain language of 44-5-311 prohibits a criminal justice agency from disseminating the address, telephone number, or place of employment of the victim or a member of the victim's family unless an exception in 44-5-311(1) applies, nor may information directly or indirectly disclosing the identity of victims of certain sex crimes be publicly disseminated unless an exception in 44-5-311(1) applies. However, disclosure of crime scene location information by a law enforcement agency is generally required, even if the victim has requested confidentiality or is the victim of a sex crime and disclosure may inadvertently implicate the identity of the victim. 50 A.G. Op. 6 (2004).

Persons Entitled to Receive Confidential Criminal Justice Information: A person not otherwise statutorily authorized is authorized by law to obtain confidential criminal justice information pursuant to this section when that person has obtained a District Court order or subpoena requiring disclosure. A person other than one charged with an offense is not entitled to receive confidential criminal investigative reports without either specific statutory authority or a District Court order or subpoena requiring dissemination. 42 A.G. Op. 119 (1988).

Confidential Criminal Justice Information: As 53-9-104 was written before 1987 legislative changes, the Workers' Compensation Division had authority to obtain confidential criminal justice information, which it had to keep confidential. 41 A.G. Op. 92 (1986).

44-5-306. Criminal history record information account.

Compiler's Comments

Effective Date: Section 5, Ch. 182, L. 2003, provided: "[This act] is effective on passage and approval." Approved March 31, 2003.

44-5-307. Use of criminal history record information account — staffing — funding.

Compiler's Comments

Effective Date: Section 5, Ch. 182, L. 2003, provided: "[This act] is effective on passage and approval." Approved March 31, 2003.

44-5-311. Nondisclosure of information about victim.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 6, Ch. 167, L. 2023. Amendment effective April 19, 2023.

Severability: Section 38, Ch. 167, L. 2023, was a severability clause.

2015 Amendment: Chapter 285 inserted references to 45-5-702, 45-5-703, 45-5-704, and 45-5-705; and made minor changes in style. Amendment effective July 1, 2015.

Attorney General's Opinions

What Crime Victim Information Not Subject to Dissemination — Crime Scene Information Subject to Disclosure: If a crime victim requests confidentiality, the plain language of this section prohibits a criminal justice agency from disseminating the address, telephone number, or place of employment of the victim or a member of the victim's family unless an exception in subsection (1) of this section applies, nor may information directly or indirectly disclosing the identity of victims of certain sex crimes be publicly disseminated unless an exception in subsection (1) of this section applies. However, disclosure of crime scene location information by a law enforcement agency is generally required, even if the victim has requested confidentiality or is the victim of a sex crime and disclosure may inadvertently implicate the identity of the victim. 50 A.G. Op. 6 (2004).

Part 5

Criminal Intelligence Information Section

Part Administrative Rules

Title 23, chapter 12, subchapter 3, ARM Criminal intelligence information.

44-5-501. Creation of criminal intelligence information section — advisory council.

Compiler's Comments

1985 Amendment — Correction: In (1) following "may create" deleted "within the criminal investigation bureau"; and in (2)(e) substituted "department" for "criminal investigation bureau". Using the amendment to 61-3-108(2)(a) made by section 12 of Ch. 503 as a model, the Code Commissioner, in (2)(c), substituted "department involved in criminal intelligence or criminal investigation work" for "criminal investigation bureau or any of its sections" in order to comply with the intent of section 13(2) of Ch. 503.

44-5-503. Duties of section.

Case Notes

No Right to Expectation of Privacy in Public Criminal Records or Negligence in Use of Records: In 1998, Barr applied for a part-time airport security officer position and consented to a background check. A 10-year check revealed no arrests, and Barr was hired. About 1 month later, another security officer requested a criminal background check on Barr, which revealed a 1968 arrest in Alaska for criminal nonsupport. Prior to the end of Barr's probationary period, his employment was terminated, and he sued the airport authority. Barr's claim was summarily dismissed. On appeal, the Supreme Court held that under 44-5-103, Barr's Alaska arrest was public information that anyone could access and its dissemination was not improper and that coupled with Barr's consent to the background check, Barr had no constitutional expectation of privacy in the criminal record. Barr's negligence claims also failed because he failed to offer proof of all elements of common-law negligence. Summary judgment for defendants was affirmed. Barr v. Great Falls Int'l Airport Authority, 2005 MT 36, 326 M 93, 107 P3d 471 (2005).

Sheriff Entitled to Consider Confidential Criminal Justice Information in Deciding Whether to Grant Permit for Concealed Weapon: Smith was involved in an incident in 1993 resulting in charges for a number of felonies to which he pleaded guilty. Smith received a deferred imposition of sentence, and after satisfying the conditions of the sentence, the charges were dismissed. In 1995 and 1997, Smith applied for a permit to carry a concealed weapon, but each request was denied by the County Sheriff because of the 1993 incident and because of Smith's criminal history. Smith contended that the Sheriff improperly relied on evidence from Smith's criminal file to establish reasonable cause to deny the applications, because the District Court had dismissed the 1993 charges and ordered the records expunged. However, 46-18-204 does not provide for record expungement when a charge is dismissed, but rather provides that the record be considered confidential criminal justice information. Pursuant to 44-5-303, the Sheriff was entitled to receive the information and to consider it when exercising the discretion in 45-8-321 regarding whether or not to grant a concealed weapon permit. Smith v. Missoula County, 1999 MT 330, 297 M 368, 992 P2d 834, 56 St. Rep. 1318 (1999).

44-5-504. Section standards and procedures.

Compiler's Comments

1985 Amendment: In first sentence substituted "department of justice" for "criminal investigation bureau".

Statement of Intent: The statement of intent attached to Ch. 145, L. 1985, provided: "A statement of intent is needed for this bill because section 8 [44-5-504] requires the attorney general to adopt standards and procedures for operation of the criminal intelligence information section.

The standards and procedures should particularly address relations and the exchange of information between the section and participating agencies, information processing and distribution systems, the security of such systems and the information collected, and the safeguarding of individual privacy."

44-5-505. Section supervisor and personnel.

Compiler's Comments

1985 Amendment — Correction: In (2) substituted "department of justice" for "criminal investigation bureau". In (1), to comply with the intent of section 13(2) of Ch. 503, the Code Commissioner substituted "The attorney general" for "The chief of the criminal investigation bureau of the department of justice".

44-5-506. Participating agencies.

Compiler's Comments

2005 Amendment: Chapter 36 in (1)(b) substituted "sheriff's offices" for "sheriff's departments". Amendment effective October 1, 2005.

1985 Amendment — Correction: In (1)(c) following "sections" deleted "of the criminal investigation bureau" and, to comply with the intent of section 13(2) of Ch. 503 and preserve the intent of section 6 of Ch. 145, L. 1985, which enacted 44-5-506, inserted "engaged in criminal investigation" following "department of justice".

Part 6

National Crime Prevention and Privacy Compact

Part Compiler's Comments

Preamble: The preamble attached to Ch. 220, L. 1999, provided: "WHEREAS, it is in the interest of the state to facilitate the dissemination of criminal history records from other states for use in Montana as authorized by state law; and

WHEREAS, the National Crime Prevention and Privacy Compact creates a legal framework for the cooperative exchange of criminal history records for noncriminal justice purposes; and

WHEREAS, the compact provides for the organization of an electronic information-sharing system among the federal government and the states to exchange criminal history records for noncriminal justice purposes authorized by federal or state law, such as background checks for governmental licensing and employment; and

WHEREAS, under the compact, the FBI and the party states agree to maintain detailed databases of their respective criminal history records, including arrests and dispositions, and to make them available to the federal government and party states for authorized purposes; and

WHEREAS, the FBI shall manage the federal data facilities that provide a significant part of the infrastructure for the system; and

WHEREAS, entering into the compact would facilitate the interstate and federal-state exchange of criminal history information to streamline the processing of background checks for noncriminal justice purposes; and

WHEREAS, release and use of information obtained through the system for noncriminal justice purposes would be governed by the laws of the receiving state; and

WHEREAS, entering into the compact will provide a mechanism for establishing and enforcing uniform standards for record accuracy and for the confidentiality and privacy interests of record subjects."

Effective Date: This part is effective October 1, 1999.

44-5-601. Compact adopted — text.

Case Notes

No Federal Civil Rights Privacy Claim Against State or Municipal Entities: Barr sued the state and a municipal airport authority for violating his civil rights under 42 U.S.C. 1983 and 42 U.S.C. 1985 when the airport failed to hire him as a permanent security officer after discovering Barr's past public criminal record. The District Court summarily dismissed the claims, and the Supreme Court affirmed. In order for the municipality to be liable under the federal statutes, it was necessary for Barr to show that the municipality had a policy or custom that inflicted the injury of which Barr complained, which Barr could not show. Further, Barr's civil rights claims stemmed from a privacy invasion that did not occur, so he was unable to establish a federal privacy violation. Barr's claim against the state was also barred because states are not persons for purposes of the federal statutes. Barr v. Great Falls Int'l Airport Authority, 2005 MT 36, 326 M 93, 107 P3d 471 (2005). See also Monell v. Dept. of Social Services, 436 US 658 (1978), and Will v. Mich. Dept. of State Police, 491 US 58 (1989).

No Right to Expectation of Privacy in Public Criminal Records or Negligence in Use of Records: In 1998, Barr applied for a part-time airport security officer position and consented to a background check. A 10-year check revealed no arrests, and Barr was hired. About 1 month later, another security officer requested a criminal background check on Barr, which revealed a 1968 arrest in Alaska for criminal nonsupport. Prior to the end of Barr's probationary period, his employment was terminated, and he sued the airport authority. Barr's claim was summarily dismissed. On appeal, the Supreme Court held that under 44-5-103, Barr's Alaska arrest was public information that anyone could access and its dissemination was not improper and that coupled with Barr's consent to the background check, Barr had no constitutional expectation of privacy in the criminal record. Barr's negligence claims also failed because he failed to offer proof of all elements of common-law negligence. Summary judgment for defendants was affirmed. Barr v. Great Falls Int'l Airport Authority, 2005 MT 36, 326 M 93, 107 P3d 471 (2005).

CHAPTER 6
DNA RECORDS

Chapter Administrative Rules
Title 23, chapter 4, subchapter 5, ARM DNA Index.

Chapter Case Notes

Petition for Touch DNA Testing Properly Denied — No Reasonable Probability of Exoneration Based on Evidence Presented at Trial: The District Court properly denied the petitioner's petition for touch DNA testing of evidence from a crime scene that the petitioner was convicted of burglarizing. The subject of the appeal was the petitioner's request that touch DNA analysis be conducted on fingerprint evidence collected from a medicine cabinet mirror and rear door of an apartment, areas that a witness believed the plaintiff had touched. The evidence technician investigating the crime scene obtained a partial print from these areas, but the prints collected were insufficient to conduct a traditional DNA analysis. The petitioner contended that if touch DNA testing of the partial fingerprints revealed DNA that did not match his, there was a strong possibility he would have been exonerated. The District Court disagreed and concluded that the petitioner failed to set forth a plausible theory under which the DNA evidence would establish his innocence. On appeal, the Supreme Court affirmed, reasoning that in light of the evidence produced at trial there was not a reasonable probability the petitioner would have been exonerated by touch DNA evidence showing his DNA was not on a mirror or door of the apartment that was burglarized. Sartain v. St., 2017 MT 216, 388 Mont. 421, 401 P.3d 701.

Circumstantial Evidence Establishing Defendant's Presence at Crime Scene When Victim Only Other Witness Sufficient for Conviction: Southern was charged with two counts of kidnapping, one count of burglary, one count of theft, and five counts of sexual intercourse without consent. Southern contended that the only evidence connecting him to the crimes, which included DNA and other physical evidence, was circumstantial and that even though the evidence placed him at the crime scene, it did not establish that he committed the crimes. The Supreme Court noted that under State ex rel. Murphy v. McKinnon, 171 M 120, 556 P2d 906 (1976), presence at a crime scene is insufficient, in itself, to prove criminal liability. However, this evidence not only placed Southern at the crime scene, but placed him there when the only people present were the victim and her attacker. Although the evidence was circumstantial, it was of sufficient quality and quantity that a reasonable jury could find Southern guilty. Judgment was affirmed. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999).

Chain of Custody — Sufficiency of Evidence Demonstrating Chain — Faulty Laboratory Procedure: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based in part upon serological DNA evidence gained from blood samples taken from Weeks, the stepdaughter, and a child of the stepdaughter. Weeks challenged the admissibility of the samples because one of the samples was mistakenly sent to another laboratory before being forwarded to the correct laboratory and because when a sample of blood was taken from him, the person marking the sample did not follow the requirements of the laboratory manual. Citing St. v. Bradley, 262 M 194, 864 P2d 787 (1993), the Supreme Court held that the state's evidence as to the chain of custody was sufficient even though the blood sample was inadvertently sent to the wrong laboratory. The Supreme Court also held that although the laboratory manual was not complied with, there was sufficient evidence to prove that the sample of blood tested by the laboratory was the blood that was taken from Weeks. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995), followed in St. v. Bowser, 2005 MT 279, 329 M 218, 123 P3d 230 (2005).

DNA Evidence — Conflicting Expert Testimony on Statistical Foundation for Test — Weight and Admissibility: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based in part upon DNA evidence gained from blood samples taken from Weeks, the stepdaughter, and a child of the stepdaughter. Weeks contended that because of conflicting expert testimony as to the size of the statistical basis necessary to apply the results to a population of 100 million, the DNA results should not be admitted. Citing Barmeyer v. Mont. Power Co., 202 M 185, 657 P2d 594 (1983), the Supreme Court held that the conflicting evidence was a matter for the jury to consider in deciding the weight of the evidence. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995).

DNA Evidence — Lack of Industry Standard No Preclusion of Admissibility: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based in part upon DNA evidence gained from blood samples taken from Weeks, the stepdaughter, and a child of the stepdaughter. Weeks contended that lack of one industrywide standard for DNA testing laboratory procedures precluded admissibility of the DNA evidence. An expert witness testified that membership in the American Association of Blood Banks (AABB) resulted in the application of a de facto standard for all testing. Citing St. v. Moore, 268 M 20, 885 P2d 457 (1994), the Supreme Court held that the methodology of DNA testing could not be seriously questioned and that because the laboratory was a member of the AABB and because Weeks failed to point out any errors in the laboratory procedures, the DNA evidence was properly admitted. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995).

DNA Evidence — Statistical Evidence Not Inherently Prejudicial: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based in part upon DNA evidence. Weeks argued that the statistical evidence resulting from the DNA testing was prejudicial. The Supreme Court held that because Weeks introduced no specific evidence showing that he was prejudiced by the statistical evidence resulting from the DNA testing, the statistical evidence was more probative than prejudicial. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995).

Part 1

DNA Index

Part Compiler's Comments

Report to Legislature: Section 9, Ch. 251, L. 1995, provided: "The department of justice shall report to the 56th legislature on the success of the program created by [sections 1 through 7] [this part], including the number of samples analyzed and the number of cases successfully prosecuted using the DNA identification index created by [sections 1 through 7] [this part]."

Effective Date: Section 11, Ch. 251, L. 1995, provided: "[This act] [44-6-101 through 44-6-103, 44-6-106 through 44-6-108, and 44-6-110] is effective on passage and approval." Approved March 27, 1995.

44-6-101. Definitions.

Compiler's Comments

2005 Amendment: Chapter 155 in definition of felony offense near beginning after "under" substituted "the Montana Code Annotated" for "Title 45, chapter 5 or 9" and at end after "year" deleted "or burglary or aggravated burglary under 45-6-204"; and made minor changes in style. Amendment effective April 7, 2005.

Retroactive Applicability: Section 3, Ch. 155, L. 2005, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to biological samples collected prior to [the effective date of this act]." Effective April 7, 2005.

2001 Amendment: Chapter 565 inserted definition of felony offense; and made minor changes in style. Amendment effective October 1, 2001.

Retroactive Applicability: Section 1, Ch. 152, L. 2001, amended sec. 18, Ch. 375, L. 1997, to read: "Section 18. Retroactive applicability. The provisions of Title 46, chapter 23, part 5, and of [this act] relating to registration apply retroactively, within the meaning of 1-2-109, to:

(1) sexual offenders who are sentenced by a state or federal court in any state on or after July 1, 1989, or who as a result of a sentence are under the supervision of a county, state, or federal agency in any state on or after July 1, 1989; and

(2) violent offenders who are sentenced by a state or federal court in any state on or after October 1, 1995, or who as a result of a sentence are under the supervision of a county, state, or federal agency in any state on or after October 1, 1995." Amendment effective March 29, 2001.

1999 Amendment: Chapter 147 inserted definition of biological sample; and made minor changes in style. Amendment effective March 23, 1999.

1997 Amendment: Chapter 375 in definition of violent offense substituted "has the meaning contained in 46-23-502" for "means an offense contained in 45-5-102, 45-5-103, 45-5-202, 45-5-302, 45-5-303, 45-5-401, or 45-6-103 or an equivalent offense under federal law or the law of another state".

Preamble: The preamble attached to Ch. 375, L. 1997, provided: "WHEREAS, the Legislature finds that the danger of recidivism posed by sexual and violent offenders and the protection of the public from these offenders is of paramount concern to government and the people; and

WHEREAS, the Legislature further finds that law enforcement agencies' efforts to protect their communities, conduct investigations, and apprehend sexual and violent offenders is impaired by the lack of information about offenders who live within their jurisdictions; and

WHEREAS, the system of registering sexual and violent offenders provides law enforcement with information critical to preventing victimization and to resolving incidents of sexual or violent offenses promptly, including notification of the public when necessary to the continued protection of the community; and

WHEREAS, persons who have committed a sexual or violent offense have a reduced expectation of privacy because of the public's interest in safety; and

WHEREAS, the Legislature finds that releasing information about sexual or violent offenders to law enforcement agencies and, under certain circumstances, providing access to limited information about certain sexual offenders to the general public will further the primary governmental interest of protecting specific vulnerable groups and the public in general from potential harm.

THEREFORE, it is the policy of the State of Montana to assist local law enforcement agencies' efforts in protecting their communities by requiring that sexual or violent offenders register and to authorize the release of necessary and relevant information about sex offenders to the public."

1997 Statement of Intent: The statement of intent attached to Ch. 375, L. 1997, provided: "A statement of intent is required for this bill in order to provide guidance for rules adopted under [section 12] [46-23-509] concerning the qualifications of sexual offender evaluators and concerning evaluations of sexual offenders. The legislature intends that sexual offender evaluators possess education and experience similar to the education and experience requirements of therapists certified by the Montana sex offender treatment association. The legislature further intends that rules for evaluating the risk of repeat offenses by sexual offenders include the following factors:

(1) whether the sexual offender has a mental abnormality;
(2) whether the sexual offender's conduct is repetitive and compulsive;
(3) whether drugs or alcohol played a part in the offense or offenses;
(4) whether the sexual offender served the maximum term for the offense or offenses;
(5) whether the offense or offenses involved a child;
(6) the age of the sexual offender at the commission of the offense or offenses;
(7) the relationship between the sexual offender and the victim or victims;
(8) whether the offense or offenses involved use of a weapon;
(9) the number, date, and nature of prior offenses;
(10) conditions of release that minimize risk of another offense, including whether the sexual offender is under supervision or receiving counseling and treatment;
(11) physical conditions that minimize the risk of another offense, such as advanced age or debilitating illness of the sexual offender;
(12) whether psychological or psychiatric profiles of the sexual offender indicate a risk of recidivism;
(13) the sexual offender's response to and participation in treatment;
(14) recent behavior of the sexual offender;
(15) recent threats or gestures by the sexual offender against persons; and
(16) a review of any victim impact statements."

Applicability: Section 18, Ch. 375, L. 1997, provided: "The provisions of [this act] relating to registration apply to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989; and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

Administrative Rules

ARM 23.4.501 Definitions.

Case Notes

Requirement for DNA Testing Proper Condition of Suspended Sentence for Defined Felony Offense: As a condition of Johnson's three suspended nonviolent felony sentences, including a burglary conviction, the District Court ordered Johnson to submit to DNA testing. Johnson appealed the testing requirement on grounds that it violated the right to privacy and the right against unlawful search and seizure, but the Supreme Court affirmed. Under 44-6-103, a person convicted of a felony offense shall submit to DNA testing. Johnson's burglary conviction met the definition of a felony offense, as defined in this section, so the DNA testing requirement as part of the sentences was legal. St. v. Johnson, 2005 MT 48, 326 M 161, 108 P3d 485 (2005).

44-6-102. Establishment of DNA identification index.

Compiler's Comments

2001 Amendment: Chapter 565 in (2)(a) after "convicted of" inserted "a felony offense"; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 147 in (2)(a) near middle inserted "or a youth found under 41-5-1502 to have committed"; inserted (2)(b) concerning order of sentencing judge under 46-18-202; and made minor changes in style. Amendment effective March 23, 1999.

Case Notes

Inevitable Discovery of DNA Sample — No Privacy Interest in Sample: The state obtained a voluntary blood sample from Notti during a sexual assault investigation and placed the information in a suspect database. In a later homicide investigation, the information was compared to the crime lab's forensic unknown database and a match linked Notti to the homicide. Notti contended, but never showed, that the state violated his right to privacy when it improperly placed the data in the DNA identification index, because Notti was not a convicted felon at the time that the DNA sample was obtained. However, Notti waived any privacy right in voluntarily giving a blood sample. Further, Notti did not cite any authority to suggest that the state could not maintain a separate suspect database for DNA profiles in ongoing investigations. The Supreme Court held that even if storage of the DNA profiles did raise constitutional privacy issues, the evidence would have inevitably been discovered anyway because the DNA from the assault case would have resulted in posting in the DNA identification index. St. v. Notti, 2003 MT 170, 316 M 345, 71 P3d 1233 (2003), followed in St. v. Lacey, 2009 MT 62, 349 M 371, 204 P3d 1192 (2009), with regard to applicability of inevitable discovery exception. See also St. v. Pearson, 217 M 363, 704 P2d 1056 (1985).

44-6-103. Collection of samples and maintenance of data.

Compiler's Comments

2013 Amendment: Chapter 101 near beginning of (1) inserted "a person required to register as a sexual or violent offender under 46-23-504". Amendment effective October 1, 2013.

2011 Amendment: Chapter 125 in middle of (1) after "DNA testing" inserted clause related to department supervision of adult offenders convicted in another state; and made minor changes in style. Amendment effective October 1, 2011.

Applicability: Section 2, Ch. 125, L. 2011, provided: "[This act] applies to an adult offender who is convicted in another state and sentenced to death or imprisonment for more than 1 year and is subject to supervision by the department of corrections pursuant to the Interstate Compact for Adult Offender Supervision provided for in 46-23-1115 on or after October 1, 2011."

2001 Amendment: Chapter 565 in (1) near beginning of first sentence after "convicted of" substituted "a felony offense" for "a sexual offense or violent offense"; inserted (3) requiring the offender to pay the cost of collecting the sample and limiting the fee to the actual cost of collection; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 147 in (1) in first sentence after "violent offense" inserted "or a defendant ordered under 46-18-202 to provide a biological sample for DNA testing", after "provide" deleted "to a person or entity designated by the county attorney", and substituted "biological sample" for "sample of blood", inserted second sentence concerning sample provided to department of corrections, and inserted third sentence concerning sample provided to person or entity designated by sheriff; near beginning of (2) substituted "biological sample" for "blood sample", after "sent by the" inserted "department of corrections or the", and substituted "county sheriff" for "county attorney"; inserted (4) concerning refusal to provide biological sample; and made minor changes in style. Amendment effective March 23, 1999.

Code Commissioner Change: Pursuant to sec. 3, Ch. 546, L. 1995, the Code Commissioner substituted Department of Public Health and Human Services for Department of Health and Environmental Sciences.

Administrative Rules

ARM 23.4.502 Collection of biological samples for DNA analysis.
ARM 23.4.503 Storage of DNA samples.

Case Notes

Requirement for DNA Testing Proper Condition of Suspended Sentence for Defined Felony Offense: As a condition of Johnson's three suspended nonviolent felony sentences, including a burglary conviction, the District Court ordered Johnson to submit to DNA testing. Johnson appealed the testing requirement on grounds that it violated the right to privacy and the right against unlawful search and seizure, but the Supreme Court affirmed. Under this section, a person convicted of a felony offense shall submit to DNA testing. Johnson's burglary conviction met the definition of a felony offense, as defined in 44-6-101, so the DNA testing requirement as part of the sentences was legal. St. v. Johnson, 2005 MT 48, 326 M 161, 108 P3d 485 (2005).

Circumstantial Evidence Establishing Defendant's Presence at Crime Scene When Victim Only Other Witness Sufficient for Conviction: Southern was charged with two counts of kidnapping, one count of burglary, one count of theft, and five counts of sexual intercourse without consent. Southern contended that the only evidence connecting him to the crimes, which included DNA and other physical evidence, was circumstantial and that even though the evidence placed him at the crime scene, it did not establish that he committed the crimes. The Supreme Court noted that under State ex rel. Murphy v. McKinnon, 171 M 120, 556 P2d 906 (1976), presence at a crime scene is insufficient, in itself, to prove criminal liability. However, this evidence not only placed Southern at the crime scene, but placed him there when the only people present were the victim and her attacker. Although the evidence was circumstantial, it was of sufficient quality and quantity that a reasonable jury could find Southern guilty. Judgment was affirmed. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999).

44-6-104. Consumer DNA database searches — familial DNA searches — warrant required.

Compiler's Comments

Effective Date: This section is effective October 1, 2021.

44-6-106. Release of DNA records.

Case Notes

Circumstantial Evidence Establishing Defendant's Presence at Crime Scene When Victim Only Other Witness Sufficient for Conviction: Southern was charged with two counts of kidnapping, one count of burglary, one count of theft, and five counts of sexual intercourse without consent. Southern contended that the only evidence connecting him to the crimes, which included DNA and other physical evidence, was circumstantial and that even though the evidence placed him at the crime scene, it did not establish that he committed the crimes. The Supreme Court noted that under State ex rel. Murphy v. McKinnon, 171 M 120, 556 P2d 906 (1976), presence at a crime scene is insufficient, in itself, to prove criminal liability. However, this evidence not only placed Southern at the crime scene, but placed him there when the only people present were the victim and her attacker. Although the evidence was circumstantial, it was of sufficient quality and quantity that a reasonable jury could find Southern guilty. Judgment was affirmed. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999).

Attack on Numbers Used for DNA Match Without Merit When Statistical Evidence Excluded: Argument that it was error to admit DNA test results because the numbers used to mathematically determine a match were unreliable was without merit because the court had excluded all DNA statistical evidence. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994), followed in St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995).

Defense Complaint Concerning DNA Analysis Evidence Admission — Lack of Statistical Evidence: DNA statistical analysis evidence was excluded on defendant's motion. Defendant could not complain on appeal that the jury had no valid statistics to assist it in understanding the DNA analysis evidence. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

DNA Testing Challenges That Go to Weight of Evidence, Not to Admissibility: Whether DNA paternity analysis probes lacked consistency because of alleged anomalies, whether the thermal cycler used was the proper one and properly constructed, whether proper testing procedures were followed, whether the lab technician was qualified, and whether DNA PCR analysis is sufficiently reliable for forensic use were matters of weight for the jury, not questions of lack of foundation for or of admissibility of the DNA test results. The standard for the admission of expert scientific testimony is: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling its operation; and (4) whether the theory or technique has been generally accepted or rejected in the particular scientific field. An alleged error in the application of a reliable methodology is grounds for exclusion of an opinion only if the error negates the basis for the reliability of the principle itself. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994), followed in St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995).

Failure to Point Out Specific Errors in DNA Lab Techniques: Defendant failed to properly raise specific points of error concerning allegedly sloppy laboratory DNA testing techniques. The court would not presume which techniques that he considered sloppy and would not rule that it was error to admit DNA test results based on allegedly sloppy techniques. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

Threshold Test for Admissibility of DNA Evidence: The threshold test for admissibility of DNA evidence should require only a preliminary showing of reliability of the particular data to be offered, that is, some indication of how the laboratory work was done and what analysis and assumptions underlie the probability calculations. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

44-6-107. Expungement of DNA records.

Compiler's Comments

2001 Amendment: Chapter 565 near beginning of first sentence after "conviction of" substituted "a felony offense or the adjudication of a youth for a sexual or violent offense" for "a sexual or violent offense" and at end of second sentence after "conviction for" substituted "the offense or adjudication" for "a sexual or violent offense". Amendment effective October 1, 2001.

44-6-109. Restrictions for collection of DNA from minor by peace officer.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

Erroneous Codification Instruction: Section 2, Ch. 320, L. 2019, provided that this section was to be codified as an integral part of Title 46, chapter 5, part 4. The code commissioner has codified this section in Title 44, chapter 6, part 1, to more closely reflect the subject matter.

44-6-110. Rulemaking authority.

Compiler's Comments

1995 Statement of Intent: The statement of intent attached to Ch. 251, L. 1995, provided: "A statement of intent is required for this bill in order to provide guidance concerning rules adopted for the withdrawal of blood samples for DNA testing.

It is the intent of the legislature that rules adopted by the department of justice will ensure that blood collections under this bill will be conducted in a manner that will not compromise the health and welfare of the donor and testing personnel."

Administrative Rules

Title 23, chapter 4, subchapter 5, ARM DNA Index.

CHAPTER 7
BOARD OF CRIME CONTROL

Part 1
General Provisions

44-7-101. Functions.

Compiler's Comments

2021 Amendment: Chapter 83 deleted former (2) that read: "(2) The board shall consider all appeals brought from decisions of the Montana public safety officer standards and training council pursuant to 44-4-403. A board member designated as a member of the Montana public safety officer standards and training council, as provided in 44-4-402, may not participate in appeals brought to the board from decisions of the council. The board shall promulgate rules governing the manner and method of the appeals"; and made minor changes in style. Amendment effective July 1, 2021.

2007 Amendment: Chapter 506 inserted (2) providing that the board shall consider appeals of decisions of the Montana public safety officer standards and training council, providing that a board member who is a council member may not participate in appeals brought to the board, and authorizing the board to adopt rules; and deleted former subsections (2) through (7) that read: "(2) The board may:

(a) establish minimum qualifying standards for employment of peace officers, as defined in 7-32-303, detention officers, detention center administrators, juvenile detention center administrators, juvenile detention or juvenile corrections officers, public safety communications officers, probation and parole officers, corrections officers, and employees of the department of transportation designated or appointed as peace officers under 61-10-154 or 61-12-201; and

(b) develop procedures for revoking or suspending the certification of peace officers, as defined in 7-32-303, detention officers, detention center administrators, juvenile detention center administrators, juvenile detention or juvenile corrections officers, public safety communications officers, probation and parole officers, corrections officers, and employees of the department of transportation designated or appointed as peace officers under 61-10-154 or 61-12-201.

(3) The board may require basic training for officers, establish minimum standards for equipment and procedures and for advanced inservice training for officers, establish minimum standards for the certification of public safety communications officers, establish minimum standards for the certification of employees of the department of transportation designated or appointed as peace officers under 61-10-154 or 61-12-201, and establish minimum standards for law enforcement, detention officer, and juvenile detention or juvenile corrections officer training schools administered by the state or any of its political subdivisions or agencies, to ensure the public health, welfare, and safety.

(4) The board may waive the minimum qualification standard provided in subsection (2) for good cause shown.

(5) The board shall establish minimum standards for training of probation and parole officers, pursuant to 46-23-1003.

(6) The board shall establish minimum standards for training corrections officers and employees of the department of transportation designated or appointed as peace officers under 61-10-154 or 61-12-201.

(7) It is the duty of the appointing authority to cause each probation and parole officer, corrections officer, juvenile detention or juvenile corrections officer, and employee of the department of transportation designated or appointed as a peace officer under 61-10-154 or 61-12-201 to attend and successfully complete within 1 year of employment, an appropriate basic course certified by the board. The appointing authority may terminate a probation and parole officer's, corrections officer's, or juvenile detention or juvenile corrections officer's employment or the employment of an employee of the department of transportation designated or appointed as a peace officer under 61-10-154 or 61-12-201 for failure to:

(a) meet the minimum standards established by the board; or

(b) satisfactorily complete the appropriate basic course." Amendment effective July 1, 2007.

Saving Clause: Section 24, Ch. 506, L. 2007, was a saving clause.

2005 Amendment: Chapter 366 in (2)(a), (2)(b), and (6) at end substituted "employees of the department of transportation designated or appointed as peace officers under 61-10-154 or 61-12-201" for "commercial vehicle inspectors"; in (3) near middle after "certification of" substituted "employees of the department of transportation designated or appointed as peace officers under 61-10-154 or 61-12-201" for "motor carrier services division officers appointed under 61-12-201"; in (7) near middle of first sentence after "corrections officer, and" substituted "employee of the department of transportation designated or appointed as a peace officer under 61-10-154 or 61-12-201" for "commercial vehicle inspector appointed under its authority whose term of employment commenced after September 30, 1999" and at end of second sentence substituted "or the employment of an employee of the department of transportation designated or appointed as a peace officer under 61-10-154 or 61-12-201" for "or commercial vehicle inspector's employment"; and made minor changes in style. Amendment effective October 1, 2005.

2003 Amendment: Chapter 316 in (2)(a) and (2)(b) inserted reference to juvenile detention center administrators, juvenile detention officers, and juvenile corrections officers; in (3) near end and in (7) in first sentence near beginning and in second sentence near middle inserted reference to juvenile detention officers and juvenile corrections officers; in (7) in first sentence near end substituted "1 year" for "6 months"; and made minor changes in style. Amendment effective July 1, 2003.

1999 Amendment: Chapter 315 at end of (2)(a) and (2)(b) inserted "probation and parole officers, corrections officers, and commercial vehicle inspectors"; inserted (6) requiring board to establish minimum standards for training corrections officers and commercial vehicle inspectors; inserted (7) describing duty of appointing authority and authorizing authority to terminate employment of probation and parole officer, corrections officer, or commercial vehicle inspector for failure to meet standards or to complete appropriate basic course; and made minor changes in style. Amendment effective October 1, 1999.

The amendment to this section made by Ch. 508, L. 1999, was rendered void by sec. 12, Ch. 508, L. 1999, a contingent voidness section.

1993 Amendments: Chapter 161 near middle of (3), after "communications officers", inserted "establish minimum standards for the certification of motor carrier services division officers appointed under 61-12-201"; and made minor changes in style.

Chapter 437 inserted (2)(b) granting the Board authority to develop revocation and suspension procedures; and made minor changes in style.

1991 Amendments: Chapter 58 at end of (2) inserted reference to public safety communications officers; near middle of (3) inserted reference to standards for certification of public safety communications officers; and made minor change in style. Amendment effective July 1, 1991.

Chapter 809 in (4) inserted "provided in subsection (2)"; and inserted (5) requiring Board to establish minimum standards for training probation and parole officers.

1991 Statement of Intent: The statement of intent attached to Ch. 58, L. 1991, provided: "A statement of intent is required for this bill because it grants authority to the board of crime control to adopt rules establishing minimum qualifications and minimum certification standards for public safety communications officers. These rules should address the following:

(1) standards of physical, educational, mental, and moral fitness governing the recruitment, selection, appointment, and certification of public safety communications officers;

(2) types of programs acceptable for meeting certification standards;

(3) standards for determining programs to be approved for fulfillment of the certification requirements, such as adequacy of facilities and qualifications of instructors;

(4) number of hours of instruction, if any, required;

(5) contents of examination, if any, required; and

(6) attendance requirements, if any.

It is not the intent of this legislation that the board of crime control be required to establish state-operated training schools for public safety communications officers, although the board may establish courses of study for public safety communications officers at training schools already administered by the state."

1991 Statement of Intent: The statement of intent attached to Ch. 809, L. 1991, provided: "A statement of intent is required for this bill because [section 1] [44-4-301] [renumbered 44-7-101] grants the board of crime control authority to adopt minimum standards for training of probation and parole officers.

It is the intent of the legislature that standards for training provide 2 weeks of training for probation and parole officers. Training should include courses in subjects relating to investigations and arrests performed by probation and parole officers within the scope of their duties under Title 46, chapter 23, part 10."

1989 Amendment: Inserted second sentence of (1) that read: "The board shall also provide to criminal justice agencies technical assistance and supportive services that are approved by the board or assigned by the governor or legislature"; at end of (2) substituted "as defined in 7-32-303, detention officers, and detention center administrators" for "whose primary responsibility as authorized by law includes either the prevention and detention of crime or supervision of the enforcement of the penal, traffic, or fish and game laws of this state and its political subdivisions"; at beginning of (3) inserted "The board shall have the authority to" and near middle, after "enforcement", inserted "and detention officer"; and made minor changes in phraseology.

Administrative Rules

Title 23, chapter 14, ARM Rules of the Board of Crime Control.

Attorney General's Opinions

Procurement Act Inapplicable to Board of Crime Control Grants to Nongovernmental Agencies: Federal law allows states to subgrant certain federal funds to local governments and, in some cases, to nongovernmental agencies within the state. Certain grants made by the Board of Crime Control involve the passthrough of federal funding to local nongovernmental agencies that in turn provide crime control services within their communities to persons or entities that are not agencies of the state. The statutory grant of supervision over procurement contracts does not authorize the Department of Administration to supervise federally funded grants awarded by the Board of Crime Control to nongovernmental agencies. Therefore, the Montana Procurement Act, Title 18, ch. 4, does not apply to grants awarded by the Board of Crime Control to nongovernmental agencies to fund community projects. 52 A.G. Op. 5 (2008).

44-7-110. Crisis intervention team training program — rulemaking.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 720, L. 2023. Amendment effective May 22, 2023.

2021 Amendment: Chapter 417 in (1) after "board of crime control shall" substituted "administer and support" for "develop and administer"; in (2) substituted current text for former text that read: "Local law enforcement agencies, including tribal law enforcement agencies, are eligible to receive grant funding. Grant funds must be used to provide specialized training to help officers"; in (2)(a) at beginning inserted "provide specialized training to law enforcement officers to help officers"; in (4)(a) before "best practices" inserted "national and international"; in (4)(b) at end after "developed by the board" inserted "in conjunction with stakeholders"; inserted (5) regarding reporting requirements to the law and justice interim committee; in (6)(a) after "for the purposes of administering" inserted "and supporting"; and made minor changes in style. Amendment effective July 1, 2021.

Effective Date: This section is effective October 1, 2017.

2017 Codification Instruction — Implementation: The codification instruction in sec. 2, Ch. 49, L. 2017, directed this section to be codified in Title 44, ch. 4, part 3. Because that part was renumbered by sec. 25(4), Ch. 384, L. 2017, the Code Commissioner has included the newly enacted section within the body of the renumbered material to conform to the renumbering instruction.

44-7-115. Prosecution diversion program — rulemaking.

Compiler's Comments

Effective Date: Section 15, Ch. 390, L. 2017, provided that this section is effective July 1, 2017.

2017 Codification Instruction — Implementation: The codification instruction in sec. 12(2), Ch. 390, L. 2017, directed this section to be codified in Title 44, ch. 4, part 3. Because that part was renumbered by sec. 25(4), Ch. 384, L. 2017, the code commissioner has included the newly enacted section within the body of the renumbered material to conform to the renumbering instruction.

44-7-120. Supportive housing grant program.

Compiler's Comments

2017 Codification Instruction — Implementation: The codification instruction in sec. 7(2), Ch. 179, L. 2017, directed this section to be codified in Title 44, ch. 4, part 3. Because that part was renumbered by sec. 25(4), Ch. 384, L. 2017, the Code Commissioner has included the newly enacted section within the body of the renumbered material to conform to the renumbering instruction.

Effective Date: This section is effective October 1, 2017.

44-7-125. Definitions.

Compiler's Comments

Effective Date: Section 12, Ch. 641, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 19, 2023.

Preamble: The preamble attached to Ch. 641, L. 2023, provided: "WHEREAS, the lack of complete, consistent, and integrated criminal justice system data has stymied legislative efforts to allocate financial resources and to enact policy changes that would improve outcomes for offenders and crime victims; and

WHEREAS, the seemingly separate pieces of the state and local criminal justice system are intertwined, and the state cannot make effective changes without supporting its local partners; and

WHEREAS, the Law and Justice Interim Committee studied criminal justice data needs and gaps as part of an interim study; and

WHEREAS, as part of the study, state and local stakeholders and committee members spent hours identifying problems and discussing solutions; and

WHEREAS, improved state and local criminal justice system data collection, sharing, and integration will help change the current reactionary nature of the system; and

WHEREAS, improved state and local criminal justice system data collection, sharing, and integration can create efficiencies to save money in the future by reducing or eliminating time-consuming and sometimes redundant data entry; and

WHEREAS, any savings from efficiencies created from improved state and local criminal justice system data collection, sharing, and integration or from improved policy choices can benefit both state and local stakeholder and taxpayers, regardless of where in the system an improvement is made; and

WHEREAS, improved state and local criminal justice system data collection, sharing, and integration ultimately drives public safety by informing funding, policy, caseload, and staffing decisions, as well as how policy decisions can affect prison and supervision populations and recidivism.

WHEREAS, to ensure that data collection is a means to an end, the state must adopt a workable and meaningful definition of recidivism to which data may be applied."

44-7-126. Criminal justice data warehouse.

Compiler's Comments

Effective Date: Section 12, Ch. 641, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 19, 2023.

Preamble: The preamble attached to Ch. 641, L. 2023, provided: "WHEREAS, the lack of complete, consistent, and integrated criminal justice system data has stymied legislative efforts to allocate financial resources and to enact policy changes that would improve outcomes for offenders and crime victims; and

WHEREAS, the seemingly separate pieces of the state and local criminal justice system are intertwined, and the state cannot make effective changes without supporting its local partners; and

WHEREAS, the Law and Justice Interim Committee studied criminal justice data needs and gaps as part of an interim study; and

WHEREAS, as part of the study, state and local stakeholders and committee members spent hours identifying problems and discussing solutions; and

WHEREAS, improved state and local criminal justice system data collection, sharing, and integration will help change the current reactionary nature of the system; and

WHEREAS, improved state and local criminal justice system data collection, sharing, and integration can create efficiencies to save money in the future by reducing or eliminating time-consuming and sometimes redundant data entry; and

WHEREAS, any savings from efficiencies created from improved state and local criminal justice system data collection, sharing, and integration or from improved policy choices can benefit both state and local stakeholder and taxpayers, regardless of where in the system an improvement is made; and

WHEREAS, improved state and local criminal justice system data collection, sharing, and integration ultimately drives public safety by informing funding, policy, caseload, and staffing decisions, as well as how policy decisions can affect prison and supervision populations and recidivism.

WHEREAS, to ensure that data collection is a means to an end, the state must adopt a workable and meaningful definition of recidivism to which data may be applied."

Part 2
Domestic Violence Intervention

44-7-201. Domestic violence intervention program.

Compiler's Comments

2017 Amendments — Composite Section: Chapter 104 inserted (1)(b) regarding court implementation of an offender intervention program; and made minor changes in style. Amendment effective October 1, 2017.

Chapter 394 in (1)(b) near end inserted reference to offense of strangulation of partner or family member. Amendment effective May 19, 2017.

Effective Date: Section 12, Ch. 493, L. 2005, provided that this section is effective July 1, 2005.

44-7-202. Domestic violence intervention account — administration by board of crime control.

Compiler's Comments

Effective Date: Section 12, Ch. 493, L. 2005, provided that this section is effective July 1, 2005.

44-7-203. Program costs.

Compiler's Comments

Effective Date: Section 12, Ch. 493, L. 2005, provided that this section is effective July 1, 2005.

44-7-204. Restriction on use of funds.

Compiler's Comments

2021 Amendment: Chapter 566 at end substituted "department of justice" for "department of corrections". Amendment effective July 1, 2021.

Preamble: The preamble attached to Ch. 566, L. 2021, provided: "WHEREAS, the Legislature is concerned with the delays associated with transferring defendants to state custody after imposition of sentence. When the Department of Corrections does not timely assume custody of defendants after sentencing, local government facilities may lack capacity to hold other persons. It is the expectation of the Legislature that the Department of Corrections will ensure that defendants sentenced for one or more felonies will not remain in a county detention facility for more than 10 business days after sentencing unless unusual circumstances arise; and

WHEREAS, with respect to the Department of Corrections, the Legislature has been advised that the vocational opportunities at the Montana Women's Prison are inadequate, particularly when compared to the offerings at the Montana State Men's Prison. The Legislature is mindful that the campuses may face different limitations in what programming may be offered based on location, footprint, and facilities; and

WHEREAS, with respect to the Department of Corrections, the Legislature is concerned with the findings of the Legislative Audit Division in 2020 that the Department of Corrections had drug treatment beds that were not fully utilized in fiscal year 2019, which resulted in a payment for failure to allow the contractor to operate at 75% capacity; and

WHEREAS, with respect to the Department of Corrections, the Legislature is concerned that the Department of Corrections has yet to fully implement statutory directives to measure the effectiveness of its programs—both those provided by the Department of Corrections employees and those provided by contractors. In 2017, the Legislature directed the Department of Corrections to conduct evaluations of programs to determine their impact on reducing recidivism. This work, in addition to other requirements in Senate Bill No. 59 (2017), appears to be unaddressed or incomplete. Moreover, the Department of Corrections' definition of recidivism is an inadequate measure for the determination of effectiveness of its programming. The Legislature is interested in having data on crimes committed by those discharged from the Department of Corrections' custody, not merely "the rate at which adult offenders return to prison in Montana for any reason within three years of their release from prison", which fails to address reentry outcomes of many individuals committed to the Department of Corrections' custody and evaluates a truncated time period; and

WHEREAS, with respect to the Office of State Public Defender, the Legislature is concerned with the findings of the Legislative Audit Division in 2020 regarding billing practices by contractors, including the failure to require the use of assistants for nonattorney tasks, and allowing contractors to work a number of hours each year that may induce attorneys to be contractors instead of the Office of State Public Defender employees; and

WHEREAS, with respect to the Office of State Public Defender, it is the sense of the Legislature that the Office of State Public Defender expends its appropriation, in part, to perform tasks that are not required by the state or federal constitution or by statutory directive, such as in section 47-1-104(4), MCA. Given limited resources and the demands on the Office of State Public Defender staff, the Legislature believes that it is incumbent on the Office of State Public Defender management to limit the scope of its work to what is required by statute and the constitution; and

WHEREAS, with respect to the Office of State Public Defender, neither through its employees nor its contractors should the Office of State Public Defender impair the Legislature's intent to have defendants share in the costs of counsel provided by the Office of State Public Defender. The Office of State Public Defender employees and contractors should not move the court to waive assessments under section 46-8-113, MCA, unless the defendant can show a compelling reason why they cannot pay this assessment over the course of the sentence; and

WHEREAS, in House Bill No. 640 (2019), the Legislature established a mechanism to ensure that sexual abuse reports generated by those with mandatory reporting responsibilities are provided to county attorneys and that county attorneys report to the Attorney General on the status of the investigations and prosecutions generated from these referrals. It is the sense of the Legislature that the Department of Justice has not undertaken a thorough review of the reports generated pursuant to section 41-3-210(3), MCA, and the Legislature urges the Department of Justice to do so; and

WHEREAS, the Legislature has taken a number of steps to strengthen the laws and investigative response to address human trafficking and sexual exploitation of minors. Given the collective commitment in the legislative and executive branches to combat these crimes, the Legislature needs greater clarity on whether its appropriations and statutory changes are having an impact; and

WHEREAS, the Legislature expresses its concern that the backlog of testing on sexual assault kits must be eliminated as soon as possible; and

WHEREAS, the definition of recidivism utilized by the judicial branch in evaluating the effectiveness of treatment courts is different than the definition used by the Department of Corrections for its programming, making it difficult to compare the effectiveness of treatment courts to in-patient treatment. It is the sense of the Legislature that a single definition of recidivism would make it possible to have a consistent evaluation of effectiveness; and

WHEREAS, the Legislature believes that expungement of a conviction for driving under the influence of drugs or alcohol will impair the correctional and public safety goals that the Legislature aims to achieve through the Section D appropriation."

2017 Amendment: Chapter 384 at end substituted "department of corrections" for "department of justice". Amendment effective January 1, 2018.

Saving Clause: Section 37, Ch. 384, L. 2017, was a saving clause.

Severability: Section 38, Ch. 384, L. 2017, was a severability clause.

Effective Date: Section 12, Ch. 493, L. 2005, provided that this section is effective July 1, 2005.

44-7-210. Counseling and services to be evidence-informed.

Compiler's Comments

2017 Codification Instruction — Implementation: The codification instruction in sec. 4, Ch. 104, L. 2017, directed this section to be codified in Title 44, ch. 4, part 3. Because that part was renumbered by sec. 25(4), Ch. 384, L. 2017, the code commissioner has included the newly enacted section within the body of the renumbered material to conform to the renumbering instruction.

Effective Date: This section is effective October 1, 2017.

Part 3
Restorative Justice Programs

44-7-301. Intent.

Compiler's Comments

2013 Amendment: Chapter 237 substituted second and third sentences for former second sentence that read: "It is the intent of 2-15-2013 to divert appropriate offenders who are at low risk for violence from incarceration to community programs based on restorative justice and to divert funds from the department of corrections to the department of justice to support an office of restorative justice and to support community programs based on restorative justice." Amendment effective July 1, 2013.

Preamble: The preamble attached to Ch. 237, L. 2013, provided: "WHEREAS, the Law and Justice Interim Committee examined the efficacy of restorative justice principles and practices within the criminal justice system as requested by Senate Joint Resolution No. 29 from the 2011 legislative session; and

WHEREAS, the Committee found that restorative justice programs have been established in Gallatin County, Lewis and Clark County, Missoula County, and Flathead County; and

WHEREAS, the Committee found that these programs have proven successful in significantly reducing incarceration rates and the risk that offenders will reoffend;

WHEREAS, this saves the state money that would otherwise need to be spent on providing additional jail and prison capacity at a per-inmate cost averaging about $90 a day or about $33,000 a year; and

WHEREAS, the local programs were initially supported by federal grant money passed through the Montana Board of Crime Control and technical assistance was provided by the Office of Restorative Justice established by the Legislature in 2001 and placed under the Department of Justice; and

WHEREAS, the Office of Restorative Justice under the Department of Justice is no longer functioning and no further restorative justice grants have been applied for."

Effective Date: Section 7, Ch. 581, L. 2001, provided: "[This act] is effective July 1, 2001."

44-7-302. Restorative justice grants.

Compiler's Comments

2021 Amendment: See 2021 Session Law for amendment made by sec. 76, Ch. 261, L. 2021. Amendment effective April 20, 2021.

2013 Amendment: Chapter 237 deleted former (1) that read: "(1) There is an office of restorative justice in the department of justice"; in (1) substituted "restorative justice grant programs" for "office of restorative justice"; in (1)(a) after "justice" inserted "practices" and after "state" deleted "by balancing the needs of victims, communities, and juvenile and adult offenders"; in (2)(b) before "jurisdictions" inserted "local and state"; deleted former (2)(c) that read: "(c) bring additional resources to Montana communities for restorative justice programs"; in (2) substituted definition of restorative justice for "means the philosophy of promoting and supporting practices, policies, and programs that focus on repairing the harm of crime, strengthening communities around the state, emphasizing accountability, and providing alternatives to incarceration for offenders who are at low risk for violence"; deleted former (3)(b) that read: "(b) Restorative justice is intended to improve the ability of the justice system to meet the needs of victims, to encourage community and victim participation in the criminal justice process, to reduce crime and increase the public sense of safety, to hold offenders accountable, and to provide rehabilitation and reintegration of offenders back into the community"; in (3) at beginning substituted "A restorative justice program eligible for grant funding pursuant to this section shall use evidence-based practices, which may" for "Restorative justice programs", before "victim-offender" inserted "facilitated", and substituted "victim impact panels, offender accountability letters" for "use of victim and community impact statements"; deleted former (4) that read: "(4) Efforts of the office of restorative justice may include but are not limited to:

(a) providing educational programs on the philosophical framework of restorative justice;

(b) providing technical assistance to schools, law enforcement, youth courts, probation and parole officers, juvenile corrections programs, and prisons in designing and implementing applications of restorative justice;

(c) housing a repository for resources and information to coordinate expertise in restorative justice;

(d) serving as a liaison between victims, the judiciary, and state agencies, such as the department of justice and the department of corrections, that are involved in criminal and juvenile justice efforts, including victim compensation programs;

(e) providing information to schools, local governments, law enforcement, state agencies, the judiciary, and the legislature regarding systemic changes that may be necessary to enhance further development of restorative justice in the state; and

(f) securing additional resources for restorative justice programs through a grant program administered by the board of crime control, which may be coordinated with other appropriate grant programs of agencies, and providing sustained funding for successful community programs"; inserted (4) concerning seeking of grant money and reporting; and made minor changes in style. Amendment effective July 1, 2013.

Preamble: The preamble attached to Ch. 237, L. 2013, provided: "WHEREAS, the Law and Justice Interim Committee examined the efficacy of restorative justice principles and practices within the criminal justice system as requested by Senate Joint Resolution No. 29 from the 2011 legislative session; and

WHEREAS, the Committee found that restorative justice programs have been established in Gallatin County, Lewis and Clark County, Missoula County, and Flathead County; and

WHEREAS, the Committee found that these programs have proven successful in significantly reducing incarceration rates and the risk that offenders will reoffend;

WHEREAS, this saves the state money that would otherwise need to be spent on providing additional jail and prison capacity at a per-inmate cost averaging about $90 a day or about $33,000 a year; and

WHEREAS, the local programs were initially supported by federal grant money passed through the Montana Board of Crime Control and technical assistance was provided by the Office of Restorative Justice established by the Legislature in 2001 and placed under the Department of Justice; and

WHEREAS, the Office of Restorative Justice under the Department of Justice is no longer functioning and no further restorative justice grants have been applied for."

Effective Date: Section 7, Ch. 581, L. 2001, provided: "[This act] is effective July 1, 2001."

44-7-303. Restorative justice fund created — source of funding — use of fund.

Compiler's Comments

2005 Amendment: Chapter 504 inserted (2)(d) requiring deposit of money received by the department of justice for the purpose of administering 46-15-411(2); in (3) at beginning inserted exception clause; and made minor changes in style. Amendment effective July 1, 2005.

Effective Date: Section 7, Ch. 581, L. 2001, provided: "[This act] is effective July 1, 2001."

Administrative Rules
Title 23, chapter 15, subchapter 4, ARM Forensic rape examination payment program.

Part 4
Family Violence Prevention and Services Act Grant Program

Part Compiler's Comments
Effective Date: Section 9, Ch. 62, L. 2023, provided: "[This act] is effective October 1, 2024."

CHAPTER 10
LAW ENFORCEMENT ACADEMY

Chapter Administrative Rules
Title 23, chapter 12, subchapters 12 through 14, ARM Montana Law Enforcement Academy.

Part 1
General Provisions

44-10-102. Purpose.

Compiler's Comments
1989 Amendment: After "Montana law enforcement officers" inserted "and other qualified individuals" and near end, before "training", deleted "additional". Amendment effective July 1, 1989.

44-10-103. Establishment of academy.

Compiler's Comments
1985 Amendment: At end deleted "to be located at one of the units of the Montana university system, which unit shall be selected in the manner hereinafter provided."

Part 2
Government of Academy

44-10-201. Department of justice to govern academy.

Compiler's Comments
Section Not Codified: Section 82A-1202, R.C.M. 1947, abolishing the Law Enforcement Academy Advisory Board and transferring its functions to the Department of Justice was not codified in the MCA as this action has now been completed. However, this section has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 272, L. 1971, as amended by sec. 7, Ch. 250, L. 1973.

44-10-202. Powers and duties of department.

Compiler's Comments
2015 Amendment: Chapter 331 in (1)(c) inserted exception clause; inserted (2) relating to state and federal constitutional law; and made minor changes in style. Amendment effective October 1, 2015.

1989 Amendment: In (2), (3), and (6), after "officers", inserted "and other individuals"; in (5), after "officers", inserted "and other individuals enrolled"; and made minor changes in phraseology. Amendment effective July 1, 1989.

1989 Statement of Intent: The statement of intent attached to Ch. 40, L. 1989, provided: "A statement of intent is included with this bill to make clear the legislature's intent with regard to rules that must be adopted under the extension of authority included in [section 4] of the bill.

It is the intent of this bill to authorize attendance at the Montana law enforcement academy of qualified individuals who are not at the time employed as law enforcement officers. Attendance is intended to be on a space-available basis. Rules should be adopted to insure continued priority for the training of law enforcement officers. Rules should assure that law enforcement officer training would not be disrupted or displaced by the attendance of other qualified individuals.

It is the further intent of the legislature that all costs of training are borne by the other qualified individuals and not by the state of Montana. Should rules be required to assure other qualified individuals bear the cost of the training, including the establishment of an adequate fee structure, it is the intent of the legislature that such rules be adopted."

1985 Amendment: Deleted former (1) that read: "choose a site for the Montana law enforcement academy at the unit of the university system of Montana which in the determination of the department is best suited for the needs of the academy"; and in (6) at end, deleted "which certificates shall be signed by the president of the selected university unit".

Administrative Rules

Title 23, chapter 12, subchapter 12, ARM Attendance at Montana Law Enforcement Academy.

Title 23, chapter 12, subchapter 13, ARM Conduct while in attendance at Montana Law Enforcement Academy.

Title 23, chapter 12, subchapter 14, ARM Performance criteria at Montana Law Enforcement Academy.

Case Notes

Effect of 1985 Amendment of Law Enforcement Academy Statute: The 1985 amendment of this section not only removed the requirement that the location of the Montana Law Enforcement Academy be at a university unit but also stripped the Department of Justice of the power to choose a site for the academy. The net effect was to require the Attorney General to get the approval of the Department of Administration before he can lease, rent, or purchase property for quarters under 2-17-101. Cornwall v. St., 231 M 58, 752 P2d 135, 45 St. Rep. 429 (1988).

Specific Authority Overriding Lease-Option Limitations: The specific authority given to the Attorney General in this section to choose a site for the Montana Law Enforcement Academy overrides the limitations placed on lease-option contracts by Title 18, ch. 3, part 1. Cornwall v. St., 231 M 58, 752 P2d 135, 45 St. Rep. 429 (1988).

44-10-204. Department of justice account established.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 531, L. 2023. Amendment effective May 18, 2023.

Effective Date: Section 4(1), Ch. 298, L. 2003, provided: "[This act] is effective July 1, 2003."

Part 3
Officers Who Attend Academy

44-10-301. Eligibility.

Compiler's Comments

1989 Amendment: After "law enforcement officers" inserted "and other individuals who meet the qualifications established by the department of justice" and before "academy" substituted "the Montana law enforcement" for "this". Amendment effective July 1, 1989.

1989 Statement of Intent: The statement of intent attached to Ch. 40, L. 1989, provided: "A statement of intent is included with this bill to make clear the legislature's intent with regard to rules that must be adopted under the extension of authority included in [section 4] of the bill.

It is the intent of this bill to authorize attendance at the Montana law enforcement academy of qualified individuals who are not at the time employed as law enforcement officers. Attendance is intended to be on a space-available basis. Rules should be adopted to insure continued priority for the training of law enforcement officers. Rules should assure that law enforcement officer training would not be disrupted or displaced by the attendance of other qualified individuals.

It is the further intent of the legislature that all costs of training are borne by the other qualified individuals and not by the state of Montana. Should rules be required to assure other qualified individuals bear the cost of the training, including the establishment of an adequate fee structure, it is the intent of the legislature that such rules be adopted."

Administrative Rules

Title 23, chapter 12, subchapter 12, ARM Attendance at Montana Law Enforcement Academy.

CHAPTER 11
MUTUAL ASSISTANCE
RIGHTS OF ASSISTING OFFICERS

Part 1
General Provisions

44-11-101. Mutual assistance authorized — powers and duties of assisting officers.

Compiler's Comments

1985 Amendment: Near beginning of second sentence inserted "in the jurisdiction of the requesting officer or entity and while"; and at end of section inserted "and is under the authority of the requesting officer or entity".

Case Notes

Territorial Jurisdiction Not Controlling on Officer's Right to Make Arrest: Williams argued that Krausz, a Miles City police officer, did not have the authority to arrest him for driving under the influence because he was not stopped in Miles City or within 5 miles of the city limits. The Supreme Court held that Krausz was acting at the request of a highway patrol officer who did have jurisdiction over the incident and that therefore Krausz did have the authority to arrest Williams. St. v. Williams, 273 M 459, 904 P2d 1019, 52 St. Rep. 1085 (1995).

Injury by Fellow Servant — Recovery Limited to Workers' Compensation Benefits: Plaintiff, a Deputy Sheriff, was injured when his vehicle was rear-ended by a vehicle driven by a highway patrolman who was acting as an assisting officer. Under the mutual assistance statute, the patrolman was under the authority of the plaintiff and was granted the same immunities as his employer. Under this section, the patrolman was a fellow servant of the plaintiff when he injured plaintiff. Plaintiff was not deprived of "full legal redress" because Art. II, sec. 16, Mont. Const., provides that coverage of a fellow servant is limited to workers' compensation benefits. Scott v. St., 247 M 429, 808 P2d 451, 48 St. Rep. 73 (1991).

44-11-102. Liability of assisted entity for obligation resulting from assistance.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Part 2
Rights of Employment

44-11-201. Retention of rights of employment.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 3
Interstate Law Enforcement Mutual Aid Act

44-11-303. Definitions.

Compiler's Comments

1991 Amendment: In definition of peace officer substituted "46-1-202" for "46-1-201"; and made minor change in style.

44-11-304. Authorization to enter agreement — general content — authority of peace officer.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

44-11-305. Detailed content of agreement.

Attorney General's Opinions

Sheriff Authorized to Accept Compensation From Federal Agency for Performance of Services Outside Official Duties: A Sheriff may receive compensation from a federal agency under the terms of a cooperative law enforcement agreement without violating any Montana statutory or constitutional provision, so long as the services rendered by the Sheriff fall outside the scope of the Sheriff's official duties. 49 A.G. Op. 12 (2001).

44-11-310. Filing of agreement.

Compiler's Comments

2007 Amendment: Chapter 94 in introductory clause after "after" inserted "the final" and after "approval by the" substituted "governing bodies of all parties to the agreement" for "attorney general". Amendment effective October 1, 2007.

CHAPTER 12
SEIZURES RELATED TO CONTROLLED SUBSTANCES

Chapter Case Notes

Questionable Testimony Fails to Rebut Presumption of Forfeiture: Payne, who was driving a rental car, was stopped for speeding and subsequently arrested for driving under the influence. During the stop, based on observations, the officer asked Payne if he was carrying drugs or large amounts of cash, and Payne responded that he was not. Payne also stated that he was traveling from Pittsburgh to Seattle to visit his children and flying back. The officer was suspicious because Payne was driving thousands of miles to visit but flying back after only a few hours. When removing Payne's property, the officer found some drugs and paraphernalia in plain view and removed a toolbox from the trunk. The toolbox contained $129,970. A petition for forfeiture was filed for the funds in the toolbox, and Payne argued that the petition should be dismissed, claiming that he had won the money in a poker game. The Supreme Court ruled that the lower court had not erred in finding that Payne's testimony was "completely unbelievable" and that it failed to rebut the strong circumstantial evidence provided by the state and the presumption in favor of forfeiture. St. v. $129,970.00 in U.S. Currency, 2007 MT 148, 337 M 475, 161 P3d 816 (2007).

Statutory Framework for Seizure, Forfeiture, and Release of Seized Property Related to Dangerous Drugs: All property subject to forfeiture under 44-12-102 may be seized without a warrant if a peace officer has probable cause to believe that the property was used or is intended to be used in violation of Title 45, ch. 9, or Title 45, ch. 10, part 1. Unless the seized property is a controlled substance, a petition to institute forfeiture proceedings must be filed in District Court within 45 days of the seizure. After a petition and summons are properly served on all owners or claimants of seized property pursuant to 44-12-201 (now repealed), an owner or claimant must, within 20 days of service, file a verified answer to the allegations regarding use of the property contained in the petition. If a verified answer is not filed within 20 days, the District Court shall upon motion order the property forfeited to the state. If a verified answer is timely filed, forfeiture proceedings must be set for a hearing without a jury no sooner than 60 days after the answer is filed. If the District Court finds that the property was used for the purpose charged, the property must be disposed of as provided by law. If the District Court finds that the property was not used for the purpose charged, the property must be released to the owner of record as of the date of seizure. A forfeiture proceeding must be initiated within 45 days of the seizure, and that proceeding necessarily leads to either forfeiture of the property or release of the property to the owner of record. Clark v. Roosevelt County, 2007 MT 44, 336 M 118, 154 P3d 48 (2007).

Proper Standard to Rebut Presumption — Preponderance of Evidence: Vanderburg argued that the trial court had erred in stating that the presumption created for forfeiture had to be rebutted by a preponderance of the evidence and that regardless of the standard, he had rebutted the presumption favoring forfeiture. The Supreme Court held that Rule 301, M.R.Ev. (Title 26, ch. 10), stands for the proposition that a disputable presumption must be overcome by a preponderance of the evidence and that in the present case, the trial court had correctly concluded that the presumption had not been rebutted. In re Seizure of $23,691.00, 273 M 474, 905 P2d 148, 52 St. Rep. 1063 (1995), following St. v. Flack, 260 M 181, 860 P2d 89 (1993), and distinguishing, as to overcoming a presumption, Magone v. Aul, 269 M 281, 887 P2d 1235 (1994).

Known Claimant of Firearms — Notice of Forfeiture Required: Following a conviction of Dan Froehlich on drug charges, the state sought forfeiture of firearms and other property seized during a search of his home. Froehlich's estranged wife claimed ownership of the firearms but was not given statutory notice of the forfeiture proceedings. The District Court ordered forfeiture of the property, and the wife appealed. Upon review, the Supreme Court found that the wife had clearly conveyed a claim to the firearms and was legally considered a known owner or claimant of the property. As such, she was entitled to statutory notice of the forfeiture proceedings, including personal service. The order of forfeiture was vacated, and the forfeiture proceedings were dismissed. The state's failure to provide notice was not remedied by the District Court allowing the wife to intervene after the forfeiture order was granted. In re Magone v. Froehlich, 270 M 381, 892 P2d 540, 52 St. Rep. 240 (1995).

Affidavits Showing Legitimate Sources and Intended Uses of Seized Cash as Rebuttal of Presumption — Summary Judgment Proper: Thomas and Ellen Aul were charged with possession of marijuana with intent to sell. While out on bail, Ellen was arrested for the purchase of marijuana from an undercover officer, and while at the jail, officers discovered $3,000 in her possession. The officers seized the cash, and forfeiture proceedings were initiated. Thomas and each of his parents submitted sworn affidavits and accompanying bank documents stating that the money was given to Thomas and Ellen as an anniversary gift, and Thomas stated that the money was intended for use in purchasing a trailer for the couple. The state responded by questioning the veracity of the affidavits and arguing that the true source of the cash was the Auls' extensive drug-related activities. Thomas moved for summary judgment. His motion was denied. Section 44-12-203 (now repealed) provided for a rebuttable presumption of forfeiture of all seized property. To rebut that presumption under 44-12-204 (now repealed), the owner of the property must prove that the property was not used for the purpose charged or, alternatively, that the property was used without the owner's knowledge or consent. The affidavits in this case constituted explicit and unequivocal statements regarding the legitimate source and intended purpose of the money. The state failed to set forth specific facts to refute the affidavits and relied solely upon speculative and conclusory allegations in the pleadings. Failure by the District Court to grant summary judgment constituted reversible error. Magone v. Aul, 269 M 281, 887 P2d 1235, 51 St. Rep. 1535 (1994), following Thornton v. Songstad, 263 M 390, 868 P2d 633 (1994).

Defective Notice of Property Forfeiture — Relation Back of Curative Amendment — Due Process Violated: Notice of seizure of automobile and intent to institute forfeiture proceedings under Title 44, ch. 12, was in violation of due process and deprived the court of jurisdiction to enter a default judgment against the owner, who did not answer the allegations, when the notice did not inform the owner that he must answer within 20 days or face default judgment. After the 45 days for filing the notice had passed, the notice could not be amended to cure the defect. The amendment could not relate back to the original timely filing so as to make the amendment timely, because: (1) the forfeiture statute is an exception to the rule that property may not be seized without a prior factfinding hearing and the statute's safeguards should thus be rigidly adhered to and strictly construed; and (2) allowing an amendment as requested by the State under former Rule 4D(7), M.R.Civ.P. (now superseded), which provides for amendment of process in the court's discretion unless it clearly appears that the person served would suffer material prejudice to his substantial rights, would (assuming the Rule is applicable to this forfeiture proceeding) significantly prejudice the owner's rights. St. v. 1978 LTD II, 216 M 401, 701 P2d 1365, 42 St. Rep. 901 (1985).

Chapter Law Review Articles

Montana's Real Property Forfeiture Statute: Will It Pass Constitutional Muster?, Nevin, 54 Mont. L. Rev. 69 (1993).

Part 1
General Provisions

44-12-101. Definitions.

Compiler's Comments

2015 Amendment: Chapter 421 inserted definition of actual knowledge; and made minor changes in style. Amendment effective July 1, 2015.

Saving Clause: Section 15, Ch. 421, L. 2015, was a saving clause.

Severability: Section 16, Ch. 421, L. 2015, was a severability clause.

Applicability: Section 17, Ch. 421, L. 2015, provided: "[This act] applies to forfeiture proceedings begun on or after [the effective date of this act]." Effective July 1, 2015.

Case Notes

Forfeiture Statutes Operate as Penalty — Right to Jury Trial: Where title and possession to real property are at issue, the action is legal and entitles a party to a jury trial under Art. II, sec. 26, Mont. Const. The Supreme Court noted that forfeiture statutes operate to transfer property rights to the state, as a penalty against the owners for misuse of the property, and it is too narrow of an interpretation to characterize a forfeiture proceeding as only one of determining title. St. v. Chilinski, 2016 MT 280, 385 Mont. 249, 383 P.3d 236.

44-12-102. Things subject to forfeiture.

Compiler's Comments

2015 Amendment: Chapter 421 in (1) substituted "A court may order, as part of the sentence imposed upon conviction, that the following property be forfeited as provided in 44-12-207 through 44-12-211" for "The following are subject to forfeiture"; deleted former subsections (2)(a), (2)(b), and (2)(c) that read: "(2) (a) A conveyance used by a person as a common carrier in the transaction of business as a common carrier is not subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of Title 45, chapter 9.

(b) A conveyance is not subject to forfeiture under this section because of any act or omission established by the owner of the conveyance to have been committed or omitted without the owner's knowledge or consent.

(c) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to any violation of Title 45, chapter 9"; and made minor changes in style. Amendment effective July 1, 2015.

Saving Clause: Section 15, Ch. 421, L. 2015, was a saving clause.

Severability: Section 16, Ch. 421, L. 2015, was a severability clause.

Applicability: Section 17, Ch. 421, L. 2015, provided: "[This act] applies to forfeiture proceedings begun on or after [the effective date of this act]." Effective July 1, 2015.

2011 Amendment: Chapter 156 in (2)(d) at end inserted limitation to exception related to synthetic cannabinoids. Amendment effective April 8, 2011.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: At end of (1)(b) decreased amount of marijuana involved from 250 grams to 60 grams; in (1)(d), after "use in", deleted "unlawfully transporting or in" and after "facilitate the" substituted "commission of a violation of Title 45, chapter 9" for remainder of former (1)(d) that read: "transportation of anything enumerated in subsection (1)(a) or (1)(b) for the purpose of sale or receipt of such thing;

(ii) in which a controlled substance is unlawfully kept, deposited, or concealed; or

(iii) in which a controlled substance is unlawfully possessed by an occupant"; at beginning of (1)(h), before "personal", deleted "real or", near middle, after "from", deleted "sale of a controlled substance in", and at end inserted "that is punishable by more than 5 years in prison"; inserted (1)(i) relating to forfeiture of real property and interests therein; near end of (2)(d) decreased amount of marijuana involved from 250 grams to 60 grams; and made minor changes in phraseology and punctuation.

1987 Amendment: Inserted (1)(h) subjecting to forfeiture real or personal property obtained from sale of a controlled substance.

1983 Amendment: Inserted (1)(g) relating to forfeiture of everything of value, proceeds, and money intended to be exchanged for controlled substances.

1981 Amendment: Inserted subsection (1)(f) permitting the forfeiture of all drug paraphernalia.

Case Notes

Federal Constitutional Prohibition Against Excessive Fines Inapplicable to State: Defendant's truck was seized in a methamphetamine arrest and forfeited pursuant to state law. Defendant argued in state court that the forfeiture violated the excessive fines clause of the Eighth Amendment to the U.S. Constitution, which is virtually identical to Art. II, sec. 22, Mont. Const. The U.S. Supreme Court has not applied the federal excessive fines clause to states, and the Montana Supreme Court declined to do so as well. The court noted that even if the claim had been brought pursuant to the Montana Constitution, it would be difficult to hold that forfeiture of a truck used to facilitate the scourge of methamphetamine was a violation of the state prohibition against excessive punishment. St. v. Forfeiture of 2003 Chevrolet Pickup, 2009 MT 25, 349 M 106, 202 P3d 782 (2009). See also St. v. Good, 2004 MT 296, 323 M 378, 100 P3d 644 (2004).

Statutory Framework for Seizure, Forfeiture, and Release of Seized Property Related to Dangerous Drugs: All property subject to forfeiture under this section may be seized without a warrant if a peace officer has probable cause to believe that the property was used or is intended to be used in violation of Title 45, ch. 9, or Title 45, ch. 10, part 1. Unless the seized property is a controlled substance, a petition to institute forfeiture proceedings must be filed in District Court within 45 days of the seizure. After a petition and summons are properly served on all owners or claimants of seized property pursuant to 44-12-201 (now repealed), an owner or claimant must, within 20 days of service, file a verified answer to the allegations regarding use of the property contained in the petition. If a verified answer is not filed within 20 days, the District Court shall upon motion order the property forfeited to the state. If a verified answer is timely filed, forfeiture proceedings must be set for a hearing without a jury no sooner than 60 days after the answer is filed. If the District Court finds that the property was used for the purpose charged, the property must be disposed of as provided by law. If the District Court finds that the property was not used for the purpose charged, the property must be released to the owner of record as of the date of seizure. A forfeiture proceeding must be initiated within 45 days of the seizure, and that proceeding necessarily leads to either forfeiture of the property or release of the property to the owner of record. Clark v. Roosevelt County, 2007 MT 44, 336 M 118, 154 P3d 48 (2007).

Admissibility of Evidence of Lawfully Seized Property — Summary Dismissal of Petition for Forfeiture Improper: After Branam's vehicle was stopped by an officer following a report of an assault, Branam fled. The officer had the vehicle towed to a storage yard. An employee of the storage yard noticed cash and a weapon in the vehicle. A search of the vehicle under warrant yielded cash, a weapon, and drug paraphernalia. The state petitioned for forfeiture of the property. Branam moved to dismiss the petition on grounds that because the state did not have probable cause to seize the property, the evidence was inadmissible. The District Court agreed and summarily dismissed the petition, and the state appealed. The Supreme Court held that the facts alleged in the petition were sufficient to satisfy the requirements of 44-12-103, so the petition was sufficient to withstand Branam's motion to dismiss. As a matter of law, the property was lawfully seized and probable cause existed to institute forfeiture proceedings, so Branam was not entitled to summary judgment dismissing the petition. However, the court declined to comment on the admissibility of the evidence because the question of whether the state could present sufficient admissible evidence at trial to establish that the property was subject to forfeiture under this section was not before the court. The case was reversed and remanded for further proceedings. St. v. Branam, 2006 MT 300, 334 M 457, 148 P3d 635 (2006).

Seized Property Abandoned by Owner in Lawful Possession of State for Purposes Other Than Forfeiture — Subsequent Petition for Forfeiture Not Precluded: After Branam's vehicle was stopped by an officer following a report of an assault, Branam fled. The officer had the vehicle towed to a storage yard. An employee of the storage yard noticed cash and a weapon in the vehicle. A search of the vehicle yielded cash, a weapon, and drug paraphernalia, and a canine alerted to the smell of drugs on the cash but not on the vehicle. Branam was not charged with a drug-related offense, but numerous confidential informants stated that the vehicle had been used in drug transactions. The state petitioned for forfeiture of the property. Branam moved to dismiss the petition on grounds that the state did not have probable cause to seize the property. The District Court agreed and summarily dismissed the petition, and the state appealed. The Supreme Court reversed. Property is subject to forfeiture to the state if it is or has been used in connection with the manufacture, distribution, or sale of dangerous drugs, and property may be seized for the purpose of declaring it forfeit to the state if an officer has probable cause to believe that a conveyance has been or is intended to be used to unlawfully transport, keep, deposit, or conceal a controlled substance. Probable cause is required at the time of seizure if the state seizes property without a warrant solely for purposes of forfeiture. However, if property is lawfully seized for purposes other than forfeiture, nothing in 44-12-103 precludes a later petition for forfeiture when an investigation develops probable cause to believe that the property is subject to forfeiture. Search and seizure without a warrant may not be held illegal if a defendant has disclaimed any right or interest in the place or object searched or the evidence or contraband seized or if a right of the defendant has not been infringed by the search and seizure. Here, Branam's act of fleeing and leaving the vehicle and its contents on the street constituted abandonment sufficient to justify having the vehicle towed, and the warrantless discovery of the cash and weapon by the towing company employee did not infringe on Branam's right of privacy. Probable cause to seize property exists when an officer's knowledge is sufficient to warrant a reasonable person to believe that an offense has been committed, and when a vehicle is stopped and the occupants of the vehicle immediately flee, suspicions of an offense connected to the vehicle arise. Thus, when the officer took possession of the vehicle, sufficient probable cause existed to cause seizure of the property and allow further investigation. Additionally, nothing required that Branam be charged with a criminal offense to allow forfeiture of the property. St. v. Branam, 2006 MT 300, 334 M 457, 148 P3d 635 (2006).

Quitclaim Deed Made Subsequent to Arrest Void — Relation Back Doctrine Applied — Forfeiture Sale Proper — State's Interest in Seizure Ripe Upon Commission of Crime: On January 12, 1993, law enforcement officers searched Hulbert's residence and discovered that marijuana was being grown there. Hulbert was subsequently arrested. On January 21, 1993, Hulbert issued a quitclaim deed for his residence to Young, a former business partner, in exchange for $5,000. The residence was part of business property previously sold to Hulbert by Young under a contract for deed. On February 23, 1993, a petition to institute forfeiture proceedings was filed against Hulbert for both the real property and the drug paraphernalia found in the residence. The District Court held that the relation back doctrine applied and that the quitclaim deed was void and ordered the property sold. Although the quitclaim deed preceded the state's petition for forfeiture, the state's interest in seizing the property was ripe upon the commission of the crime, January 12, 1993, and a transfer of the property subsequent to the crime was void. The Supreme Court held that application of the relation back doctrine was proper and that the District Court did not err in permitting the real estate to be seized. The case was remanded for a determination of the value of the property as of the date of the seizure and the amount owing to Young as holder of a security interest under contract for deed. Johnson v. Equip. Used to Cultivate Marijuana, 271 M 500, 898 P2d 1200, 52 St. Rep. 511 (1995).

Seller Under Contract for Deed Not Owner of Property — Doctrine of Equitable Conversion Applies — Property Subject to Forfeiture: A petition to institute forfeiture proceedings was filed against Hulbert for both Hulbert's residence and the drug paraphernalia found in the residence. The residence was part of business property previously sold to Hulbert by Young under a contract for deed. Young claimed to be an innocent owner. The Supreme Court held that the doctrine of equitable conversion applies and that, as a result of the contract for deed, Young had only the naked legal title that was held as trustee for the purchaser (Hulbert) and as security for the unpaid purchase price and that Young's interest at the time of the commission of the crime was as an owner of personalty rather than as an owner of real property. The District Court did not err in permitting the real estate to be seized. The case was remanded for a determination of the value of the property as of the date of the seizure and the amount owing to Young as holder of a security interest under contract for deed and a determination of whether the property should be surrendered to Young or sold, with proceeds to be used first to pay off the amount of the security interest owing to Young. Johnson v. Equip. Used to Cultivate Marijuana, 271 M 500, 898 P2d 1200, 52 St. Rep. 511 (1995).

44-12-103. When property may be seized.

Compiler's Comments

2015 Amendment: Chapter 421 inserted (1)(a) concerning itemized receipts; and made minor changes in style. Amendment effective July 1, 2015.

Saving Clause: Section 15, Ch. 421, L. 2015, was a saving clause.

Severability: Section 16, Ch. 421, L. 2015, was a severability clause.

Applicability: Section 17, Ch. 421, L. 2015, provided: "[This act] applies to forfeiture proceedings begun on or after [the effective date of this act]." Effective July 1, 2015.

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1989 Amendment: In last sentence of (1) substituted "deliver a conveyance that he seizes to the offices of his law enforcement agency" for "deliver a conveyance that he seizes to the sheriff of the county in which the seizure is made".

1981 Amendment: Added "or in violation of Title 45, chapter 10, part 1" to (2)(d).

Commissioner Correction: In subsection (2), a reference to "[section 1]" was changed to 44-12-102 by the Code Commissioner, 1979, to correct what appears to be a typographical error.

Case Notes

Statutory Framework for Seizure, Forfeiture, and Release of Seized Property Related to Dangerous Drugs: All property subject to forfeiture under 44-12-102 may be seized without a warrant if a peace officer has probable cause to believe that the property was used or is intended to be used in violation of Title 45, ch. 9, or Title 45, ch. 10, part 1. Unless the seized property is a controlled substance, a petition to institute forfeiture proceedings must be filed in District Court within 45 days of the seizure. After a petition and summons are properly served on all owners or claimants of seized property pursuant to 44-12-201 (now repealed), an owner or claimant must, within 20 days of service, file a verified answer to the allegations regarding use of the property contained in the petition. If a verified answer is not filed within 20 days, the District Court shall upon motion order the property forfeited to the state. If a verified answer is timely filed, forfeiture proceedings must be set for a hearing without a jury no sooner than 60 days after the answer is filed. If the District Court finds that the property was used for the purpose charged, the property must be disposed of as provided by law. If the District Court finds that the property was not used for the purpose charged, the property must be released to the owner of record as of the date of seizure. A forfeiture proceeding must be initiated within 45 days of the seizure, and that proceeding necessarily leads to either forfeiture of the property or release of the property to the owner of record. Clark v. Roosevelt County, 2007 MT 44, 336 M 118, 154 P3d 48 (2007).

Admissibility of Evidence of Lawfully Seized Property — Summary Dismissal of Petition for Forfeiture Improper: After Branam's vehicle was stopped by an officer following a report of an assault, Branam fled. The officer had the vehicle towed to a storage yard. An employee of the storage yard noticed cash and a weapon in the vehicle. A search of the vehicle under warrant yielded cash, a weapon, and drug paraphernalia. The state petitioned for forfeiture of the property. Branam moved to dismiss the petition on grounds that because the state did not have probable cause to seize the property, the evidence was inadmissible. The District Court agreed and summarily dismissed the petition, and the state appealed. The Supreme Court held that the facts alleged in the petition were sufficient to satisfy the requirements of this section, so the petition was sufficient to withstand Branam's motion to dismiss. As a matter of law, the property was lawfully seized and probable cause existed to institute forfeiture proceedings, so Branam was not entitled to summary judgment dismissing the petition. However, the court declined to comment on the admissibility of the evidence because the question of whether the state could present sufficient admissible evidence at trial to establish that the property was subject to forfeiture under 44-12-102 was not before the court. The case was reversed and remanded for further proceedings. St. v. Branam, 2006 MT 300, 334 M 457, 148 P3d 635 (2006).

Seized Property Abandoned by Owner in Lawful Possession of State for Purposes Other Than Forfeiture — Subsequent Petition for Forfeiture Not Precluded: After Branam's vehicle was stopped by an officer following a report of an assault, Branam fled. The officer had the vehicle towed to a storage yard. An employee of the storage yard noticed cash and a weapon in the vehicle. A search of the vehicle yielded cash, a weapon, and drug paraphernalia, and a canine alerted to the smell of drugs on the cash but not on the vehicle. Branam was not charged with a drug-related offense, but numerous confidential informants stated that the vehicle had been used in drug transactions. The state petitioned for forfeiture of the property. Branam moved to dismiss the petition on grounds that the state did not have probable cause to seize the property. The District Court agreed and summarily dismissed the petition, and the state appealed. The Supreme Court reversed. Property is subject to forfeiture to the state if it is or has been used in connection with the manufacture, distribution, or sale of dangerous drugs, and property may be seized for the purpose of declaring it forfeit to the state if an officer has probable cause to believe that a conveyance has been or is intended to be used to unlawfully transport, keep, deposit, or conceal a controlled substance. Probable cause is required at the time of seizure if the state seizes property without a warrant solely for purposes of forfeiture. However, if property is lawfully seized for purposes other than forfeiture, nothing in this section precludes a later petition for forfeiture when an investigation develops probable cause to believe that the property is subject to forfeiture. Search and seizure without a warrant may not be held illegal if a defendant has disclaimed any right or interest in the place or object searched or the evidence or contraband seized or if a right of the defendant has not been infringed by the search and seizure. Here, Branam's act of fleeing and leaving the vehicle and its contents on the street constituted abandonment sufficient to justify having the vehicle towed, and the warrantless discovery of the cash and weapon by the towing company employee did not infringe on Branam's right of privacy. Probable cause to seize property exists when an officer's knowledge is sufficient to warrant a reasonable person to believe that an offense has been committed, and when a vehicle is stopped and the occupants of the vehicle immediately flee, suspicions of an offense connected to the vehicle arise. Thus, when the officer took possession of the vehicle, sufficient probable cause existed to cause seizure of the property and allow further investigation. Additionally, nothing required that Branam be charged with a criminal offense to allow forfeiture of the property. St. v. Branam, 2006 MT 300, 334 M 457, 148 P3d 635 (2006).

Analysis of Federal Knock and Announce Statute — Involvement of Federal Postal Inspector: A postal inspector suspected that a package addressed to Ochadleus contained drugs. The inspector took the package to the Billings DEA office, and a drug-sniffing dog alerted to the package. The inspector obtained a search warrant, and the package was found to contain marijuana. The inspector then obtained a warrant to search the intended destination of the package. The package was delivered by the inspector later that day, and shortly thereafter, state officers executed the search warrant and arrested Ochadleus for possession with intent to distribute. Ochadleus contended that the state officers violated the federal knock and announce statute, 18 U.S.C. 3109, noting that the officers failed to knock. The Supreme Court disagreed. The statute does not directly apply to state law enforcement officers, but rather applies when federal officers are a significant part of a search conducted pursuant to a state warrant, as in this case involving a federal postal inspector and the federal Drug Enforcement Administration. Additionally, the statute does not contain an express requirement that officers actually knock on the door, but rather requires that officers give notice of their authority and purpose. Here, Ochadleus's roommate saw the officers through the window in the door and then backed away. It was reasonable for the officers to assume that the action of backing away was a refusal to admit them, and it would have been futile for the officers to knock before entering. Thus, the federal statute was not violated, the forced entry was lawful, and Ochadleus's conviction was affirmed. St. v. Ochadleus, 2005 MT 88, 326 M 441, 110 P3d 448 (2005).

Knock and Announce Rule — Exigent Circumstances Exception — Futility Exception — Warrant Requirements: Without knocking and announcing its presence, a SWAT team broke down the doors of a rental home, discovered a methamphetamine lab, and arrested the occupants, including Anyan. Anyan contended that the entry was illegal and that evidence seized should be suppressed. Following a guilty plea, Anyan appealed on grounds of the illegality of the no-knock entry. Absent state statutory or case law, the Supreme Court examined extensive federal precedent, concluding that pursuant to the right of privacy and the right to be free from illegal search and seizure, an officer serving a search warrant must comply with the knock and announce requirement unless there are exigent circumstances that would present a threat of physical violence or the likelihood that evidence would be destroyed. Mere suspicion or evidence that firearms are present in the residence or that a particular resident is armed is not sufficient to create an exigency; rather, there must be specific information to lead the officer to a reasonable conclusion that the presence of firearms raises a concern for officer safety. Another exception to the knock and announce requirement, known as the futility exception, arises when police have a reasonable suspicion that the occupants know of the police presence and purpose prior to entry and that knocking and announcing would be futile. In addition, the decision to make a no-knock entry should ordinarily be made by a neutral and detached magistrate as part of the application for a search warrant, along with any foreknown exigent circumstances justifying a no-knock entry, but an investigating officer may make the decision if unexpected exigent circumstances arise at the scene. The knock and announce rule is flexible, and courts must determine whether an unannounced entry was reasonable under the particular circumstances of each case, including the time that an officer must wait prior to forced entry. However, unless exigent circumstances exist, the failure of officers to knock and announce their presence renders evidence procured during execution of the search warrant inadmissible. Thus, the officers' no-knock entry into Anyan's house violated federal and state constitutional rights to be free from unreasonable search and seizure, and failure of the District Court to suppress the evidence seized during the search was reversible error. St. v. Anyan, 2004 MT 395, 325 M 245, 104 P3d 511 (2004), followed in St. v. Ochadleus, 2005 MT 88, 326 M 441, 110 P3d 448 (2005), in which the Supreme Court reiterated that no-knock entry into a residence is the exception and not the rule. The Anyan futility exception was also applied in St. v. Hill, 2008 MT 260, 345 M 95, 189 P3d 1201 (2008), where officers responding to a domestic disturbance call did not knock but announced their presence through the open door of a trailer and observed defendant moving aggressively toward the back of the trailer, but defendant ignored their order to stop. The officers had a reasonable suspicion that the trailer occupants knew of their presence and purpose prior to entry. A woman screaming in the trailer indicated an ongoing domestic disturbance, and continuing to wait at the open door after defendant failed to respond would have been superfluous, futile, and dangerous. Anyan was overruled by St. v. Neiss, 2019 MT 125, 396 Mont. 1, 443 P.3d 435, to the extent that Anyan and subsequent decisions require prior judicial approval for no-knock entries.

Part 2
Procedure

Part Case Notes

Forfeiture Statutes Operate as Penalty — Right to Jury Trial: Where title and possession to real property are at issue, the action is legal and entitles a party to a jury trial under Art. II, sec. 26, Mont. Const. The Supreme Court noted that forfeiture statutes operate to transfer property rights to the state, as a penalty against the owners for misuse of the property, and it is too narrow of an interpretation to characterize a forfeiture proceeding as only one of determining title. St. v. Chilinski, 2016 MT 280, 385 Mont. 249, 383 P.3d 236.

Forfeiture of Van Upheld Against Claim of Lienholder Who Did Not Appear: The state sought to enforce a forfeiture of a van used to transport drugs. In the forfeiture proceeding, the defendant in the criminal action for the possession of drugs raised the issue that his father held a lien on the van. The District Court found that the father was an innocent lienholder who had no knowledge of his son's criminal activity, and the court released the van to the father. The Supreme Court held that the son had no standing to raise the existence of the lien held by his father and that the statutory scheme created a presumption in favor of forfeiture, requiring the lienholder to raise the existence of the lien in order to rebut the presumption, which the lienholder did not do. The Supreme Court concluded that the District Court abused its discretion in dismissing the state's petition for forfeiture and in releasing the van to the lienholder. In re Seizure of 1988 Chevrolet Van, 251 M 180, 823 P2d 858, 48 St. Rep. 1154 (1991).

Forfeiture Proceedings — No Violation of Defendant's Due Process Rights: In a proceeding under this chapter, defendant, in his answer to the State's notice of intent to institute forfeiture proceedings, admitted ownership of the vehicle but refused to respond to the allegations that it had been used in criminal activity. Hearing on the forfeiture was held after defendant had been sentenced and forfeiture was ordered. On appeal, defendant asserted that the requirement of this part that the owner or claimant of seized property file an answer within 20 days of the State's notice was a violation of his right to due process. Defendant reasoned that the statute requires an unconstitutional choice to be made in the forfeiture proceeding, i.e., a defendant must choose either to give evidence that may be used against him in a criminal proceeding or to forfeit his property. The Supreme Court found that part 2 of this chapter does not require that a defendant incriminate himself in the answer and further found that this defendant had not done so. Therefore, the court ruled that the statutes are not facially unconstitutional. Neither was the statutes' application to defendant unconstitutional, since his forfeiture hearing was not held until after his sentencing. St. v. Baker, 205 M 244, 667 P2d 416, 40 St. Rep. 1244 (1983).

44-12-207. Forfeiture of property for commission of criminal offense.

Compiler's Comments

Saving Clause: Section 15, Ch. 421, L. 2015, was a saving clause.

Severability: Section 16, Ch. 421, L. 2015, was a severability clause.

Applicability: Section 17, Ch. 421, L. 2015, provided: "[This act] applies to forfeiture proceedings begun on or after [the effective date of this act]." Effective July 1, 2015.

Effective Date: Section 18, Ch. 421, L. 2015, provided: "[This act] is effective July 1, 2015."

Case Notes

Forfeiture Statutes Operate as Penalty — Right to Jury Trial: Where title and possession to real property are at issue, the action is legal and entitles a party to a jury trial under Art. II, sec. 26, Mont. Const. The Supreme Court noted that forfeiture statutes operate to transfer property rights to the state, as a penalty against the owners for misuse of the property, and it is too narrow of an interpretation to characterize a forfeiture proceeding as only one of determining title. St. v. Chilinski, 2016 MT 280, 385 Mont. 249, 383 P.3d 236.

44-12-208. Notice of seized property — itemized receipt — charging document.

Compiler's Comments

Saving Clause: Section 15, Ch. 421, L. 2015, was a saving clause.

Severability: Section 16, Ch. 421, L. 2015, was a severability clause.

Applicability: Section 17, Ch. 421, L. 2015, provided: "[This act] applies to forfeiture proceedings begun on or after [the effective date of this act]." Effective July 1, 2015.

Effective Date: Section 18, Ch. 421, L. 2015, provided: "[This act] is effective July 1, 2015."

44-12-209. Pretrial hearing.

Compiler's Comments

Saving Clause: Section 15, Ch. 421, L. 2015, was a saving clause.

Severability: Section 16, Ch. 421, L. 2015, was a severability clause.

Applicability: Section 17, Ch. 421, L. 2015, provided: "[This act] applies to forfeiture proceedings begun on or after [the effective date of this act]." Effective July 1, 2015.

Effective Date: Section 18, Ch. 421, L. 2015, provided: "[This act] is effective July 1, 2015."

44-12-210. Forfeiture upon criminal conviction — hearing.

Compiler's Comments

Saving Clause: Section 15, Ch. 421, L. 2015, was a saving clause.

Severability: Section 16, Ch. 421, L. 2015, was a severability clause.

Applicability: Section 17, Ch. 421, L. 2015, provided: "[This act] applies to forfeiture proceedings begun on or after [the effective date of this act]." Effective July 1, 2015.

Effective Date: Section 18, Ch. 421, L. 2015, provided: "[This act] is effective July 1, 2015."

Case Notes

Vehicle Forfeiture — Sham Ownership Improperly Determined Unilaterally — Personal Service Required for Joint Owners Listed on Title: Although a vehicle title serves as prima facie evidence of ownership, police unilaterally determined that a mother listed jointly with her son on a vehicle's title registration was a sham owner and did not name or serve her in the vehicle's forfeiture proceedings. The District Court dismissed the mother's claim that she was not served with the forfeiture petition and summons under 44-12-201 (now repealed) because it determined that she became a party to the forfeiture action when she voluntarily appeared in the forfeiture action to request the release of the vehicle. On appeal, however, the Supreme Court reversed, holding that the mother's presumed knowledge of the subsequent forfeiture hearing was not a substitute for timely service of the summons and petition and that the forfeiture proceeding was ineffective in terminating her interest in the vehicle. Muir v. Bilderback, 2015 MT 181, 379 Mont. 468, 353 P.3d 479.

44-12-211. Innocent owner — ownership interest in property subject to forfeiture.

Compiler's Comments

Saving Clause: Section 15, Ch. 421, L. 2015, was a saving clause.

Severability: Section 16, Ch. 421, L. 2015, was a severability clause.

Applicability: Section 17, Ch. 421, L. 2015, provided: "[This act] applies to forfeiture proceedings begun on or after [the effective date of this act]." Effective July 1, 2015.

Effective Date: Section 18, Ch. 421, L. 2015, provided: "[This act] is effective July 1, 2015."

Case Notes

Vehicle Forfeiture — Sham Ownership Improperly Determined Unilaterally — Personal Service Required for Joint Owners Listed on Title: Although a vehicle title serves as prima facie evidence of ownership, police unilaterally determined that a mother listed jointly with her son on a vehicle's title registration was a sham owner and did not name or serve her in the vehicle's forfeiture proceedings. The District Court dismissed the mother's claim that she was not served with the forfeiture petition and summons under 44-12-201 (now repealed) because it determined that she became a party to the forfeiture action when she voluntarily appeared in the forfeiture action to request the release of the vehicle. On appeal, however, the Supreme Court reversed, holding that the mother's presumed knowledge of the subsequent forfeiture hearing was not a substitute for timely service of the summons and petition and that the forfeiture proceeding was ineffective in terminating her interest in the vehicle. Muir v. Bilderback, 2015 MT 181, 379 Mont. 468, 353 P.3d 479.

Summary Judgment Inappropriate — Forfeiture Property — Evidence of Sham Owner: Contradictory evidence was presented concerning the ownership of a seized vehicle and whether it was used for drug activity. Because the evidence demonstrated that there were genuine issues of material fact as to whether the registered owner was an innocent owner or a sham owner and whether the vehicle had been used in drug transactions, the District Court properly determined that summary judgment was not warranted. Muir v. Bilderback, 2015 MT 180, 379 Mont. 459, 353 P.3d 473.

44-12-212. Disposition of property following hearing.

Compiler's Comments

2015 Amendment: Chapter 421 in (1) substituted "provisions of 44-12-207 are not established or the property owner is an innocent owner as provided in 44-12-211, the court" for "court finds that the property was not used for the purpose charged or that the property listed in 44-12-102(1)(g) was used without the knowledge or consent of the owner, it"; in (2) substituted "provisions of 44-12-207 are established and the property owner is not an innocent owner as provided in 44-12-211" for "court finds that the property was used for the purpose charged and that the property listed in 44-12-102(1)(g) was used with the knowledge or consent of the owner"; and made minor changes in style. Amendment effective July 1, 2015.

Saving Clause: Section 15, Ch. 421, L. 2015, was a saving clause.

Severability: Section 16, Ch. 421, L. 2015, was a severability clause.

Applicability: Section 17, Ch. 421, L. 2015, provided: "[This act] applies to forfeiture proceedings begun on or after [the effective date of this act]." Effective July 1, 2015.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: In (2)(a), in second sentence before "must be sold", inserted "if it is sold", after "public auction by" substituted "the law enforcement agency that seized the property" for "the sheriff of the county in which the seizure was made", before "may return" substituted "law enforcement agency" for "state", and inserted last sentence relating to prohibition against purchase of seized property by certain persons.

1987 Amendment: Inserted (3) authorizing court to take any action to protect innocent persons when disposing of property obtained from sale of a controlled substance.

1983 Amendment: In (1), inserted "or that the property listed in 44-12-102(1)(g) was used without the knowledge or consent of the owner"; and in (2), inserted "and that the property listed in 44-12-102(1)(g) was used with the knowledge or consent of the owner".

Case Notes

Claimant Entitled to Return of Property Upon Dismissal of Petition for Forfeiture: Following an investigation by a drug task force, it was concluded that Clark's bar was being used to distribute methamphetamine, so the bar and liquor license were seized. A petition was instituted for forfeiture of the property. Clark's petition for return of the property was denied after the District Court ruled that probable cause existed for the seizure, and Clark appealed on grounds that probable cause was not proved for the seizure. While the forfeiture petition was pending, the bar burned down. A motion was made to withdraw the petition, and the motion was granted. Although property may be seized without a warrant under certain drug-related circumstances, law enforcement officials are not entitled to hold seized property indefinitely. Rather, a forfeiture proceeding must be initiated within 45 days of the seizure, and that proceeding necessarily leads to either forfeiture of the property or release of the property to the owner of record. Here, without addressing the question of probable cause, which was moot because it had no practical impact on the issue of Clark's entitlement to have the property returned, the Supreme Court held that once the petition for forfeiture was withdrawn, Clark was entitled to return of the property as a matter of law. Clark v. Roosevelt County, 2007 MT 44, 336 M 118, 154 P3d 48 (2007).

Statutory Framework for Seizure, Forfeiture, and Release of Seized Property Related to Dangerous Drugs: All property subject to forfeiture under 44-12-102 may be seized without a warrant if a peace officer has probable cause to believe that the property was used or is intended to be used in violation of Title 45, ch. 9, or Title 45, ch. 10, part 1. Unless the seized property is a controlled substance, a petition to institute forfeiture proceedings must be filed in District Court within 45 days of the seizure. After a petition and summons are properly served on all owners or claimants of seized property pursuant to 44-12-201 (now repealed), an owner or claimant must, within 20 days of service, file a verified answer to the allegations regarding use of the property contained in the petition. If a verified answer is not filed within 20 days, the District Court shall upon motion order the property forfeited to the state. If a verified answer is timely filed, forfeiture proceedings must be set for a hearing without a jury no sooner than 60 days after the answer is filed. If the District Court finds that the property was used for the purpose charged, the property must be disposed of as provided by law. If the District Court finds that the property was not used for the purpose charged, the property must be released to the owner of record as of the date of seizure. A forfeiture proceeding must be initiated within 45 days of the seizure, and that proceeding necessarily leads to either forfeiture of the property or release of the property to the owner of record. Clark v. Roosevelt County, 2007 MT 44, 336 M 118, 154 P3d 48 (2007).

Quitclaim Deed Made Subsequent to Arrest Void — Relation Back Doctrine Applied — Forfeiture Sale Proper — State's Interest in Seizure Ripe Upon Commission of Crime: On January 12, 1993, law enforcement officers searched Hulbert's residence and discovered that marijuana was being grown there. Hulbert was subsequently arrested. On January 21, 1993, Hulbert issued a quitclaim deed for his residence to Young, a former business partner, in exchange for $5,000. The residence was part of business property previously sold to Hulbert by Young under a contract for deed. On February 23, 1993, a petition to institute forfeiture proceedings was filed against Hulbert for both the real property and the drug paraphernalia found in the residence. The District Court held that the relation back doctrine applied and that the quitclaim deed was void and ordered the property sold. Although the quitclaim deed preceded the state's petition for forfeiture, the state's interest in seizing the property was ripe upon the commission of the crime, January 12, 1993, and a transfer of the property subsequent to the crime was void. The Supreme

Court held that application of the relation back doctrine was proper and that the District Court did not err in permitting the real estate to be seized. The case was remanded for a determination of the value of the property as of the date of the seizure and the amount owing to Young as holder of a security interest under contract for deed. Johnson v. Equip. Used to Cultivate Marijuana, 271 M 500, 898 P2d 1200, 52 St. Rep. 511 (1995).

Seller Under Contract for Deed Not Owner of Property — Doctrine of Equitable Conversion Applies — Property Subject to Forfeiture: A petition to institute forfeiture proceedings was filed against Hulbert for both Hulbert's residence and the drug paraphernalia found in the residence. The residence was part of business property previously sold to Hulbert by Young under a contract for deed. Young claimed to be an innocent owner. The Supreme Court held that the doctrine of equitable conversion applies and that, as a result of the contract for deed, Young had only the naked legal title that was held as trustee for the purchaser (Hulbert) and as security for the unpaid purchase price and that Young's interest at the time of the commission of the crime was as an owner of personalty rather than as an owner of real property. The District Court did not err in permitting the real estate to be seized. The case was remanded for a determination of the value of the property as of the date of the seizure and the amount owing to Young as holder of a security interest under contract for deed and a determination of whether the property should be surrendered to Young or sold, with proceeds to be used first to pay off the amount of the security interest owing to Young. Johnson v. Equip. Used to Cultivate Marijuana, 271 M 500, 898 P2d 1200, 52 St. Rep. 511 (1995).

44-12-213. Disposition of proceeds of sale.

Compiler's Comments

1999 Amendment: Chapter 389 in (1)(d) near middle substituted "is allocated as provided" for "to the account established"; in (3)(a) at beginning inserted "Each year, the first $125,000 of"; inserted (3)(b) providing for disposition of net proceeds received in excess of $125,000; and made minor changes in style. Amendment effective July 1, 1999.

1995 Amendment: Chapter 545 deleted (4) that read: "(4) The attorney general shall provide the legislative finance committee and the legislative auditor with a detailed, written report of the amounts and property credited to the account no later than 4 months after the end of each fiscal year. The attorney general may not disclose any information that would compromise any investigation or prosecution." Amendment effective July 1, 1995.

1993 Amendment: Chapter 349 in first sentence of (4) substituted "legislative finance committee and the legislative auditor" for "legislature".

1991 Amendment: In (3), in second sentence after "account", deleted "as appropriated by the legislature" and inserted third and fourth sentences statutorily appropriating up to $125,000 a year to Attorney General for enforcement; and inserted (4) requiring that Attorney General report to the Legislature no later than 4 months after the end of each fiscal year. Amendment effective July 1, 1991.

1987 Amendment: In (1)(b), (1)(c), and (2) substituted "account" for "fund"; at end of (1)(b) added reference to subsection (1)(e); at end of (1)(c) inserted "except as provided in subsection (1)(d) and (1)(e)"; inserted (1)(d) and (1)(e) relating to distribution of proceeds of sale of property seized by a state employee or law enforcement agency; in (2) inserted "county, city, or town", inserted "laws" before "enforcement", and at end inserted "concerning drugs"; and inserted (3) requiring net proceeds of property seized by a state employee or law enforcement agency to be deposited in state special revenue fund.

1983 Amendment: In (1)(b), substituted "who shall establish and maintain a drug forfeiture fund and deposit the remainder into the fund" for "for deposit in the county general fund" and the same phrase for "for deposit in the city or town general fund" in (1)(c); and inserted (2) requiring confiscating agency to expend proceeds in drug forfeiture fund for drug enforcement and education.

CHAPTER 13
SPECIAL LAW ENFORCEMENT ASSISTANCE FUNDING

Part 1
Special Law Enforcement Assistance Account

44-13-102. Federal forfeitures deposited in account.

Compiler's Comments

1995 Amendment: Chapter 219 at beginning inserted exception clause. Amendment effective July 1, 1995.

1991 Amendment: Inserted second and third sentences statutorily appropriating up to $125,000 each fiscal year to Attorney General for support of state and local enforcement programs. Amendment effective July 1, 1991.

44-13-103. Limitations on use of special law enforcement assistance account.

Compiler's Comments

2001 Amendment: Chapter 118 in (2)(e) after "payment" substituted "for services for victims of crimes as provided in Title 53, chapter 9, part 1" for "of funds into the account created by 53-9-109". Amendment effective March 23, 2001.

Preamble: The preamble attached to Ch. 118, L. 2001, provided: "WHEREAS, the 1995 Legislature in Senate Bill No. 83 changed funding for the crime victims compensation and assistance program from an earmarked special revenue account to the general fund; and

WHEREAS, the crime victims compensation and assistance program has been supported entirely by general fund money since fiscal year 1996; and

WHEREAS, repealing section 53-9-109 is necessary in order to clarify the conflict that currently exists between actual appropriation practices and the law."

1995 Amendment: Chapter 545 deleted (3) that read: "(3) The attorney general shall submit to the legislative finance committee and the legislative auditor a detailed written report of the amounts and property credited to the account and of the disposition of money and property credited to the account, but may not make any disclosure that would compromise any investigation or prosecution." Amendment effective July 1, 1995.

1993 Amendment: Chapter 349 in (3), after "shall", deleted "as provided in 5-11-210" and substituted "legislative finance committee and the legislative auditor" for "legislature".

1991 Amendment: Near beginning of (3), after "shall", substituted "as provided in 5-11-210, submit to the legislature" for "give the legislature not later than 4 months after the end of each fiscal year". Amendment effective March 20, 1991.

1987 Amendment: Substituted existing section (see 1987 Session Law) for former section that read: "Money, property, and proceeds from property credited to the account may be used only for the following types of activities:

(1) payment of informants;

(2) use by undercover agents to purchase unlawful substances, including, without limitation, counterfeit or real controlled substances, pornographic materials, stolen property, or other contraband;

(3) use as gambling front money by undercover agents; and

(4) payment of overtime to state or local law enforcement officers when engaged in special investigations."

CHAPTER 14
DISPOSITION OF PROPERTY

Part 1
Disposition of Unclaimed Personal Property

44-14-101. Disposition of property held by state public safety officer — rulemaking.

Compiler's Comments

Effective Date: Section 5, Ch. 295, L. 2017, provided: "[This act] is effective on passage and approval." Approved May 4, 2017.

CHAPTER 15
FACIAL RECOGNITION FOR GOVERNMENT USE

Part 1
General Provisions

Part Compiler's Comments

Effective Date: Section 16, Ch. 781, L. 2023, provided that this part is effective June 29, 2023.

Retroactive Applicability: Section 17, Ch. 781, L. 2023, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to contracts for third-party facial recognition services signed or renewed by the department of corrections, the department of justice, and the department of labor and industry as of January 1, 2022."

Severability: Section 13, Ch. 781, L. 2023, was a severability clause.

ASSISTANCE FUNDING

Special Law Enforcement Assistance Account

[illegible] July 1, 1995.

1991 Amendment: Inserted second and third sentences [illegible] $125,000 each fiscal year to Attorney General for support of state and local enforcement programs. Amendment effective July 1, 1991.

44-12-103. Limitations on use of special law enforcement assistance account.

Compiler's Comments

2001 Amendment: Chapter 375 in (2)(b) after "payments" substituted "for services for victims of crimes as provided in Title 53, chapter 9, part 1" for "of funds into the account created by 53-9-109". Amendment effective March 28, 2001.

Preamble: The preamble attached to Ch. 375, L. 2001, provided: "WHEREAS, the 1995 Legislature in Senate Bill No. 62 changed funding for the crime victims compensation and assistance program from an earmarked special revenue account to the general fund; and

WHEREAS, the crime victims compensation and assistance program has been supported entirely by general fund money since fiscal year 1996; and

WHEREAS, repealing section 53-9-109 is necessary in order to clarify the conflict that currently exists between actual appropriation practices and the law."

1995 Amendment: Chapter 540 deleted (3) that read: "(3) The attorney general shall submit to the legislative finance committee and the legislative auditor a detailed written report of the amounts and property credited to the account and the disposition of money and property credited to the account, but may not make any disclosure that would compromise any investigation or prosecution." Amendment effective July 1, 1995.

1993 Amendment: Chapter 349 in (3) after "shall", deleted "as provided in 5-11-210" and substituted "legislative finance committee and the legislative auditor" for "legislature".

1991 Amendment: Near beginning of (3) after "shall", substituted "as provided in 5-11-210, submit to the legislature" for "give the legislature not later than 4 months after the end of each fiscal year". Amendment effective March 26, 1991.

1987 Amendment: Substituted existing section (see 1987 Session Law) for former section that read: "Money, property, and proceeds from property credited to the account may be used only for the following types of expenses:

(1) payment of informants;

(2) use by undercover agents to purchase unlawful substances, including, without limitation, counterfeit or real dangerous substances, pornographic materials, stolen property, or other contraband;

(3) use as gambling front money by undercover agents; and

(4) payment of overtime to state or local law enforcement officers when engaged in special investigations."

CHAPTER 14
DISPOSITION OF PROPERTY

Part 1
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44-14-101. Disposition of property held by state public safety officer — rulemaking.

Compiler's Comments

Effective Date: Section 5, Ch. 295, L. 2017, provided: "(This act) is effective on passage and approval." Approved May 4, 2017.

TITLE 45
CRIMES

CHAPTER 1
GENERAL PRELIMINARY PROVISIONS

Chapter Compiler's Comments

Annotator's Note — Source: The compiler's comments entitled "Annotator's Note" are taken from the Montana Criminal Code of 1973 Annotated (1980 rev. ed.) produced by the Montana Criminal Law Information Research Center (MONTCLIRC) and printed under cosponsorship of the State Bar of Montana. Minor revisions have been made to conform them to the style and format of the annotations.

Part 1
Construction and Applicability

Part Criminal Law Commission Comments

Source: Ill. Crim. Code (Ill. C.C.), 1961, [Chapter] 38, § 1-1.

Part Compiler's Comments

Annotator's Note: The Criminal Code of 1973 represents the second phase of the revisions to Title 94, R.C.M. 1947, by the Montana Criminal Law Commission. The Commission, created by sec. 1, Ch. 103, L. 1963 (March 1, 1963), first submitted a draft on Criminal Procedure in 1966 which was enacted as Title 95, R.C.M. 1947, in 1967. While some states use the term Criminal Code to refer to both substantive and procedural law, in Montana the new Code contains only substantive law and definitions. Much of the Code was taken from the Illinois Criminal Code of 1961. Other sources include the Michigan, Wisconsin and New York Criminal Codes and the Model Penal Code (1962). The decision notes and law review references which follow relate to those jurisdictions which have similar provisions to the Criminal Code of 1973. For purposes of identification the Code will be referred to throughout the Annotations as Montana Criminal Code of 1973 and abbreviated as M.C.C. 1973.

Part Case Notes

Exclusivity of Title 87 as Remedy for Fish and Game Violations: Section 87-1-102(1) (1993, now repealed, but see 87-6-102) provided in part that a "person who purposely or knowingly violates any provision of this title, any other state law pertaining to fish and game, or the orders or rules of the commission or department is guilty of a misdemeanor, except if a felony is expressly provided by law, and shall be fined not less than $50 or more than $500, imprisoned in the county jail for not more than 6 months, or both, unless a different punishment is expressly provided by law for the violation". This provision limits penalties for fish and game violations to those provided in Title 87 and precludes the charging of appellant with felony criminal mischief under Title 45. The portion of St. v. Fertterer, 255 M 73, 841 P2d 467 (1992), holding that Title 87 does not provide the exclusive remedy for fish and game violations and allowing defendant to be charged with felony criminal mischief under Title 45, is manifestly wrong and is expressly overruled. St. v. Gatts, 279 M 42, 928 P2d 114, 53 St. Rep. 1042 (1996). (See 87-6-104, enacted as 87-1-110 (now repealed) in 1997.)

Construction and Application:

The Montana Supreme Court has accepted as authoritative guides to interpretation of the Montana Criminal Code the official comments of the Criminal Law Commission and the annotator's notes. See St. v. Kamrud, 188 M 100, 611 P2d 188, 37 St. Rep. 933 (1980); St. v. Scanlon, 174 M 139, 569 P2d 368 (1977); St. v. Shannon, 171 M 25, 554 P2d 743 (1976); St. v. Fuger, 170 M 442, 554 P2d 1338 (1976); St. v. Klein, 169 M 350, 547 P2d 754 (1976).

In adopting a statute from a sister state (Illinois), Montana adopts the construction placed on it by the highest court of the state from which it is adopted. St. v. Murphy, 174 M 307, 570 P2d 1103 (1977), followed in St. v. Tower, 267 M 63, 881 P2d 1317, 51 St. Rep. 946 (1994).

The Illinois courts have stated that because the Criminal Code of 1961 was adopted by the Legislature following a long period of study by eminent lawyers and legal scholars, the published comments of those who drafted the legislation regarding the various articles and paragraphs of the code deserve consideration in interpretation of intent contained in the code. People v. Miller, 55 Ill. App.2d 146, 204 N.E.2d 305, 307 (1965), reversed in part on other grounds, vacated in part 35 Ill.2d 62, 219 N.E.2d 475 (1966).

Part Law Review Articles

"I'm an Indian Outlaw, Half Cherokee and Choctaw": Criminal Jurisdiction and the Question of Indian Status, Meyring, 67 Mont. L. Rev. 177 (2006).

45-1-102. General purposes and principles of construction.

Criminal Law Commission Comments

Source: Ill. C.C., 1961, [Chapter] 38, § 1-2, R.C.M. 1947, § 94-101.

This section expresses the legislative purpose of the code and provides a convenient reference for the interpretation of its more specific provisions. See also the provisions of the Bill of Rights of the Montana Constitution [Art. II, 1972 Constitution] which outline the basic concepts of criminal law.

Compiler's Comments

Annotator's Note: Paragraph (1) and clauses (a) through (d) are taken verbatim from Ill. C.C. 1961, [Chapter] 38, § 1-2. Paragraph (2) comes directly from R.C.M. 1947, § 94-101. Attention is therefore directed to decisions from both jurisdictions regarding the appropriate section.

This section sets forth certain generally recognized purposes of the substantive criminal law. Attention is directed to the preventive considerations without placing undue emphasis upon any one purpose.

Case Notes

Theory of Accountability Not Required to Be Set Forth in Information: Tower was arrested for sale of a dangerous drug. Over Tower's objection at trial, the jury was instructed on the issue of accountability under 45-2-301 and 45-2-302. Tower contended that in order to fulfill the purpose of the criminal laws of Montana, notice must be given in the information that the theory of accountability will be relied upon. The Supreme Court reviewed the trial record and determined that Tower had every reason to anticipate an accountability theory. Because accountability is not a separate offense, the Supreme Court held that due process did not require the state to set forth the theory in the information. The Supreme Court noted that this section and the accountability statutes had been borrowed from the State of Illinois and that Illinois had not interpreted the accountability statutes to require that notice of the theory of accountability be included in the charging documents. Citing St. v. Zadick, 148 M 296, 419 P2d 749 (1966), the Supreme Court also noted that this interpretation was consistent with the previous law of accountability in Montana. Tower also claimed that he was surprised by the jury instruction on accountability given at trial. The Supreme Court reviewed the development of the law of accountability and the requirements applicable to charging documents. St. v. Tower, 267 M 63, 881 P2d 1317, 51 St. Rep. 946 (1994), followed in St. v. Abe, 1998 MT 206, 290 M 393, 965 P2d 882, 55 St. Rep. 876 (1998), and St. v. Tellegen, 2013 MT 337, 372 Mont. 454, 314 P.3d 902.

When One Must Look to Other Statutes to Determine Prohibited Conduct — Statute Establishing Jurisdiction and Penalty Not Deficient: District Court dismissed a charge of driving under the influence of alcohol, third offense, because defendant's first offense was a violation of 61-12-601 (now repealed) when he was a minor and the court found he had only one prior conviction as an adult under 61-8-401 (now repealed and content reorganized in Title 61, chapter 8, part 10). The court held that the current charge was DUI, second offense, and that it lacked jurisdiction to hear the charge. On appeal, the state argued that 61-12-601 is unconstitutionally vague because it: (1) does not establish a crime but merely provides a forum where other traffic crimes are to be prosecuted if a juvenile driver is involved; and (2) establishes penalties the court may impose. The Supreme Court affirmed the dismissal, holding that a statute is not deficient merely because one must look to other statutes to determine prohibited conduct, in this case whether the minor had unlawfully operated a motor vehicle. St. v. Gee, 222 M 498, 723 P2d 934, 43 St. Rep. 1452 (1986).

Test of Penal Statute:

A criminal offense statute must be specific enough to give fair notice of the conduct prohibited, provide standards for law enforcement personnel so as to prevent arbitrary or discriminatory arrests and the chilling of constitutionally protected activity, and provide a meaningful differentiation between culpable and innocent conduct. St. v. Bush, 195 M 475, 636 P2d 849, 38 St. Rep. 2045 (1981).

Since one purpose of the criminal law is to protect individuals and public interests and since a private person may not excuse a criminal act, Gilbert v. U.S., 359 F2d 285 (9th Cir. 1966), section 94-8-223, R.C.M. 1947 (repealed 1977), relating to the felony of sale and manufacture of silencers and explosives for wrongful use, was held not to be unconstitutionally vague because it did not specify that the destruction of person or property be without the consent of the victim. St. v. McBenge, 175 M 362, 574 P2d 260 (1978).

A criminal statute violates the requirements of due process if it fails to adequately give notice as to what action or conduct is proscribed, but impossible standards of specificity are not required. People v. Schwartz, 64 Ill.2d 275, 356 N.E.2d 8 (1976), certiorari denied, 429 US 1098 (1977).

In determining whether a statute is unconstitutionally vague, the court must apply the rule that no person should be held criminally responsible for conduct which he could not reasonably understand to be proscribed; however, where language used in a statute conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices, the statute is not unconstitutionally vague. Ceen v. Checker Taxi Co., Inc., 42 Ill. App.3d 93, 355 N.E.2d 628 (1976).

In determining whether a penal statute is adequate the test is whether it is sufficiently definite and certain to enable those who read it to know what acts are proscribed and what conduct will make them liable for criminal punishment. People v. Jackson, 66 Ill. App.2d 276, 216 N.E.2d 316, 318 (1966).

Liberal Versus Strict Construction:

The rule that statutes in derogation of common law must be strictly construed has been held not to apply to code provisions, including penal code provisions, liberal construction being the rule as to all. Continental Supply Co. v. Abell, 95 M 148, 24 P2d 133 (1933).

However, the Illinois courts have held that criminal statutes must be construed strictly against the state. People v. Hughes, 123 Ill. App.2d 115, 260 N.E.2d 34, 37 (1970). They are to be construed strictly in favor of the accused, and nothing is to be taken by intendment or implication against the accused beyond the obvious or literal meaning of the statutes. People v. Kessler, 11 Ill. App.3d 321, 296 N.E.2d 631 (1973), affirmed in part, reversed in part on other grounds, 57 Ill.2d 493, 315 N.E.2d 29, certiorari denied, 419 US 1054 (1974), on remand 30 Ill. App.3d 1021, 333 N.E.2d 69 (1975).

Code to Be Construed as a Whole: In determining legislative intent in this code, the entire criminal code and each of its sections is to be considered. People v. Hairston, 46 Ill. App.2d 348, 263 N.E.2d 840, 846 (1970). An act is criminal where the statute either makes such conduct unlawful or imposes a punishment for its commission. People v. Graf, 93 Ill. App.2d 43, 235 N.E.2d 886, 889 (1968).

Legislative Authority: The Legislature has the inherent power, within its constitutional limits, to prohibit any act as criminal and to fix punishment for the commission of crimes, to determine the manner of executing punishment, to provide penological systems, and to establish rules and regulations for government and discipline of inmates. People ex rel. Kubala v. Kinney, 25 Ill.2d 491, 185 N.E.2d 337, 388 (1962).

Liberal Construction: Sections defining "nepotism" and prohibition against public officers, boards, or commissions appointing relatives to a position of trust or emolument and providing punishment by fine and imprisonment in the county jail were not strictly construed in view of subsection (2). State ex rel. Kurth v. Grinde, 96 M 608, 32 P2d 15 (1934).

45-1-103. Application to offenses committed before and after enactment.

Criminal Law Commission Comments

Source: N.Y. Pen. C., Title 39, § 5.05. See also R.C.M. 1947, § 94-103.

This section is intended to provide for the transition from the old Criminal Code to the new Criminal Code. The provisions of the new Criminal Code apply only to offenses committed after its effective date [January 1, 1974]. See also Section 33 [Ch. 513, L. 1973].

Compiler's Comments

Annotator's Note: The second paragraph of this section is meant to control only in cases of doubt as to the construction of an offense defined outside of this code where the meaning of the statute is difficult to ascertain. However, where the definition of the offense outside the code clearly includes a particular mental state or other element, that definition controls.

The 1977 amendment substituted "January 1, 1974" throughout the section for references to the effective date of this code; substituted "this title and title 95" in subsection (2) for "this code"; and made minor changes in phraseology and punctuation.

Case Notes

Effective Date of Criminal Code: When defendant came into possession of items of personal property in 1973, which were stolen by someone in 1973, it was error to charge defendant under the new Criminal Code as the alleged offense was committed prior to code's effective date of January 1, 1974, and prior law was continued in effect when any of the elements of the offense were committed prior to effective date of new code. St. v. Jimison, 168 M 18, 540 P2d 315 (1975).

Effective Date of Criminal Code: The provisions of the 1973 Montana Criminal Code do not apply to offenses committed prior to its effective date. Where the alleged burglary occurred prior to the effective date of the code, the old burglary statute, section 94-901, R.C.M. 1947 (now part of 45-6-201), applied. St. v. Austad, 166 M 425, 533 P2d 1069 (1975).

Constitutionality:

Saving clause of Ch. 513, L. 1973, providing that offenses committed prior to the effective date must be punished according to the provisions of law existing at time of commission thereof in same manner as if this chapter had not been enacted, did not provide for an unconstitutional discrimination even though it did discriminate with respect to sentencing between persons committing similar offenses before and after such date. United States ex rel. Hayden v. Zelker, 506 F2d 1228 (2nd Cir. 1974).

There is no constitutional impediment to making a new penal law only prospective in application; if there is a change in the law abolishing a crime or altering its definition, the state may prefer to retain the right to prosecute for the act previously committed in deliberate defiance of the law as it then existed. People v. McDaniel, 79 Misc.2d 848, 361 N.Y.S.2d 555 (1974).

Sentencing — Applicability of Effective Date:

A prisoner who was serving a sentence as a second-felony offender based on his plea of guilty when his sentence was vacated because he had not been advised of his right to appeal and who was then resentenced was not entitled to be resentenced pursuant to the revised penal law in effect on the date of resentencing, since the vacating of sentence and reimposition of sentence nunc pro tunc as of the original date of sentence was merely a procedural device whereby time to appeal was reinstated. People ex rel. Caruth v. La Vallee, 37 A.D.2d 661, 323 N.Y.S.2d 18 (1971).

The new penal law evinced legislative intent not to apply punishment provisions thereof in prosecutions for crimes committed prior to its effective date even where punishment was mitigated, and defendant who was convicted and sentenced subsequent to the effective date of the new penal law for attempted robbery in the second degree committed prior to that date was properly sentenced under the old law even though the new penal law reduced the maximum sentence for the offense. People v. Pepples, 32 A.D.2d 1041, 303 N.Y.S.2d 796 (1969), affirmed in 27 N.Y.2d 785, 315 N.Y.S.2d 851, 264 N.E.2d 345 (1970).

Criminal Provision to Be Expressed With Certainty: If a statute carries a penalty making its violation a crime, the provision should be expressed with a degree of certainty in order that it may be understood without having to rely on inferences. St. v. Salina, 116 M 478, 154 P2d 484 (1944).

45-1-104. Other limitations on applicability.

Criminal Law Commission Comments

Source: R.C.M. 1947, §§ 94-103, 94-106, 94-108; Ill. C.C., 1961, [Chapter] 38, §§ 1-3, 1-4.

It has been contended that the victim of a criminal offense should be denied civil relief until he has performed his public duty to prosecute the offender. The English courts developed the rule that a civil action cannot be maintained until after prosecution, if the offense involved a felony.

Legislatures in a number of states have reached the opposite conclusion declaring the criminal and civil aspects to be independent. See R.C.M. 1947, section 94-106. This appears to be the prevailing American rule and is continued by this section.

Subsection (2) is intended to complete the process of replacing the common law definitions of offenses with statutory definitions—a process which has continued for many years.

The language that the provision does not affect the power of a court to "employ any sanction authorized by law" is intended to preserve the power of courts of justice to punish for contempt and the authority of properly constituted courts of justice to act as courts martial. See R.C.M. 1947, section 94-108.

Compiler's Comments

Annotator's Note: The text for this section comes directly from Ill. C.C. 1961, [Chapter] 38, § 1-3, 1-4 and preserves most of the provisions of the prior Montana law. The absence of references concerning court-martial proceedings is conspicuous. The code, however, preserves the authority of a court-martial to impose military penalties by the clause "employ any sanction authorized by law".

Subsection (2) of this section completes the process of replacing common-law definitions of offenses with statutory definitions. The suppression of all common-law definitions does not mean, however, that the large body of interpretive rules is superseded. These rules are still of value and would be difficult to replace.

Case Notes

Admissibility of Criminal Prosecutions in Civil Actions: As a general rule, judgment of conviction for assault and battery is inadmissible as evidence to establish the facts on which the judgment was rendered in a subsequent civil action. Doyle v. Gore, 15 M 212, 38 P 939 (1895). Note, however, that Rule 803(22) of the Montana Rules of Evidence which, in effect, makes evidence of conviction of a felony admissible (at least against the objection that it is hearsay, which is the principal reason for excluding such evidence) limits the applicability of Doyle v. Gore to misdemeanor cases. Also, both the Montana and Illinois courts have indicated that a plea of guilty to a criminal charge may be admitted in a subsequent civil action as an admission against interest of the party making the plea. Sikora v. Sikora, 160 M 27, 499 P2d 808 (1972); Smith v. Andrews, 54 Ill. App.2d 51, 203 N.E.2d 160, 164 (1964).

Power to Punish Contempt: It is a fundamental right of courts to punish for contempt. State ex rel. Cheadle v. District Court, 92 M 94, 10 P2d 586 (1932). The court may imprison or fine those in contempt but may not recompense an injured party for damages. Eberle v. Greene, 71 Ill. App.2d 85, 217 N.E.2d 6, 10 (1966). "Direct contempt" has been defined by an Illinois court as any conduct committed in the presence of a judge during the course of a judicial hearing that is calculated to embarrass, hinder, or obstruct the administration of justice or which is designed to undermine the court's dignity or authority and which has the tendency of bringing the administration of justice into disrepute and encouraging public disrespect. People v. Gilliam, 83 Ill. App.2d 251, 227 N.E.2d 96, 99 (1967).

Applicability of Common Law: Under this code, conduct is not an offense unless proscribed by statute. In addition, it has been held that the elements of the common-law crimes, such as burglary, have no application. See People v. Blair, 1 Ill. App.3d 6, 272 N.E.2d 404, 406 (1971), affirmed in 52 Ill.2d 371, 288 N.E.2d 443. In regard to the new section on theft (45-6-301), that provision was held by an Illinois court to encompass all forms of theft and did not conflict with this section. People v. Jackson, 66 Ill. App.2d 276, 214 N.E. 2d 316, 318 (1966).

Civil Actions and Criminal Prosecutions: Criminal prosecutions and civil actions are separate actions which may be based upon the same factual situations. Prosecution of the criminal action against the defendant has been ruled not to be a bar to the complaining witness' right to institute a civil action. People v. Stacy, 64 Ill. App.2d 157, 212 N.E.2d 286, 288 (1965). Ordinarily, acquittal in a criminal case is no bar to a civil suit. People v. Small, 319 Ill. 437, 150 N.E. 435 (1926). Similarly, acquittal in a criminal prosecution has been held not to be res judicata in a civil case based on the same facts. Simon v. Nitzberger, 327 Ill. App. 553, 64 N.E.2d 396 (1946).

Ordinance Violation: An action by a city instituted in its police court by the filing of a complaint charging a violation of one of its ordinances and seeking the imposition of a fine was criminal in its nature; the court acquired jurisdiction over defendant by the issuance and service of a warrant of arrest. State ex rel. Marquette v. Police Court, 86 M 297, 283 P 430 (1929), modifying Bozeman v. Nelson, 73 M 147, 237 P 528 (1925).

Removal From Office: A proceeding for the summary removal of a County Attorney for misconduct, even though instituted by a private person, was a public proceeding and, though it was summary in its nature, was classed as a prosecution for crime under 94-112, R.C.M. 1947 (since repealed). State ex rel. McGrade v. District Court, 52 M 371, 157 P 1157 (1916).

Part 2
Classification and Limitations

45-1-201. Classification of offenses.

Criminal Law Commission Comments

Source: New. The actual sentence imposed upon conviction determines the classification of the offense. The potential sentence determines the court's jurisdiction at the commencement of the action and is determinative of the commencement of the period of limitations. The section is at least partially contra the holding in St. v. Atlas, 75 M 547, 244 P 477 (1926), in which the Montana Supreme Court held that the potential sentence determines the grade of the crime.

Compiler's Comments

Annotator's Note: This section represents a considerable change in the classification of offenses from prior law. The section must be read in conjunction with the new definitions for felony and misdemeanor located in 45-2-101. The two sections when taken together emphasize that the potential sentence determines jurisdiction, prosecution, and the running of the Statute of Limitations while actual classification of the offense will not occur until judgment and sentencing. This position is intentionally opposite St. v. Atlas, 75 M 547, 244 P 477 (1926), and the federal court position that the potential sentence determines the grade of the crime. However, the section is in accord with Gransberry v. St., 149 M 158, 423 P2d 853 (1967): "Whether [the crime] is felony or misdemeanor is not determined until [sentence is imposed]." Subsection (2) is similar to 45-1-103(2), MCA, and provides that offenses outside the code are to be governed by the provisions of the new code insofar as the classification of offenses.

The 1977 amendment substituted "this title and title 95" at the end of subsection (2) for "this code".

Case Notes

Defense of Statute of Limitations — Cannot Be Raised for First Time on Appeal: The defendant was charged with felony theft, but the trial court reduced the charge to misdemeanor theft during the trial in light of evidence as to the value of the stolen property. On appeal, the defendant argued that the 1-year statute of limitations for trying him on the misdemeanor charge had run. The Supreme Court ruled that the defense of the statute of limitations was jurisdictional, had to be asserted at the trial, and was waived if not asserted before appeal. St. v. Larson, 240 M 203, 783 P2d 416, 46 St. Rep. 2055 (1989).

Supreme Court Review of Sentence — Legality Only: Defendant requested the Supreme Court remand for resentencing on the grounds that the District Court erred in believing a mandatory minimum sentence applied to the crime of attempt. The Supreme Court found no evidence of ineffective assistance of counsel or prejudice in sentencing. The Supreme Court will review sentences for legality only. Because the sentence was well within the legal limits, the request for remand was refused. St. v. Hurlbert, 232 M 115, 756 P2d 1110, 45 St. Rep. 923 (1988).

Constitutionality: In Montana, the discretion to classify an offense as a felony or misdemeanor belongs to the sentencing court since the classification depends entirely upon the actual sentence imposed by the trial court upon conviction. Where the power to classify a crime as a felony or a misdemeanor is given to the judge through the sentence he imposes, there is no equal protection violation as there is where that power is given to the prosecutor. St. v. Maldonado, 176 M 322, 578 P2d 296 (1978).

When Charges Duplicative: The court did not err in permitting the trial and conviction of defendants on two separate offenses, nor did it violate the constitutional guarantee against double jeopardy since the statutes defining the offenses have, in the ordinary situation, no common elements. St. v. Davis, 176 M 196, 577 P2d 375 (1978).

Jurisdiction Where Information Amended: Where original information charged defendant with commission of a felony and the District Court had original jurisdiction, it did not lose jurisdiction when the state subsequently reduced the charge to a lesser included misdemeanor over which the District Court would not have had original subject matter jurisdiction. St. v. Shults, 169 M 33, 544 P2d 817 (1976).

Convictions in Other Jurisdictions: In construing state statutes relating to voter disqualification, a Montana voter cannot be denied the right to vote because of conviction of an offense in federal court that would not be a felony by Montana statutory definition. Melton v. Oleson, 165 M 424, 530 P2d 466 (1974), overruling State ex rel. Anderson v. Fousek, 91 M 448, 8 P2d 791 (1932).

Concurrent Sentences: Where defendant was convicted of felony under first portion of consolidated information and of misdemeanor under second portion and the trial court adjudged that the sentences be served concurrently, the felony sentence was to be served in state prison with credit for misdemeanor fine to be given at the same time, and any remaining time under the misdemeanor at end of the state prison term was to be served in county jail. St. v. Bogue, 142 M 459, 384 P2d 749 (1963).

Limitation of Actions: The potential maximum sentence was determinative of the grade of the crime until sentence was imposed where the offense was neither divisible into degrees nor inclusive of lesser offenses and was punishable as either a felony or misdemeanor in the discretion of the court or jury; if the sentence imposed was other than imprisonment in the state prison, the offense was considered a misdemeanor under 94-114, R.C.M. 1947 (since repealed), but the reduction was not retroactive so as to make the misdemeanor period of limitations applicable. St. v. Atlas, 75 M 547, 244 P 477 (1926).

45-1-205. General time limitations.

Criminal Law Commission Comments

Source: R.C.M. 1947, §§ 94-5701, 94-5702, 94-5703, 94-5705. Ill. C.C., 1961, [Chapter] 38, §§ 3-5, 3-6, 3-8.

This section describes the general time limitations on prosecutions; the extension thereof under certain conditions; and the exclusion of certain periods in the calculation of limitations.

Subsection (1) continues the present Montana provision that no time limit exists with respect to homicide.

Subsection (2) similarly preserves the present general time limitations in Montana of five (5) years for all other felonies and one year for misdemeanors.

Subsection (3) is designed to permit increases in the general time limitations with respect to certain offenses which are capable of being readily concealed by the offender, from both the victim and the law enforcing authorities, over substantial periods of time and beyond the general limitations applicable to those offenses.

Subsection (5) states the general rule that the period of limitation does not start in the case of a "continuing offense" until the last act of the offense is performed. The rule would be applicable to a series of related acts constituting a single course of conduct extended over a period of time, often occurring in cases of embezzlement, conspiracy, bigamous cohabitation, and nuisance.

When the limitation period has not run on the offense charged, but has run on an offense included therein, the general rule is that the defendant cannot be convicted of the included offense, since to hold otherwise would permit the prosecutor, by charging a more serious inclusive offense not barred by the limitation, to circumvent the limitation on the lesser offense. (St. v. Chevlin, 284 SW2d 563 (Mo. 1955)).

Unless time is a material ingredient in the offense or in charging the same, it is only necessary to prove that it was committed prior to the finding of the indictment or filing the information or complaint. (St. v. Rogers, 31 M 1, 77 P 293 (1904)). The general statute of limitations applicable to misdemeanors should not be enlarged beyond what its plain language imports, and whenever the exceptions embodied in subsection (3) are invoked, the case should clearly and unequivocally fit within the exceptions. (St. v. Clemens, 40 M 567, 107 P 896 (1910)).

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 7, Ch. 167, L. 2023. Amendment effective April 19, 2023.

Severability: Section 38, Ch. 167, L. 2023, was a severability clause.

2019 Amendment: Chapter 367 in (1)(b) in exception clause inserted "(1)(c) or" and at end deleted "except that it may be commenced within 20 years after the victim reaches 18 years of age if the victim was less than 18 years of age at the time that the offense occurred. A prosecution for a misdemeanor offense under those provisions may be commenced within 1 year after the offense is committed, except that it may be commenced within 5 years after the victim reaches 18 years of age if the victim was less than 18 years of age at the time that the offense occurred"; deleted former (1)(c) that read: "(c) Except as provided in subsection (9), a prosecution under 45-5-507(1), (2), (3), or (6) may be commenced within 5 years after the victim reaches 18 years of age if the victim was less than 18 years of age at the time that the offense occurred"; inserted (1)(c) regarding offenses for which prosecution may be commenced at any time if the victim was a minor when the offense occurred; in (9) after "subsection (1)(b)" deleted "or (1)(c)"; and made minor changes in style. Amendment effective May 7, 2019.

Applicability: Section 19(2), Ch. 367, L. 2019, provided that this section applies:

"(a) to offenses committed on or after [the effective date of this act] [May 7, 2019]; and

(b) to offenses committed before [the effective date of this act] [May 7, 2019] and for which the statute of limitations has not expired on [the effective date of this act] [May 7, 2019]."

Preamble: The preamble attached to Ch. 367, L. 2019, provided: "WHEREAS, childhood sexual abuse is an epidemic in Montana, and there are many instances in recent years of victims of childhood sexual abuse being unable to seek criminal or civil justice as the result of short statute of limitations windows in Montana law; and

WHEREAS, the sexual abuse of children is despicable conduct that must be reported, investigated, and prosecuted to create specific deterrence; and

WHEREAS, the State of Montana must ensure appropriate action when mandatory reporters and others report childhood sexual abuse; and

WHEREAS, regardless of the location of the crime, to protect Montana's children, the Department of Public Health and Human Services and the Department of Justice, working closely with local law enforcement and prosecutors, must respond to allegations of sexual abuse with effective investigations and, when viable, effective prosecutions; and

WHEREAS, childhood sexual abuse causes lifelong trauma to survivors of the same; and

WHEREAS, the average reporting age of victims of childhood sexual abuse is 52 years old, requiring the Legislature to take a meaningful look into the time periods presently allowed in Montana law to pursue criminal and civil court action; and

WHEREAS, upon review, the Legislature has determined that the current truncated time periods to bring criminal prosecutions and civil litigation related to allegations of sexual abuse are not in line with mental health science as to reporting of childhood sexual abuse, are too narrow, and should be extended."

Saving Clause: Section 15, Ch. 367, L. 2019, was a saving clause.

Severability: Section 16, Ch. 367, L. 2019, was a severability clause.

2017 Amendment: Chapter 413 in (1)(b) inserted references to 45-5-504, 45-5-625, and 45-5-627 and substituted "20 years" for "10 years"; in (1)(c) deleted references to 45-5-504, 45-5-625, and 45-5-627; and made minor changes in style. Amendment effective October 1, 2017.

Applicability: Section 2, Ch. 413, L. 2017, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective October 1, 2017.

2013 Amendment: Chapter 225 in (1)(c) after "45-5-504" deleted "45-5-505". Amendment effective October 1, 2013.

2009 Amendment: Chapter 348 inserted (10) providing a statute of limitations of 3 years for the offense of reckless driving resulting in death; inserted (11) providing a statute of limitations of 3 years for the offense of careless driving resulting in death. Amendment effective October 1, 2009.

2007 Amendments — Composite Section: Chapter 446 in (1)(b) at beginning of first sentence inserted exception clause; in (1)(c) at beginning inserted exception clause; inserted (9) allowing commencement of prosecution within 1 year after a suspect is conclusively identified by DNA testing; and made minor changes in style. Amendment effective October 1, 2007.

Chapter 483 in (1)(b) in first sentence after "45-5-507(4)" inserted "or (5)"; and in (1)(c) substituted "(6)" for "(5)". Amendment effective May 11, 2007.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

2001 Amendment: Chapter 530 inserted (1)(b) increasing the time that a person may be charged for certain felony and misdemeanor sexual offenses after commission of offense and providing exception extending time when victim under age 18 at time of offense; in (1)(c) substituted "45-5-504, 45-5-505, 45-5-507(1), (2), (3), or (5)" for "45-5-502 through 45-5-505, 45-5-507"; and made minor changes in style. Amendment effective October 1, 2001.

1995 Amendment: Chapter 247 in (2), after "Except as", inserted "provided in subsection (7)(b) or as"; inserted (7)(b) concerning exception to 5-year period if offender is in possession or is exerting unauthorized control and concerning 1-year period following discovery; and made minor changes in style.

1993 Amendments: Chapter 220 inserted (6) concerning period of limitation for misdemeanors involving activities of outfitters and guides; and made minor changes in style. Amendment effective July 1, 1993.

Chapter 560 in (1)(b) inserted reference to 45-5-627; and made minor changes in style.

Severability: Section 18, Ch. 220, L. 1993, was a severability clause.

1991 Amendment: Inserted (5) to provide a 3-year statute of limitations on misdemeanor fish and wildlife violations. Amendment effective July 1, 1991.

1989 Amendments: Chapter 294 in (1)(b), after "after", substituted "the victim reaches the age of 18" for "the offense was committed" and after "less than" substituted "18 years" for "16 years". Amendment effective March 24, 1989.

Chapter 435 in (1)(a) substituted "deliberate, mitigated, or negligent homicide" for "criminal homicide". Amendment effective April 4, 1989.

Applicability: Section 3, Ch. 294, L. 1989, provided: "[This act] applies:

(1) retroactively, within the meaning of 1-2-109, to offenses that occurred before [the effective date of this act] and for which the statute of limitations has not expired on [the effective date of this act]; and

(2) to offenses occurring after [the effective date of this act]." Effective March 24, 1989.

1985 Amendment: Inserted (1)(b) establishing 5-year statute of limitations for prosecution of sexual assault, sexual intercourse without consent, indecent exposure, deviate sexual conduct, incest, or sexual abuse of children if victim was under age 16 at time of offense.

1981 Amendment: Inserted (4) providing 1-year extension of statute of limitations in prosecution of unlawful use of computer.

Annotator's Note: Subsection (1)(a) of this section comes from R.C.M. 1947, § 94-5701. A major distinction between the new code and the older law is the substitution of the word homicide for the antiquated terms "murder" and "manslaughter". These terms have been entirely removed from the new code. Subsection (2) must be taken in conjunction with subsection (1) and 45-1-201, MCA, which defines misdemeanors and felonies for purposes of time limitations in regard to potential penalties for the alleged offense. Subsection (3), which extends the time limitation for thefts involving breaches of fiduciary duty is taken from Ill. C.C., [Chapter] 38, § 3-6(a). However, a difference between the Illinois source and the Code provision is the absence in Montana of a maximum period of time after commission of the offense in which actions must be brought. Several other states have similar provisions extending time limitations for thefts difficult to detect, including: Alabama, Georgia, Mississippi, New York, and Nevada. Subsection (3)(a) suspends the running of the statute during the period of the victim's incompetence. Subsection (5) comes from Ill. C.C. 1961, [Chapter] 38, § 3-8, and refers both to continuing offenses within the Code and to those outside the Code. Subsection (6) embodies R.C.M. 1947, § 94-5705 and adds the clause "or an information or complaint is filed".

The 1977 amendment substituted "by law" in subsection (2) for "in this Code" and made minor changes in phraseology, punctuation and style.

Case Notes

Ex Post Facto Application of Longer Statute of Limitations — Violation of Constitution — Charges Dismissed With Prejudice: Nearly three decades after a child's rape, the defendant's DNA identified him as the perpetrator and he was charged. At the time of the crime, the statute of limitations for rape was 5 years. Later, it was extended to 1 year after a suspect is conclusively identified by DNA testing. The defendant filed a motion to dismiss because the statute of limitations in effect at the time of the crime had expired. The District Court denied the motion and reasoned that the statute extending the timeframe applied retroactively and did not violate ex post facto laws of the Montana Constitution or the U.S. Constitution. The defendant filed a writ of supervisory control, which the Supreme Court granted. The court held that even though the Legislature had intended the new statute of limitations to apply retroactively, its application violated the ex post facto clause. Accordingly, the court reversed and remanded the case to the District Court to grant the defendant's motion to dismiss the charges with prejudice. Tipton v. 13th Judicial District Court, 2018 MT 164, 392 Mont. 59, 421 P.3d 780.

Commencement of Felony Prosecution Possible — Mootness: Plaintiff caregivers alleged the 2009 Medical Marijuana Act allowed caregiver-to-caregiver transactions for the purpose of supplying qualified patients with medical marijuana. The MMA was amended in 2011 to prohibit caregiver-to-caregiver transactions, but the plaintiffs' declaratory judgment claim was not rendered moot since the plaintiffs could theoretically be charged under the 2009 MMA up to 5 years from the date of the alleged offense. Medical Marijuana Growers Ass'n, Inc. v. Corrigan, 2012 MT 146, 365 Mont. 346, 281 P.3d 210.

Extension of Criminal Statute of Limitations Not Considered Retroactive: The 1989 version of this section provided that if the victim of sexual intercourse without consent was a minor at the time of the offense, the offender could be prosecuted up to 5 years after the victim turned 18 years old. In 2001, the Legislature extended the statute of limitations to expire 10 years after the victim turned 18 years old. The victim in this case turned 18 in 2001, and Mordja was charged in 2007, 5 years and 10 months after the victim turned 18. Mordja moved to dismiss the charges against him on grounds that the statute of limitations had expired. The District Court denied the motion, holding that because this section was amended before the original statute of limitations expired in Mordja's case, the new limitations period applied to Mordja. On appeal, the Supreme Court affirmed. A defendant cannot have a vested right in a statute of limitations that has not yet expired. The statute of limitations did not expire in Mordja's case before this section was amended, so Mordja did not have any vested right in an affirmative defense. Application of the 2001 amendment to Mordja's case was not retroactive within the meaning of 1-2-109 because it did not affect Mordja's vested rights or impose any additional obligations or detriments on Mordja. Thus, the state had the right to prosecute Mordja at any time within the newly extended limitations period, and the District Court did not err in denying Mordja's motion to dismiss. Mordja v. District Court, 2008 MT 24, 341 M 219, 177 P3d 439 (2008), following St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001), and Stogner v. Calif., 539 US 607 (2003).

Misdemeanor Contempt Not Enforceable More Than One Year After Sentence Expired: On April 9, 1998, Dexter was sentenced in Justice's Court to 1 year in jail for third offense DUI. The sentence was suspended on condition that Dexter serve 90 days in jail and pay a $770 fine, but Dexter did neither. Sentence revocation proceedings could have been instituted under 46-18-203 during the time of Dexter's sentence, but were not. About 3 years later, Dexter was arrested on an outstanding warrant after the suspended sentence had expired, and the Justice's Court invoked its contempt powers to sentence Dexter to jail time for failing to fulfill the conditions of the suspended sentence. The Justice of the Peace contended that under 3-10-401, contempt proceedings could be brought at any time, and the District Court concluded that the Justice's Court had the authority to enforce compliance with the lawful sentencing order, but on appeal, the Supreme Court reversed. Under the penalties in 3-1-519 in effect at the time (repealed in 2001), contempt of court constituted a misdemeanor crime, which was required under subsection (2)(b) of this section to be prosecuted within 1 year of commission. The last day on which Dexter could have committed contempt was April 9, 1999, so prosecution was required to be commenced by April 9, 2000. Because the contempt prosecution did not commence until Dexter was arrested on January 23, 2002, the Justice's Court lacked jurisdiction to hold Dexter in contempt for failure to comply with the terms of a sentence that expired in April 1999. Dexter v. Shields, 2004 MT 159, 322 M 6, 92 P3d 1208 (2004). See also Milanovich v. Milanovich, 200 M 83, 655 P2d 959 (1982).

Three-Year Statute of Limitations Reasonable for Prosecution of Misdemeanor Fish and Game Violations — Equal Protection and Due Process Not Violated: Defendant was charged with five misdemeanor fish and game and outfitter violations that occurred nearly 2 years earlier. Although misdemeanor violations must generally be charged within 1 year, subsections (5) and (6) of this section allow charges for misdemeanor fish and game crimes to be brought within 3 years of violation. Defendant contended that the extended statute of limitations for charging fish and game crimes violated equal protection and due process guarantees. The District Court reviewed the legislative history of subsections (5) and (6) of this section and concluded that the extended statute of limitations served a reasonable relation to the proper legislative purpose of protecting wildlife and that in order to effectively enforce fish and games laws, additional time to discover and investigate fish and game violations was warranted. The Supreme Court agreed. A separate class of misdemeanors for fish and game violations did not violate equal protection because all persons who commit such crimes are in a similarly situated class and subject to the same treatment. Further, because fish and game and outfitter violations sometimes require investigation over several hunting seasons and involve perpetrators who reside out of state, an extended statute of limitations is a reasonable exercise of the state's legitimate police power in preserving wildlife and does not violate substantive due process. St. v. Egdorf, 2003 MT 264, 317 M 436, 77 P3d 517 (2003).

Justifiable Preindictment Delay Not Prejudicial to Defendant's Due Process Rights: DuBray was charged with a deliberate homicide committed over 10 years earlier and later appealed the denial of his motion to dismiss on grounds that preindictment delay violated his due process rights. The Supreme Court applied the two-step process in St. v. Taylor, 1998 MT 121, 289 M 63, 960 P2d 773 (1998), which required first that DuBray show actual and substantial prejudice from the delay and, if so, a consideration of the reasons for the delay and the length of the delay. Under Taylor, preindictment delay leads to a violation of due process rights if it can be said that requiring a defendant to stand trial violates those fundamental concepts of justice that lie at the base of civil and political institutions and that define the community sense of fair play and decency. The Supreme Court distinguished Taylor because in that case, the state had a known suspect yet inexplicably failed to investigate and file charges in a timely manner, while here, investigators were not made aware of DuBray's involvement until shortly before he was charged. Thus, after weighing any prejudice suffered by DuBray, such as potential failure of witnesses' memories, against the reasons for the delay and the length of the delay, the Supreme Court concluded that DuBray's due process rights were not prejudiced by the lengthy preindictment delay. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003).

Addition of New Stalking Incidents to Original Complaint — Acceptance of Substantive Amended Complaint on Day of Trial — New Trial Warranted: Kennedy was charged with a stalking incident on October 5, 1999, and was convicted in City Court. Kennedy appealed to District Court for a trial de novo. No new information or complaint was filed in District Court to reiterate the charge, but on the morning of trial, the City Attorney filed an amended complaint alleging six specific incidents of stalking, including the October 5 incident, that had occurred between December 1997 and October 1999. Kennedy moved to dismiss the stalking charge on grounds that the city failed to state the offense of repeated stalking behavior in its complaint, while the city contended that evidence of the other alleged criminal stalking offenses constituted a continuing course of conduct within the meaning of this section. The District Court denied Kennedy's motion to dismiss and allowed the amended complaint over Kennedy's objection. The trial proceeded as scheduled, and Kennedy was convicted. On appeal, the Supreme Court noted that an information must reasonably apprise the accused of the charges in order to provide an opportunity to prepare and present a defense and that alteration of a complaint is allowed at any time prior to verdict, but that acceptance of a substantive amendment is prohibited within 5 days of trial under 46-11-205. An amendment of form is one that charges the same crime, and the elements of the crime and the proof required remain the same. A substantive amendment alters the nature of the offense, the essential elements of the crime, the proofs, and the defenses. Here, the amended complaint alleging several new episodes of stalking, together with the allegation that all the incidents formed a continuous course of conduct dating back over 2 years, constituted a substantive change that added new proofs to the prosecution's burden and required Kennedy to prepare new defenses. The proposed substantive amendment was not timely filed at least 5 days before trial as required, nor did the District Court follow the procedures for motioning and rearraignment. Thus the District Court abused its discretion by accepting the amended complaint on the morning of trial, and the case was reversed for a new trial. Red Lodge v. Kennedy, 2002 MT 89, 309 M 330, 46 P3d 602 (2002).

Procedural Change in Statute of Limitations Not Violative of Ex Post Facto Protection: At the time that Duffy was alleged to have committed sexual intercourse without consent and incest with his daughter in 1986, the applicable statute of limitations provided that a prosecution be commenced within 5 years after the offense if the victim was less than 16 years old at the time that the offense occurred. In 1989, the statute was amended to provide that a prosecution be commenced within 5 years after the victim reached 18 years of age if the victim was less than 18 at the time of the offense. In Duffy's case, if the statute of limitations had not been amended, prosecution would have been barred, so Duffy maintained that applying the 1989 statute of limitations was an unlawful application of the constitutional ex post facto provisions. The Supreme Court applied the ex post facto test in St. v. Leistiko, 256 M 32, 844 P2d 97 (1992), which established that an ex post facto violation occurs when: (1) the law is retrospective; and (2) the law disadvantages the offender. Duffy failed to satisfy the second part of the Leistiko test because the 1989 change in the statute of limitations did not alter the definition of or punishment for the crimes, but merely expanded the time in which the punishment might be imposed and thus did not violate constitutional ex post facto provisions. The conduct of which Duffy was accused was illegal and punishable both before and after the statute of limitations was extended. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000). See also U.S. v. Marrow, 177 F3d 272 (5th Cir. 1999).

District Court Lacking Jurisdiction to Hear Charges of Theft Allegedly Committed on Indian Reservation — Felony Theft Not Continuing Offense: Eagle Speaker was charged with five counts of felony theft for allegedly stealing five horses on the Blackfeet Indian Reservation and transporting them off-reservation to Shelby for sale. Eagle Speaker contended that as an enrolled tribal member, the state lacked jurisdiction to prosecute because the alleged thefts occurred on the reservation and involved other members of the tribe. The District Court agreed. On appeal, the state alleged that there was probable cause to believe that both elements of felony theft occurred outside the reservation when Eagle Speaker tried to sell the horses in Shelby. The Supreme Court affirmed. Under St. v. Mullin, 268 M 214, 886 P2d 376 (1994), the crime of felony theft is not a continuing offense for purposes of tolling the statute of limitations. Rather, a theft is complete once all the elements of the crime transpire, and in this case, all elements of the theft, if it occurred, clearly occurred on the reservation. The offense of theft occurs for jurisdictional purposes where the elements of the offense take place. The alleged theft occurred on the reservation, and the lower court was without jurisdiction to hear the charges. St. v. Eagle Speaker, 2000 MT 152, 300 M 115, 4 P3d 1, 57 St. Rep. 600 (2000).

Tolling of Statute for Certain Offenses Against Minors — Evidence Supporting Date of Offense and Retroactive Application: An act that enacted a statute providing that certain prosecutions may be commenced within 5 years after the victim reaches the age of 18 if the victim was less than 18 years of age at the time of the offense also provided that the act applies retroactively to offenses committed before the effective date of the act and for which the statute of limitations has not expired on the effective date of the act. Therefore, since the statute of limitations for the offenses referred to is 5 years and since the law took effect on March 24, 1989, an offense occurring between March 24, 1984, and March 24, 1989, could be prosecuted. The victim in this case contacted the County Attorney in April of 1992, when she was 19, and charges were filed in December of 1993. Testimony at trial for sexual intercourse without consent and sexual assault showed that the victim was in the 5th grade in March of 1984 and that she testified that the offenses occurred while she was in the 7th and 8th grades, but she could not fix the dates with particularity. There was no evidence that the offenses occurred prior to March of 1984. The District Court did not err in refusing to dismiss the charges on the basis of the victim's vague references to the dates of their occurrence and an alleged violation of the statute of limitations. St. v. Mason, 283 M 149, 941 P2d 437, 54 St. Rep. 539 (1997).

Violation of Limitations Period May Be Raised at Any Time — Raising at End of Trial: Although defendant did not move to dismiss the charges for violation of the statute of limitations until the end of the trial, such a violation is a jurisdictional issue that may be raised at any time. St. v. Mason, 283 M 149, 941 P2d 437, 54 St. Rep. 539 (1997).

Felony Theft Not Continuing Course of Conduct: Felony theft of two snowmobiles occurred in 1988. The state argued that the theft was a continuing course of conduct, that the theft was not "committed" until the snowmobiles were discovered in 1994, and that therefore the 5-year statute of limitations had not yet expired. Citing St. v. Hamilton, 252 M 496, 830 P2d 1264 (1992), the Supreme Court held that because there was no explicit language in the statute indicating a legislative intent to compel that conclusion, the offense would not be considered continuing. The Supreme Court noted that to accept the state's argument would be tantamount to holding that there is no statute of limitations applicable to the crime of theft unless the stolen property had been abandoned. (However, see 1995 amendment to this section.) St. v. Mullin, 268 M 214, 886 P2d 376, 51 St. Rep. 1247 (1994).

Arrest Two Years and Five Months From Date of Offense — No Denial of Due Process: There was no violation of the statute of limitations or denial of defendant's due process rights when an arrest warrant was executed 1 year and 9 months from the date it was issued (2 years and 5 months from the date of the offense). St. v. Cummins, 257 M 491, 850 P2d 952, 50 St. Rep. 377 (1993).

Delay of One Hundred Seven Days Before Filing Information — No Due Process Violation: On June 6, 1990, Beatty reported to the Sheriff and County Attorney that he had been kidnapped, beaten, and intimidated 2 days before. Following an investigation by the Sheriff, defendant Flesch was arrested on October 5, 1990. At a hearing on April 8, 1991, defendant's wife and a casino employee testified that although they could not be certain, both thought defendant was in the Gold Nugget Casino the night of the kidnapping. At the hearing and later at trial, Flesch argued that he was deprived of due process because the delayed arrest meant that his witnesses could not positively testify about his whereabouts the night of the kidnapping. The Supreme Court stated, citing St. v. Krinitt, 251 M 28, 823 P2d 848, 48 St. Rep. 1088 (1991), that Flesch was not deprived of due process because he was not prejudiced by the 107-day delay; his alibi defense, including his wife's later definite statement that defendant was at home the night of the kidnapping, was submitted to the jury, and it failed. Even if defendant was prejudiced, any prejudice must be balanced with the necessity for a reasonable time to investigate the crime. Because the information was filed within the applicable statute of limitations and with less delay than found in Krinitt, the Supreme Court found no due process violation. St. v. Flesch, 254 M 529, 839 P2d 1270, 49 St. Rep. 813 (1992).

Official Misconduct Not Continuing Course of Conduct — Statute of Limitations: The Legislature has not explicitly extended the statute of limitations for the offense of official misconduct, nor is the nature of the offense of official misconduct such that it must be treated as a continuing offense. Therefore, charges of official misconduct are subject to the general 1-year statute of limitations for misdemeanor offenses. St. v. Hamilton, 252 M 496, 830 P2d 1264, 49 St. Rep. 33 (1992), followed in St. v. Mullin, 268 M 214, 886 P2d 376, 51 St. Rep. 1247 (1994).

Preindictment Delay — No Violation of Due Process: Defendant forged and cashed a check of his wife's and kept the proceeds for himself. The County Attorney's office investigated in March 1988 but declined to prosecute because the wife was barred from testifying against defendant by 26-1-802 (spousal privilege) and 46-16-212 (competency of spouses). The couple was divorced in May 1989. On December 12, 1989, defendant was charged with theft and forgery and was eventually convicted of theft. The Supreme Court affirmed and found that defendant had not shown actual, substantial prejudice as a result of the delay in prosecution. Prosecution was commenced within the applicable 5-year statute of limitations. The fact that defendant could no longer rely on the spousal privilege and competency of spouses statutes to prevent a witness from coming into court and testifying about the theft does not constitute "prejudice" to defendant. St. v. Krinitt, 251 M 28, 823 P2d 848, 48 St. Rep. 1088 (1991). However, see St. v. Taylor, 1998 MT 121, 289 M 63, 960 P2d 773, 55 St. Rep. 481 (1998), in which the issue is raised to a level of constitutional scrutiny for analysis of preindictment delay.

Failure to Keep Tag Attached to Animal Hide — Continuous Offense: Defendant argued that the statute of limitations on the misdemeanor offense of failing to keep a tag attached to a hide is 1 year under this section. However, the language of 87-2-509 (now repealed, but see 87-6-411) indicates that the offense continues as long as any considerable portion of the hide remains unconsumed, which in this case was interpreted to mean as long as the bear hide remained in preparation for taxidermy. St. v. Earl, 242 M 279, 790 P2d 464, 47 St. Rep. 691 (1990).

Contempt: The husband was found to be in contempt of court on August 18, 1981, for failing to allow the wife court-ordered visitation for Christmas of 1979. On appeal, the husband contended the action was barred by the Statute of Limitations. Under 3-1-519, a person found guilty of contempt commits a misdemeanor. A prosecution for a misdemeanor must be commenced within 1 year after it is committed. Because the proceeding was not begun within 1 year, the District Court was without jurisdiction to hold the husband in contempt for the denial of visitation for Christmas of 1979. Milanovich v. Milanovich, 201 M 332, 655 P2d 963, 39 St. Rep. 2146 (1982).

Preindictment Delay — Remedy: Speedy trial guarantees in criminal cases do not extend to the period prior to the formal accusation or arrest. Statutes of limitations provide the primary guarantees against bringing overly stale criminal charges. If the delay causes actual prejudice or if the State intentionally delays to gain some tactical advantage over the accused or to harass him, the delay can be a denial of due process. St. v. Goltz, 197 M 361, 642 P2d 1079, 39 St. Rep. 613 (1982), followed in St. v. Bartnes, 234 M 522, 734 P2d 1271, 45 St. Rep. 2101 (1988). However, see St. v. Taylor, 1998 MT 121, 289 M 63, 960 P2d 773, 55 St. Rep. 481 (1998), in which the issue is raised to a level of constitutional scrutiny for analysis of preindictment delay.

Failure to File Tax Returns — Statute of Limitations: Prosecution for failure to file state tax returns is a criminal prosecution differing from the civil action under 15-30-322 (now repealed) for collection of unpaid taxes. The failure to file tax returns is a misdemeanor and as such is subject to the 1-year Statute of Limitations of this section. The State is barred from prosecuting for failure to file proper returns for the period prior to 1 year before commencing prosecution. St. v. Poncelet, 187 M 528, 610 P2d 698 (1980).

Right to Speedy Trial: An Illinois court has held that it is only under most unusual circumstances that the beginning of a prosecution which is not barred by the Statute of Limitations under this section would constitute a deprivation of a right to speedy trial. People v. Plazewski, 2 Ill. App.3d 378, 276 N.E.2d 459, 462 (1971).

Construction and Application:

Because Statutes of Limitation are only measures of public policy and are therefore entirely subject to the Legislature's will, they may be changed or repealed in any case where a right to acquittal has not been absolutely acquired by the completion of the original period of limitations. People v. Isaacs, 37 Ill.2d 205, 226 N.E.2d 38, 52 (1967).

In a general Statute of Limitations an exception cannot be enlarged beyond that which its plain language imports, and whenever the exception is invoked the case must unequivocally fall within it. St. v. Clemens, 40 M 567, 107 P 896 (1910).

Requirements as to Time:

The Montana court has held that unless time is a material ingredient in the offense or in charging the offense, it is necessary only to prove that the offense was committed prior to the findings or to the filing of the information or the indictment. St. v. Rogers, 31 M 1, 77 P 293 (1904).

However, it should be noted that a complaint is subject to dismissal where the criminal complaint alleges a date that the crime was allegedly committed beyond the Statute of Limitations. People v. Hill, 68 Ill. App.2d 369, 376, 216 N.E.2d 212 (1966).

Continuing Offenses: As provided by subsection (4) (now (5)) of this section, the Statute of Limitations begins running when the course of the conduct is terminated. See People v. Konkowski, 378 Ill. 616, 39 N.E.2d 13, 16 (1941); People v. Haycraft, 3 Ill. App.3d 974, 278 N.E.2d 877, 885 (1972). It should be noted, however, that two punishments are not to be imposed for a single act, even though different ingredients are involved in the two crimes. People v. Dushewycz, 27 Ill.2d 257, 189 N.E.2d 299, 301 (1963).

Felony or Misdemeanor: The maximum potential sentence determines the grade of the crime until sentence is imposed. Under 94-114, R.C.M. 1947 (since repealed), the imposition of a sentence other than imprisonment in state prison reduced the crime to a misdemeanor in cases where the offense was neither divisible into degrees nor inclusive of lesser offenses, and punishment was within the discretion of the court or jury. This did not operate retroactively so as to deprive the court of jurisdiction by making the misdemeanor limitations period applicable. St. v. Atlas, 75 M 547, 244 P 477 (1926).

45-1-206. Periods excluded from limitation.

Criminal Law Commission Comments

Source: Ill. C.C., 1961, [Chapter] 38, § 3-7.

Certain occurrences should stop the period from running. Subsection (1) tolls the statute for the offender who is absent from this state, or absents himself from his usual place of abode and makes some effort to conceal himself.

Subsection (3) is intended to preserve the substance of the former Montana provision which tolled that statute while proceedings were pending.

Note that the phrase "same conduct" is intentionally broad.

Compiler's Comments

Annotator's Note: The exclusions contained in this section come directly from Ill. C.C. 1961, [Chapter] 38, § 3-7. Subsection (1) excludes the offender who is absent from the state. Additionally, the statute has been interpreted to exclude the offender who, although remaining in the state, absents himself from his residence with an effort to conceal himself. People v. Ross, 325 Ill. 417, 156 N.E. 303 (1927). This subsection also embodies R.C.M. 1947, § 94-5704. Subsection (2) tolls the statute for public officials with regard to larceny of public funds. The language of this subsection appears broad enough to prevent running of the statute while the offender continues to hold any public office. This exclusion should be read along with 45-1-205(3), MCA, if the offense is one which is difficult to discover. Subsection (3) preserves the substance of R.C.M. 1947, § 94-5706 which tolls the statute while proceedings are pending. The phrase "for the same conduct" is broad and is designed to cover the case in which the initial prosecution is dismissed because of a substantial variance between allegation and proof. The earlier Illinois law which this section changed had the language "for the same offense"—terminology thought to be too narrow by the revisers of the Illinois code.

Case Notes

Tolling of Statute of Limitations — Out-of-State Incarceration: Defendant claimed that the statute of limitations was running during the time he was incarcerated in California because he was still under Montana jurisdiction. However, failure of the defendant to be usually and publicly present in this state will itself interrupt the running of the statutory period regardless of jurisdiction. The statute is also tolled when the defendant is beyond the jurisdiction of this state regardless of his place of residence. St. v. Stillings, 238 M 478, 778 P2d 406, 46 St. Rep. 1431 (1989).

Pleadings: In a case in which the Statute of Limitations had been tolled by the filing of a first indictment which was later dropped, the Illinois court held that the state was not required to allege in a new indictment the particular disposition of the original indictment, but the state was required to allege the tolling of the Statute of Limitations on the basis of pendency of prior proceedings against the same defendant for the same conduct. People v. Isaacs, 37 Ill.2d 205, 226 N.E.2d 38, 52 (1967). See also People v. Rochola, 339 Ill. 474, 171 N.E. 559, 560 (1930). The occurrence of events which would toll the Statute of Limitations must not only be proved but must be pleaded as well. People v. Hawkins, 34 Ill. App.3d 566, 340 N.E.2d 223 (1975).

Absence From State:

In interpreting a precursor to this section, the Montana Supreme Court held that the state's burden of proving that the defendant, who had left the state with the intention of going to Ireland, was outside of the state for a period of at least 20 days was met by testimony which provided a legitimate inference that such a trip must have involved an absence from the state for at least that length of time. St. v. Knilans, 69 M 8, 220 P 91 (1923).

The Illinois court has held that the period of a defendant's imprisonment in another state was to be excluded in determining whether an Illinois indictment was barred by the Statute of Limitations. In that case the defendant, at the time the offense was committed, had a technical legal residence in Illinois but while visiting his father in Kentucky was arrested and extradited to Missouri where he served a prison term. The Illinois court held that the defendant was not "usually and publicly resident" in Illinois during the time of his imprisonment in Missouri. People v. Carman, 385 Ill. 23, 52 N.E.2d 197 (1944).

Burden of Proof: Where an indictment was not brought within the statutory period of limitations but contained an allegation that the defendant, for a specified period greater than the period between the date of limitation and the date on which the indictment was brought, was not usually and publicly resident within the state, in absence of proof of that allegation at the trial, the defendant could invoke the Statute of Limitations as a bar to prosecution of the action. People v. Carman, 385 Ill. 23, 52 N.E.2d 197 (1944).

Pending Proceedings: It is a general rule that once an indictment is returned the Statute of Limitations is tolled. Such a rule was upheld even where the indictment was not on the docket for part of the time because it had been stricken with leave to reinstate. People v. Johnson, 363 Ill. 45, 1 N.E.2d 386, 388 (1936). For a discussion of pending proceedings in a conspiracy indictment see People v. Link, 365 Ill. 266, 6 N.E.2d 201, 207, certiorari denied 302 US 690 (1937). The Illinois court has also held that a prior indictment charging the same offense which has been quashed or set aside need not be valid to toll the running of the Statute of Limitations. People v. Hobbs, 361 Ill. 469, 198 N.E. 224 (1935).

CHAPTER 2
GENERAL PRINCIPLES OF LIABILITY

Chapter Compiler's Comments

Annotator's Note — Source: The compiler's comments entitled "Annotator's Note" are taken from the Montana Criminal Code of 1973 Annotated (1980 rev. ed.) produced by the Montana Criminal Law Information Research Center (MONTCLIRC) and printed under cosponsorship of the State Bar of Montana. Minor revisions have been made to conform to the style and format of the annotations.

Part 1
Definitions and State of Mind

45-2-101. General definitions.

Criminal Law Commission Comments

SOURCE

Acts: Illinois Criminal Code, 1961, Chapter 38, section 2-2.

Administrative Procedure: Model Penal Code (M.P.C.) 1962, section 240.0(8).

Another: Ill. C.C., 1961, [Chapter] 38, section 2-3.

Benefit: Identical to the Model Penal Code 1962, section 240.0(1).

Bodily Injury: Substantially the same as the Model Penal Code 1962, section 210.0(2).

Cohabit: New.

Common Scheme: New.

Conduct: Identical to Illinois Criminal Code, 1961, Chapter 38, section 2-4.

Conviction: Identical to Illinois Criminal Code, 1961, Chapter 38, section 2-5.

Correctional Institution: Substantially the same as Illinois Criminal Code, 1961, Chapter 38, section 2-14.

Deception: Identical to Illinois Criminal Code, 1961, Chapter 38, section 15-4.

Defamatory Matter: Identical to Minnesota Statutes Annotated, Title 40A, section 609.765.

Deprive: Model Penal Code, 1962, section 223.0(1).

Deviate Sexual Relations: New. This definition covers homosexuality and bestiality.

Felony: New.

Forcible Felony: Ill. C.C., 1961, Chapter 38, section 2-8.

Frisk: New.

Government: Identical to the Model Penal Code 1962, section 240.0(2).

Harm: M.P.C. 1962, section 240.0(3).

House of Prostitution: Model Penal Code 1962, section 251.2.

Human Being: M.P.C. 1962, section 210.0(1).

Illegal Article: New.

Inmate: M.P.C. 1962, section 251.2(1).

Intoxicating Substance: Revised Codes of Montana 1947, section 94-35-107 [amended by Ch. 190, L. 1975].

Involuntary Act: Substantially the same as the Model Penal Code 1962, section 2.01.

Juror: Substantially the same as the New York Penal Law 1965, section 10.00(16).

Knowingly: Substantially the same as the Model Penal Code 1962, sections 1.13(13), 2.02 [except for second sentence (added by Ch. 443, L. 1975)].

Mentally Defective: Identical to the New York Penal Law 1965, section 130.00(5). Revised Codes of Montana 1947, section 94-4101(2) specified that the degree of mental deficiency be such as to render the victim "incapable of giving legal consent." Formulation in terms of capacity to give legal consent is circular and was rejected as failing to provide a meaningful guide. This definition limits criminality to mental disease or defect so serious as to render the victim "incapable of appreciating the nature of his conduct." A condition such as nymphomania which affects only the woman's capacity to "control herself sexually" where there is no physical or mental disability will not destroy consent, otherwise valid.

Mentally Incapacitated: Substantially the same as the New York Penal Law 1965, section 130.00(6). The victim need not be unconscious to be mentally incapacitated.

Misdemeanor: New.

Negligently: New York Penal Law 1965, section 15.05(4); Model Penal Code 1962, sections 1.13(15), 2.02(2)(d).

Obtain: Identical to the Model Penal Code 1962, section 223.0(5); Illinois Criminal Code 1961, Chapter 38, section 15-7.

Obtains or Exerts Control: Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 15-8.

Occupied Structure: Model Penal Code 1962, section 220.1(4).

Offender: New.

Offense: Model Penal Code 1962, section 1.04(1).

Official Detention: Model Penal Code 1962, section 242.6(1).

Official Proceeding: Identical to the Model Penal Code 1962, section 240.0(4).

Other State: Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 2-21.

Owner: Identical to Illinois Criminal Code 1961, Chapter 38, section 15-2.

Party Official: Identical to the Model Penal Code 1962, section 240.0(5).

Peace Officer: Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 2-13.

Pecuniary Benefit: Identical to the Model Penal Code 1962, section 240.0(6).

Person: Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 2-15.

Physically Helpless: Substantially the same as the New York Penal Law 1965, section 130.00(7).

Possession: Substantially the same as the Model Penal Code 1962, section 2.01(4).

Premises: Substantially the same as the New York Penal Law 1965, section 140.0(1).

Property: Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 15-1 [except for changes by Ch. 485, L. 1981].

Property of Another: Model Penal Code 1962, section 223.0(7).

Public Place: Model Penal Code 1962, section 251.2(1).

Public Servant: Substantially the same as the Model Penal Code 1962, section 240.0(7); New York Penal Law 1965, section 10.00(15).

Purposely: Substantially the same as the Model Penal Code 1962, section 2.02(2)(a), (6).

Serious Bodily Injury: Substantially the same as the Model Penal Code 1962, section 210.0(3).

Sexual Contact: Identical to the New York Penal Law 1965, section 130.00(3).

Sexual Intercourse: New York Penal Law 1965, section 130.00(1), (2), (3). This definition includes abnormal intercourse, either homosexual or heterosexual by mouth or anus, as well as normal genital copulation. The definition is broader than former law, although "the infamous crime against nature" of Revised Codes of Montana 1947, section 94-4118 probably covers most abnormal sexual acts. The definition also adheres to the "slight penetration" rule of Revised Codes of Montana 1947, section 94-4103.

Solicit: Identical to Illinois Criminal Code 1961, Chapter 38, section 2-20.

State: Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 2-21.

Statute: New.

Stolen Property: Identical to Illinois Criminal Code 1961, Chapter 38, section 15-6.

Stop: New.

Tamper: New.

Threat: Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 15-5.

Value: Michigan Proposed Crimes Code 1967, section 3201 [but amended by Ch. 485, L. 1981, and Ch. 3, L. 1985].

Vehicle: New.

Weapon: New York Penal Law 1965, section 10.00(13).

Witness: Revised Codes of Montana 1947, section 94-9001 [repealed by sec. 32, Ch. 513, L. 1973].

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 465, L. 2023. Amendment effective October 1, 2023.

2017 Amendment: Chapter 321 in definition of common scheme after "acts or omissions" inserted "resulting in a pecuniary loss to the victim of at least $1,500, or $1,500 in value"; in definition of conviction substituted "judgment of conviction and sentence" for ""judgment of conviction or sentence"; and made minor changes in style. Amendment effective July 1, 2017.

Applicability: Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

2015 Amendment: Chapter 161 substituted mentally disordered for mentally defective as defined term and in definition substituted "mental disease or disorder" for "mental disease or defect". Amendment effective April 1, 2015.

2013 Amendment: Chapter 225 in definition of deviate sexual relations after "means" deleted "sexual contact or sexual intercourse between two persons of the same sex or". Amendment effective October 1, 2013.

2009 Amendment: Chapter 473 in definition of value in (b) in two places increased property value amount from $1,000 to $1,500. Amendment effective October 1, 2009.

2007 Amendment: Chapter 155 in definition of occupied structure at end of first sentence inserted "including any outbuilding that is immediately adjacent to or in close proximity to an occupied structure and that is habitually used for personal use or employment". Amendment effective October 1, 2007.

2005 Amendment: Chapter 364 inserted definition of child or children; and made minor changes in style. Amendment effective October 1, 2005.

2001 Amendment: Chapter 312 in definition of correctional institution substituted "means a state prison, detention center, multijurisdictional detention center, private detention center, regional correctional facility, private correctional facility, or other institution for the incarceration of inmates under sentence for offenses or the custody of individuals awaiting trial or sentence for offenses" for "means a state prison, county or city jail, or other institution for the incarceration or custody of persons under sentence for offenses or awaiting trial or sentence for offenses"; and in definition of inmate substituted "is confined in a correctional institution" for "engages in prostitution in or through the agency of a house of prostitution". Amendment effective October 1, 2001.

1999 Amendments — Composite Section: Chapter 288 in definition of sexual contact after "another" substituted "directly or through clothing, in order to knowingly or purposely:

(a) cause bodily injury to or humiliate, harass, or degrade another; or

(b) arouse or gratify the sexual response or desire of either party" for "for the purpose of arousing or gratifying the sexual desire of either party"; in definition of sexual intercourse at end of (a) after "another person" substituted "to knowingly or purposely:

(i) cause bodily injury or humiliate, harass, or degrade; or

(ii) arouse or gratify the sexual response or desire of either party" for "for the purpose of arousing or gratifying the sexual desire of either party" and at beginning of (b) inserted reference to subsection (a); and made minor changes in style. Amendment effective October 1, 1999.

Chapter 354 inserted definition of telephone; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 395 in definition of conviction after "plea of guilty" inserted "or nolo contendere"; inserted definition of nolo contendere; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 397 in definition of value in (b) in two places increased value of property from $500 to $1,000; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendments: Chapter 18 in definition of deprive, near beginning of (b) after "property", inserted "of another"; and made minor changes in style.

Chapter 354 inserted definitions of document, Medicaid, Medicaid agency, Medicaid benefit, and Medicaid claim; adjusted subsection references; and made minor changes in style. Amendment effective April 11, 1995.

Severability: Section 18, Ch. 354, L. 1995, was a severability clause.

1993 Amendments — Composite Section: Chapter 143 in definition of serious bodily injury inserted (a)(iii) to include bodily injury that creates a substantial risk of serious permanent disfigurement or of protracted loss or impairment of the function or process of any body member or organ; and made minor changes in style.

Chapter 616 in definition of threat, in (i) before "property", inserted "person making the threat demands or receives" and after "property" substituted "that is not" for "is not demanded or received"; in definition of value, in (b) in two places, increased property value from $300 to $500; and made minor changes in style.

Style and gender neutral changes in definitions of peace officer, threat, in (i), and value, in (a)(i), were slightly different in the two chapters. In each case, the codifier chose the more appropriate of the two.

1985 Amendment: In definition of value increased maximum presumed value of stolen property from $150 to $300 in two places.

1981 Amendment: Inserted definitions of computer, computer network, computer program, computer services, computer software, and computer system; substituted "any tangible or intangible thing" for "anything" in definition of property; inserted (54)(k) including data, information, and computer items in definition of property; inserted (69)(a)(iii) providing method to determine value of data, information, or computer items; corrected internal references changed due to added subsections.

Annotator's Note:

When Definitions Apply: The phrase, "and unless a different meaning plainly is required, the following definitions apply in this title," added in 1977 to the preamble of 45-2-101, clarified the intent that the definitions in this section are to be controlling in all but the most ambiguous situations.

Act: Because the term "act" is so central to the construction and operation of the new code, the drafters chose the broadest possible definition in this subsection. Both the Illinois Code and the Model Penal Code define act as "including a failure to take action". To ensure that there was no ambiguity or possibility that the usual meaning of "act" was eliminated, the first clause of the definition was developed and added to the Illinois wording.

Administrative Proceeding: As discussed in The Proposed Official Draft of the Model Penal Code, May 4, 1962 at p. 196, "'Administrative proceeding' is defined so as to include quasi-judicial proceedings and, also, some proceedings directed toward formulation of regulations, if the law contemplates that the outcome shall be based on evidence and findings. The definition will also cover some actions that might be called 'executive' or 'administrative', where the official action applies a general rule to an individual, e.g., in granting or revoking a license."

Benefit: This subsection and the new sections [45-7-101 through 45-7-104] on corrupt influences prohibit the giving or receiving of any nonpecuniary benefit such as political support, honoraries, etc., to influence official discretionary functions. The wording is taken directly from the Model Penal Code.

Bodily Injury: This definition is designed to provide a broadened replacement for the term "bodily harm" used in the old Criminal Code. "Bodily harm" or "physical harm" as used in the new code is synonymous with the term "bodily injury". This definition is substantially the same as the definition adopted in the Model Penal Code 1962, section 210.0(2) which is similar to Wisconsin's statute, section 939.22 (1955).

Common Scheme: This definition as applied in the new bad check and forgery statutes imposes higher penalties for elaborate plans which result in the illegal obtaining of property or services than penalties imposed for single fraudulent acts.

Conduct: Because this definition and many of the statutes making references to the word "conduct" come from Illinois, attention is directed to decisions from that jurisdiction. Perhaps the most important use of the term in Montana law occurs in the statutes on Multiple Prosecutions: MCA, 46-11-501 [46-11-501 now repealed, 46-11-502 renumbered 46-11-410] through 46-11-505, which come [in part] from Ill. C.C. 1961, sections 3-3, 3-4. Attention is also directed to the decision of the Supreme Court in Ashe v. Swenson, 397 US 436 (1970), which has an important impact upon multiple prosecution for the same conduct.

Conviction: Section 94-4809, R.C.M. 1947, provided that no person could be convicted except upon a verdict or judgment. Because this section did not specifically define the point at which a conviction occurred, problems arose in determining when a person could be said to have been placed in double jeopardy. See, for example, Petition of Williams, 145 Mont. 45, 57, 399 P2d 732 (1965). Attention is directed to MCA, 46-18-101, et seq., which sets forth procedure for sentencing and judgment. The wording for this subsection defining "conviction" comes directly from the Illinois source.

Correctional Institution: This definition is adopted from the Illinois definition of "penal institution".

Deception: This subsection defines a term essential to the new sections on Theft and Deceptive Practices (MCA, 45-6-301 through 45-6-327). The definition supplants and simplifies a variety of former laws relating to fraudulent practices such as false pretenses, larceny by trick, fraudulent conveyances, etc. The objective of the commission in replacing the old theft sections was to remove any reference to the old common-law elements which encumbered the former code. Subsection (17)(e) makes the false promise of future performance punishable under the new theft act, although such promises were not punishable under the common law or under prior Montana statutes. The wording for this definition comes directly from the Illinois source.

Defamatory Matter: This definition was taken directly from the Minnesota law, which in turn comes from Wisconsin Stat. section 942.01(2). The definition and the new statute on Criminal Defamation replace numerous provisions in the old code on libel, giving false information for publication, etc. The definition recognizes criminal liability for defamation of a group—a protection not found in prior Montana law. For case notes see MCA, 45-8-212.

Deprive: This definition is taken without significant change from the Model Penal Code, proposed official draft, 1962. The definition is designed to cover both permanent and prolonged withholding of property from the rightful owner. The definition intentionally avoids any distinction based on "possession", "custody", or "title"—concepts which have provided much confusion in the prior law on larceny and false pretenses. See also, Ill. C.C., Chapter 38, section 15-3 (1961) defining "permanently deprive", which has marked similarities to the definition of "deprive" in this section.

Deviate Sexual Relations: This definition replaces the prior law concerning "crime against nature", which was quite ambiguous in defining which conduct was prohibited. When read in conjunction with the new provision on deviate sexual conduct (MCA, 45-5-505), this definition prohibits homosexuality and bestiality but does not outlaw acts between consenting adults of the opposite sex.

Felony: Under prior law, the determination of whether an offense was a felony depended solely upon where the maximum punishment was to be served. Under the new definition, both the length of the sentence and the jail in which the sentence is served are determining factors. When read with MCA, 45-1-201, the new section on classification of offenses, the code emphasizes that while potential sentence determines jurisdiction, including the classification of any offense necessary to the definitions of the principal offense, and the determination of the commencement of any period of limitations, the sentence actually imposed upon conviction determines the classification of the offense.

Forcible Felony: This definition is taken from the last clause of the Illinois source. Forcible felonies include such offenses as homicide, assault, kidnapping, robbery, sexual assault, arson, burglary, etc. As applied in the new code, one who is committing a forcible felony has no right to use force to defend himself (45-3-105).

Frisk: The term "frisk" is distinguished from the term "search" in that the objective of a search is to protect the officer, prevent escape, and obtain evidence while the objective of a frisk is the detection of concealed weapon in order to protect the officer. Under the new Stop and Frisk Law (MCA, §§ 46-5-401, 46-5-402 [now repealed]) a peace officer may detain and frisk a person whom he believes may have been connected with the commission of an offense or be of aid in investigation of an offense provided that the officer has reasonable cause to suspect the presence of a dangerous weapon. [But see 1991 amendments to these sections.]

Government: This definition and the new provisions on Offenses Against Public Administration (MCA, Title 45, ch. 7) are taken directly from the Model Penal Code.

Harm: This definition and the corresponding section on Threats and Other Improper Influence in Official and Political Matters (MCA, § 45-7-102) are taken verbatim from the Model Penal Code. These sections and the new Bribery section provide an all inclusive prohibition of the corrupt influencing of governmental processes.

House of Prostitution: Under prior law, a "house of prostitution" was referred to as a "house of ill fame" and the crime of prostitution was punishable on a public nuisance theory. Under the new provisions, any form of prostitution is outlawed, as is any house of prostitution—whether it be discreet or indiscreet. The definition is taken directly from the Model Penal Code. The 1977 amendment changed the reference to "one person" to "one or more persons".

Human Being: Under this definition, which is supported by both the Model Penal Code and the majority of commentators, unborn children and deceased persons are not human beings for the purposes of offense against the person.

Illegal Article: This definition and the new section on Transferring Illegal Articles (MCA, § 45-7-307) consolidate the prior law listed above and expand the definition to include not only articles to aid escape and alcoholic beverages but also any other article prohibited by governmental regulation to be in the possession of a prisoner. To complete the offense, the offender must have had reasonable knowledge that the item was illegal and have had the purpose to convey it.

Inmate: This definition and the corresponding sections on Promoting Prostitution (MCA, §§ 45-5-602 through 45-5-604 [all sections now repealed]) are taken directly from the Model Penal Code.

Intoxicating Substance: Chapter 190, L. 1975, substituted "controlled substance as defined in chapter 3 of Title 54, R.C.M. 1947 [now Title 50, chapter 32, MCA], and alcoholic beverage" in subdivision (30) for "substance having an hallucinogenic, depressant, stimulating, or narcotic effect, taken in such quantities as to impair mental or physical capability". Prior to this amendment the original wording of the section seemed to indicate that a substance could not be an "intoxicating substance" unless it had been ingested in quantities sufficient to impair mental or physical capability. This, in effect, eliminated the criminal aspect of possession of such a substance unless ingestion could be shown. The change made by the amendment now without question allows the charge of illegal possession of the defined substance if it is intoxicating by definition as an alcoholic beverage or as included in Title 50, chapter 32, MCA. The 1977 amendment made minor changes in grammar and punctuation.

Involuntary Act: The minimum elements of an offense (unless absolute liability is imposed) usually are said to be a voluntary act and a certain mental state as prescribed by law. Under the new provision on Voluntary Act, a person is not guilty of an offense (other than one in which absolute liability is provided for the act alone) unless his liability is based on conduct which includes a voluntary act or the omission to perform an act required by law which the person is capable of performing. The wording for this definition is taken from the Model Penal Code, but a number of states including Illinois, Wisconsin and Louisiana have spelled out the same theory within their criminal codes.

Juror: This definition is taken directly from the New York Penal Law. Because of the all-inclusiveness of this definition any attempt to influence a juror or prospective juror is prohibited.

Knowingly: Under the new [1973] code, the concepts of "knowingly" and "purposely" replace the old term "intentionally". The terms, however, are not synonymous. "Knowingly" refers to an awareness of the nature of one's conduct or of the existence of specified facts or circumstances. "Purposely" refers to the actor's objective or intended result. The definition for "knowingly" is taken primarily from the Model Penal Code, but a significant departure from the source is the substitution of the phrase "high probability" for "practically certain". Thus, the drafters of the new [1973] code chose to substitute a less rigid requirement. Several states, including New York and Illinois, have enacted similar although not identical provisions. The 1977 amendment made minor grammatical changes.

Mentally Defective: "Mentally defective" as used in the substantive code is an element employed to determine the validity of consent to the sexual offenses. A person who is incapable of appreciating the nature of his conduct is legally incapable of giving consent to a sexual act. Insanity as an affirmative defense was abolished in Montana by the 1979 Legislature (46-14-101(1), 46-14-201(1) [section renumbered 46-14-214], and 46-14-211, repealed) and evidence of mental disease or defect is now only admissible to show that the defendant did not have a particular state of mind which is an element of the offense charged (MCA, 46-14-201) [section renumbered 46-14-214]. The definition of "mentally defective" is taken directly from the New York source and the wording of the "consent as a defense" statute, MCA, 45-2-211, is similar to the New York source as was the former defense of insanity law, MCA, 46-14-211 (now repealed).

Mentally Incapacitated: Intoxication as a defense is covered by the new section on Responsibility (MCA, 45-2-203). This definition, which is taken directly from the New York source is a determinant in the validity of consent to sexual acts. When a person is rendered temporarily incapacitated to give consent, this definition applies. When a person is rendered completely unconscious by an intoxicating substance, the term "physically helpless" (MCA, 45-2-101[51]) is used to define his condition. That the defendant did not administer the intoxicating substance is immaterial as long as the substance was administered by someone without the victim's voluntary consent. This definition is intended to cover the situation where the defendant undermined the judgment and will of the victim by, for example, administering drugs.

Misdemeanor: A misdemeanor under prior law was defined as any crime punishable by imprisonment in the county jail or for which only a fine was imposed. The determination of whether an offense was a misdemeanor came at the beginning of the proceedings depending upon the maximum sentence prescribed in the code. Under the new definition and the corresponding section on Classification of Offenses (MCA, 45-1-201), the maximum potential sentence determines jurisdiction and the commencement of the period of limitations, but the final classification of the offense does not occur until sentence is imposed. Any crime for which the sentence finally imposed is less than one year or for which the sentence is to be served in a county jail is a misdemeanor.

Negligently: Under prior law, the concept of "criminal negligence" occurred most commonly in the area of involuntary manslaughter. R.C.M. 1947, § 94-2507 contained the clause "without due caution and circumspection", which was held to be synonymous with criminal negligence. State v. Powell, 114 Mont. 571, 576, 138 P2d 949 (1943). Because the old manslaughter section required an unlawful act not amounting to a felony and because the common law required that the act be more than merely (malum prohibitum), the Montana court developed the concept that if an act was done with criminal negligence the act became (malum in se) to allow a conviction under that section. The new [1973] code deletes all references to these concepts in order to avoid the definitional problems which they produced. The term "negligence", which is a lesser mental state than "knowingly" or "purposely", is found in the lower categories of assault and homicide in the new code. The inclusion of the term in these sections is necessary to cover such frequent offenses as motor vehicle homicide and firearm mishaps—crimes which were problem areas under prior law. The wording of the definition comes primarily from the New York source, but also borrows language from the Model Penal Code. It should be noted that this definition includes the concept of "recklessness" with the phrase "consciously disregards ...". Under the New York law, recklessness is a higher mental state than negligence. Since the distinction between negligence and recklessness is often difficult for juries to make, it has been avoided in the Montana Code.

Obtain: Under prior statutes concerning false pretenses and larceny by trick it was necessary to distinguish between the transferring of title and the transferring of possession. This definition and the sections on Theft and Related Offenses (MCA, 45-6-301 through 45-6-327) avoid these confusing and often impossible distinctions and instead provide a more general description of "interest or possession"—which should include any fraudulent transfer. The definition is taken directly from the Model Penal Code and is identical to the Illinois provision.

Obtains or Exerts Control: This definition, which is central to the new sections on Theft, eliminates the distinctions which existed under prior law between obtaining title and obtaining possession. The fraudulent transfer of either title or possession is covered by the new sections and the old distinction is of no importance. This definition and much of the new sections on Theft come directly from Illinois. More annotations will be found in the Theft sections (MCA, 45-6-301 through 45-6-327).

Occupied Structure: This definition and the terms "premises" and "vehicle" provide a comprehensive treatment of such offenses against property as Criminal Trespass, Burglary, Criminal Mischief and Arson (MCA, 45-6-101 through 45-6-103 and 45-6-201 through 45-6-205). These offenses are graded according to the type of structure against which the crime was committed and whether the act created a potential danger to human life. Prior law on arson included an exhaustive listing of different types of structures to allow the offense to be graded. This definition replaces that catalog. The wording for this subsection comes from but is not identical to the Model Penal Code source. Included within the definition are such items as house trailers, house boats, etc., which are not ordinarily considered to be "structures". It is important to note that the structure need not be occupied to be the subject of arson or burglary—under this definition the building need only be suitable for human habitation. (See 2007 amendment.)

Offender: The term "offender" is used extensively in the code. This general definition indicates that the Code provisions apply to persons who have been involved in any criminal activity for which legal action may be taken. In the Montana Code of Criminal Procedure reference is made to "defendants", indicating those who are charged with a crime.

Offense: This definition is merely a recodification of the prior law through adaptation of Model Penal Code wording. Under prior law an offense was defined as including those activities for which punishment was removal from office or disqualification to hold office. Because all offenses against public administration are now punishable with fines and/or imprisonment, reference in this subsection to removal from office is not necessary.

Official Detention: This subsection defines a term that is used in the new section on Escape (MCA, 45-7-306). Prior law punished escapees from custody being held for charges of felonies or misdemeanors but did not clearly delineate that it is an offense to escape from any lawful detention. Under the new code, the crime of escape is graded according to the degree of offense for which the escapee was being held. A person who violates parole is not an escapee under this subsection. The wording for the definition comes directly from the Model Penal Code source. The 1977 amendment made minor grammatical changes.

Official Proceeding: This subsection defines a term used in the new section on Perjury (MCA, 45-7-201). Under prior law perjury was covered by separate sections on witnesses before legislative assemblies and those before other governmental bodies. This subsection encompasses all testimony before any governmental proceedings. The definition and the section on perjury come directly from the Model Penal Code.

Other State: This definition contains the same wording as the Illinois source.

Owner: This definition and the new section on Theft (MCA, 45-6-301) are taken directly from the Illinois source. The definition is comprehensive and includes such interests in property as possession, title and custody—either actual or constructive.

Party Official: Prior Montana law did not cover attempts to bribe political party officers. This definition and the new chapter on Offenses Against Public Administration (MCA, Title 45, ch. 7) acknowledge the important public trust placed in party officials and the undermining effect that attempts to exert corrupt influence on such persons can have on the political process. This definition and the sections on Bribery and Corrupt Influences are broad enough to cover all political workers regardless of position. The wording is taken directly from the Model Penal Code.

Peace Officer: This definition is taken directly from Illinois. All persons who are granted authority to maintain order or make arrests within the state are peace officers as defined by the state. As peace officers, such individuals are permitted certain privileges and defenses under the new code such as the power to detain, the right to use force, and the privilege to require aid from members of the public.

Pecuniary Benefit: This subsection when read in conjunction with the new chapter on Corrupt Influences (MCA, 45-7-101 through 45-7-104) unqualifiedly prohibits the giving or receiving of any pecuniary benefit to influence official discretion. Offers of nonpecuniary benefit such as political support, honoraria, etc., are penalized under MCA, 45-7-101. The wording comes directly from the Model Penal Code.

Person: Under present law, "person" means a corporation as well as a natural person. Under this subsection, the term has been expanded for the purposes of criminal law to include unincorporated associations and government agencies. This definition does not create problems with the new Robbery section (MCA, 45-5-401) because that section requires actual or threatened "bodily injury" as defined in MCA, 45-2-101. Bodily injury necessarily refers only to natural persons as defined in the code. The wording for this section is taken with only minor changes from the Illinois source.

Physically Helpless: This definition is used in conjunction with the new section describing when a person is deemed to be incapable of consenting to a sexual act. The term should be compared to other states of incapacity defined in the code such as "mentally defective" (MCA, 45-2-101) and "mentally incapacitated" (MCA, 45-2-101). Under this definition a person who is paralytic or drugged to unconsciousness is deemed helpless. The definition is taken directly from New York law as is much of the new Chapter 5 of Title 45 on sexual offenses.

Possession: "Possession" with reference to such crimes as Theft (MCA, 45-6-301) and Possession of Burglary Tools (MCA, 45-6-205) refers to the exertion of control over an item with the purpose of controlling it and for a period of time long enough to allow the possessor's control to be terminated by another. The definition specifically excludes unconscious possession of property such as contraband abandoned by another or stray animals. The definition is broad enough to include the concepts of constructive possession. The wording has been adapted from the Model Penal Code.

Premises: This subsection and the companion terms of "occupied structure" (MCA, 45-2-101) and "vehicle" (MCA, 45-2-101) allow for a comprehensive treatment of such crimes against property as Criminal Trespass and Burglary (MCA, 45-6-201 through 45-6-205) and Criminal Mischief and Arson (MCA, 45-6-101 through 45-6-103). These offenses are graded according to the type of structure against which the crime was committed and whether there was a potential danger to human life. This definition of "premises" includes structures suitable for occupancy to allow prosecution for the lesser included offense of Criminal Trespass when an offender has committed the crime of burglary. While this definition is taken directly from the New York source, the drafters of the new code specifically avoided adopting the New York definitions of "building" and "real property" due to differences in the substantive provisions. Since these terms have not been defined, they take on their ordinary grammatical and legal meanings.

Property: This definition is taken almost verbatim from Illinois and recodifies the separate definition of property found in various sections throughout the old code. The 1977 amendment made several grammatical changes. [Also amended by Ch. 485, L. 1981.]

Property of Another: This subsection defining "property of another" relates to Theft and Related Offenses (MCA, 45-6-301 through 45-6-327). The wording has been adapted from a similar definition in the Model Penal Code. The subsection permits prosecution for theft of jointly-owned property, such as that owned by husband and wife, where each co-owner has an interest in the property but neither has the right to dispose of the other co-owner's interest.

Public Place: This definition is employed in the new sections on Disorderly Conduct (MCA, 45-8-101) and Prostitution (MCA, 45-5-601 through 45-5-604 [45-5-602 through 45-5-604 now repealed]). The criminality of Disorderly Conduct depends largely upon the disruption that such behavior causes when done in public areas and the offensiveness of such conduct to most people. The new section on Prostitution prohibits both public and private solicitation, replacing the former law which punished prostitution on a public nuisance theory and instead incorporates the modern concept that prostitution, regardless of how carried on, ought to be suppressed. This definition of "public place" was taken directly from the Model Penal Code.

Public Servant: This subsection defines a term of importance and utility in the new Criminal Code. Under prior law relating to bribery, there was no clear definition of "government official" and consequently numerous sections were required to cover the corrupt influence offenses. Furthermore, these sections did not include persons who had been elected or appointed but who had not yet taken office. This definition permits a consolidation of law to replace the numerous former sections and allows for simplification in language. The wording for the first sentence of the definition is adapted from the Model Penal Code. The last sentence is taken directly from the New York source. The 1977 amendment made minor grammatical changes.

Purposely: A major problem of prior Montana criminal law was the use in the code of numerous terms affecting culpability that were largely undefined. Under the new code, the mental states required for various degrees of culpability are defined carefully in a hierarchy. "Purposely" is the most culpable mental state and implies a design. This term replaces a term frequently used in the old code, "intentionally". It should be noted that a person need not act toward a particular result; he need act only with the object to engage in certain conduct. Although a person's intentions may be conditional, his mental state is still culpable under this definition, unless the condition negates the specific intent required by statute. Completing the hierarchy of mental states in the new code are the terms "knowingly" and "negligently", each defined in this section. The wording for this subsection has been taken directly from the two Model Penal Code provisions listed above.

Serious Bodily Injury: The new sections on Aggravated Kidnapping (MCA, 45-5-303) and Assault (MCA, 45-5-201 through 45-5-204) are graded in part by the degree of bodily harm threatened or inflicted. Serious bodily injury differs from bodily injury (MCA, 45-2-101) in the substantiality of pain, risk, disfigurement, or impairment which is created. This definition replaces the ambiguous and narrow phrase found in the prior section on Assault in the First Degree (R.C.M. 1947, § 94-601) "likely to produce death". The wording for the definition is nearly identical to the Model Penal Code source and to N.Y. Pen. L. 1965, § 10.00(10). The final clause of the definition concerning serious mental illness as a type of bodily injury is a new addition by the Criminal Law Commission. The clause applies to those situations in which the victim's mental functions are impaired as a result of a physical attack but in which no substantial physical injury has been manifested.

Sexual Contact: This subsection is used in defining the crime of Sexual Assault (MCA, 45-5-502). Under prior Montana law, the offense was not specifically listed but was covered by numerous vague sections, none of which defined the proscribed sexual conduct. The wording is changed from the New York source only by the addition of the word "arousing" in the final clause. The term "sexual contact" as defined includes any manipulation, fondling, or penetration of the male or female genital or anal areas and any handling of the female breast to arouse sexual desire. Under prior New York law, the term "sexual parts" was held not to include the anus. People v. Grazman-Bograti, 202 N.Y.S.2d 572 (1960). Consequently, the wording was changed to the broader term "intimate parts". Under the new code, the inadvertent touching of intimate parts is not an offense.

Sexual Intercourse: This subsection on "sexual intercourse" defines a term used throughout the new chapter on Sexual Crimes (MCA, 45-5-501). The wording for the definition combines the New York definitions of "sexual intercourse", "deviate sexual intercourse", and "sexual contact". Under prior law, the term "sexual intercourse" was used frequently but was not defined. The drafters of the new code decided not only to specifically define the term but to provide a broad meaning to allow the punishment of sex offenders who do not inflict "normal" acts upon their victims. In Montana, the essence of sex crimes has always been the element of outrage to the person (R.C.M. 1947, § 94-4103, repealed, sec. 32, Ch. 513, L. 1973). Thus, while any penetration is sufficient to complete the offense, the new code does not prohibit acts between consenting adults of the opposite sex.

Solicit: This subsection defines a term used in the new section on When Accountability Exists (MCA, 45-2-302). Under former Montana law, one who solicited the commission of a crime was criminally liable only if the planned crime was eventually committed. This definition and the sections on Accountability continue the solicitor's liability as a principal if the crime has been committed and broaden that liability by the use of the term "facilitate" which includes any action that aids a criminal activity in the slightest. The new code adds the crime of Solicitation (MCA, 45-4-401) which provides that one who solicits may be prosecuted whether or not the planned offense was completed. Because the crime of Solicitation is completely defined within its own section as is the new offense of Soliciting Suicide (MCA, 45-5-105), this definition is not applicable to those crimes which have their own specific and individual variations of the term solicit. The wording for this definition is identical to the Illinois source.

State: This subsection is primarily applicable to the jurisdictional provisions of the code (MCA, 45-1-103, et seq.). Code provisions are in force in areas in which the state shares concurrent jurisdiction such as in National Forest areas and on certain Indian lands as defined by Acts of Congress. Additionally, jurisdiction extends to water and to air spaces in which the state shares jurisdiction with regulatory agencies of other states or of the Federal government. The definition is taken directly from the Illinois source.

Statute: This subsection excludes from the definition of statute under this code such laws as Constitutional provisions, local ordinances, and administrative regulations.

Stolen Property: Under former law, receiving stolen property was an offense separate from larceny. While an essential element of the offense has always been the stolen character of the property, no definition of the term was provided. The new code makes receiving stolen property a form of Theft (MCA, 45-6-301). Because the new section on Theft also encompasses such forms of larceny as false pretenses, larceny by trick, deceptive practices, and embezzlement, property which has been stolen by virtually any means is included within this definition. Property acquired through burglary and robbery is also stolen property as defined by this subsection. Robbery (MCA, 45-5-401) is a crime against the person. Burglary (MCA, 45-6-204) prohibits "breaking and entering". Although theft may be a basis for each crime, the stealing of property during the commission of the principal offense is a separate act. By using the word "obtain", this subsection eliminates former distinctions concerning whether the property interest acquired was title or possession. (See "obtain" in 45-2-101.) The wording for the definition comes directly from the Illinois source.

Stop: The new Stop and Frisk statutes (MCA, 46-5-401, 46-5-402 [now repealed]), allow a peace officer to detain a person for 30 minutes upon reasonable cause to suspect the person has committed an offense or may be of aid in the investigation of an offense. As defined in this subsection, a "stop" differs significantly from the term "arrest" which is a taking into custody (MCA, 46-6-101). Attention is directed to MCA, 46-5-401 and 46-5-402 [now repealed], for analysis and case annotations to the Stop and Frisk Law. [But see 1991 amendments to these sections.]

Tamper: This subsection defines a term used in the Criminal Mischief section (MCA, 45-6-101). It must be shown under that section that the offender engaged in the tampering conduct with the intent to cause danger or substantial interference to a person who had an interest in the property. Illustrative of the conduct which would come within this definition are such acts as meddling with public utility equipment and the malicious disarrangement of papers and files. It should also be noted that "depositing refuse" is by this definition made criminal mischief. In this way the Criminal Mischief sections not only cover traditional meddling and destruction but also the offense of "littering", which was formerly covered by R.C.M. 1947, §§ 94-3335 through 94-3344, repealed, sec. 32, Ch. 513, Laws of Montana 1973. More serious interferences with property interests are proscribed by the sections on Arson (MCA, 45-6-102, 45-6-103) and the provisions relating to Criminal Trespass (MCA, 45-6-201 through 45-6-203).

Threat: Under prior law, the act of threatening another was made an offense in various sections on Assault and Extortion. Under the new code, a person is guilty of assault if he knowingly places another in apprehension of a physical contact (MCA, 45-5-201 through 45-5-204) but the term "threat" is no longer used in those sections. This subsection, instead, defines a term used in the new provisions on Theft (MCA, 45-6-301), Influencing Official and Political Matters (MCA, 45-7-102), and Intimidation (MCA, 45-5-203). Under those sections and the section on Attempt (MCA, 45-5-103) any obtainment of or attempted obtainment of property, services, political influence, or official favors or any threat to inflict harm, confinement, the commission of a crime, etc., on another is prohibited. The wording for this definition comes directly from Illinois.

Value: While the value of property has always been an important determinant in grading theft and related offenses, under prior law there was no statutory pronouncement concerning how value was to be ascertained. Under the new sections on Theft (MCA, 45-6-301) and Criminal Mischief (MCA, 45-6-101), if the value of the property interest invaded exceeds $150 [raised to $1,000 in 1999], the offense is classified as a felony—increased from $50 in the old code. [See compiler's comments note entitled "Pecuniary Loss v. Value" under 45-6-101.] Part (a) of this definition adheres to the traditional position that most items, both tangibles and intangibles, have a market value or replacement value which can be ascertained readily to determine the value of stolen property. Subparagraphs (i) and (ii) are to be used only when a portion of an item's value has been appropriated, as would occur when a chattel is taken and then returned or where the stolen item is a partially paid or discounted chose in action. In such cases, the value shall be either the economic loss suffered by the victim or the face amount of the instrument. In those instances where the stolen chattel has no value in the market place and has produced no ascertainable loss to the victim, the item is deemed to be worth less than $150 [raised to $300 in 1983], making the offense a misdemeanor. Paragraph (c) continues the rationale of In re Jones, 46 Mont. 122, 125, 126 P. 929 (1912), by allowing aggregation when several thefts have resulted from a "common scheme"—a series of acts motivated by a single criminal purpose (MCA, 45-2-101). It should be noted that valuation is not necessary in livestock thefts. The wording for this section is taken from the Proposed Michigan Code, but significant changes in terminology have been made. [Amended by Ch. 485, L. 1981, and Ch. 3, L. 1985.]

Vehicle: This definition is of importance in determining the nature of criminal trespasses (MCA, 45-6-201 through 45-6-203) which are classified according to the type of property interest invaded and by the potential danger to human life. Included within this definition are all those transportation devices defined by the Motor Vehicle Code (MCA, 61-1-101) as vehicles, including automobiles, motorcycles, motor driven cycles, emergency vehicles, buses, bicycles, farm and construction equipment, plus numerous vehicles not included within the Motor Vehicle Code such as railroad equipment, aquatic vessels, and aircraft. Any device which transports persons whether self-propelled or driven by motor or animal is a vehicle. A person who enters a vehicle without authority is punishable under Criminal Trespass to Vehicles (MCA, 45-6-202), while theft of vehicles is governed by the new comprehensive Theft sections (MCA, 45-6-301 through 45-6-327). This definition is also applicable to the phrase "motor-propelled vehicle" in MCA, 45-6-308.

Weapon: The use of a "weapon" determines in part whether an offender has committed simple or Aggravated Assault (MCA, 45-5-201, 45-5-202). Under prior law, assault was similarly graded by the use of a weapon, but because the term was not defined, continual problems arose in determining whether an instrument was a weapon and whether it could produce injury as used. According to this definition and the Aggravated Assault section (MCA, 45-5-202), the intentional use of anything capable of producing bodily injury—vehicle, firearm (loaded or unloaded), drug, poison, chemical, etc., which either places a person in reasonable apprehension of serious bodily injury or results in bodily injury of any degree, makes the actor criminally responsible. The wording for this subsection was adopted with some changes from the New York source. Attention is also directed to the renumbered section on Carrying Concealed Weapons (MCA, 45-8-316 through 45-8-331) which also employs this definition.

Witness: This subsection is a recodification of the term "witness" as defined in section 94-9001, R.C.M. 1947. In the new Criminal Code, the term is used in the section on Tampering With Witnesses and Informants (MCA, 45-7-206) and the renumbered sections on Witnesses From Without State (MCA, 46-15-112, 46-15-113). This definition, when read together with the substantive provision on Tampering [MCA, 45-7-206], prohibits any attempts to induce anyone about to give any testimony at an "official proceeding" (see MCA, 45-2-101[44]) to give false testimony, to withhold testimony, to elude legal process, or to absent himself from any governmental proceeding.

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ACTS

Instructions for Self-Destructive Activity Given From Afar — Elements of Aggravated Assault Satisfied Given Foreseeability of Injury: Posing as a doctor, Sherer made numerous telephone calls from Florida to Montana women, asking the women to do destructive things to their bodies under the guise of performing self-tests to diagnose possible infection. Three women harmed themselves at Sherer's suggestion, for which Sherer was convicted of two counts of criminal endangerment and one count of aggravated assault and ordered to register as a violent offender. Sherer appealed the aggravated assault charge, arguing that encouraging "someone to injure themselves does not constitute aggravated assault" and that the causation element was too remote to form the basis of an aggravated assault charge. The Supreme Court disagreed. Sherer's instructions to the victims were intended to produce the precise injuries suffered, and by admitting to the facts in the information, Sherer could not credibly claim that he did not intend the injuries because the injuries flowed directly from Sherer's instructions. Statutes defining aggravated assault, cause, act, and conduct gave fair warning that the nature of Sherer's conduct constituted the offense of aggravated assault if that conduct resulted in the intended injuries. The definition of aggravated assault does not require a defined parameter of proximity between defendant and victim or require that a defendant personally direct force toward the victim, but specifically contemplates that any form of communication may itself be sufficient conduct. Sherer was successful in causing the intended injury, and his attempts to blame the victim for falling for the deceptive, illegal activity were meritless. The aggravated assault conviction was affirmed. St. v. Sherer, 2002 MT 337, 313 M 299, 60 P3d 1010 (2002).

Failure or Omission: "Conduct" constituting the offense of involuntary manslaughter with a motor vehicle or reckless homicide, is the "act" of driving a motor vehicle in a manner likely to cause a collision resulting in death, with resulting collision and death, accompanied by the mental state of recklessness, while the act constituting the offense of failing to reduce speed to avoid an accident is the "act" of driving a motor vehicle and "failing" to reduce its speed to avoid collision, with such failure resulting in collision; since act includes failure or omission, the offense of failing to reduce speed to avoid an accident is the "act" of driving a motor vehicle in a manner likely to cause collision, with such act resulting in collision. In Interest of Vitale, 3 Ill.Dec. 603, 44 Ill. App.3d 1030, 358 N.E.2d 1288 (1976), affirmed 16 Ill.Dec. 456, 71 Ill.2d 229, 375 N.E.2d 87 (1978).

Specificity of Acts Proscribed: The statute which proscribed deviate sexual conduct (94-5-505, R.C.M. 1947, recodified as 45-5-505, MCA, renumbered 45-8-218) was held not to be unconstitutionally vague and ambiguous where 94-2-101, R.C.M. 1947 (now 45-2-101) set forth definitions which made the formulation of the offense specific and absolutely lacking in vagueness. St. v. Ballew, 166 M 270, 532 P2d 407 (1975). (See 2013 amendments to 45-2-101 and 45-8-218.)

Statute of Limitations — Continuing Series of Acts: Under the obstructing justice statute, defendant's failure to dig up the body which he had concealed or to indicate the concealment to the authorities did not constitute a continuing series of acts which prevented the 18-month limitations from running, and the Statute of Limitations commenced to run on the date of concealment and not on the date defendant disclosed to the authorities that he had concealed evidence. People v. Criswell, 12 Ill. App.3d 102, 298 N.E.2d 391, 77 ALR 3d 717 (1973).

AIDING OR ABETTING

Drug Sale — Completion of Transaction by Unanticipated Seller: The defendant was approached by undercover officers and agreed to set up a sale of drugs to them. At the time of the transaction, another individual showed up with the drugs rather than the person the defendant had told the officers was going to sell them the drugs. The defendant argued that he could not have had the requisite intent to abet the individual who had sold the drugs because he did not even know that person was going to appear. The Supreme Court ruled that the defendant could be convicted of the crime because the necessary intent was his intent to help the undercover officers purchase illegal drugs, not the intent to assist a particular individual in selling the drugs. St. v. Downing, 240 M 215, 783 P2d 412, 46 St. Rep. 2065 (1989).

ANOTHER

Charge of Assault With Weapon Limited to Intended Victim: After threatening to shoot his estranged wife's boyfriend during a telephone call, Smith was charged with one count of assault with a weapon for causing reasonable apprehension in the wife that the boyfriend would be shot and a second count for causing reasonable apprehension in the boyfriend that he would be shot. As part of a plea agreement, the second count was dismissed. Smith then moved to dismiss the first count on grounds that use of the word "another" in the statute meant that reasonable apprehension of serious bodily injury was apprehension experienced by the intended victim, not by a third-party victim who suffers apprehension of reasonable harm to the intended victim. The Supreme Court agreed. Thus, to convict Smith of assault with a weapon required that Smith caused reasonable apprehension of serious bodily injury in the boyfriend. Although that crime was properly charged in the second count, that count was dismissed. The first count was not a proper charge and should have been dismissed, and the District Court erred in not doing so. St. v. Smith, 2004 MT 191, 322 M 206, 95 P3d 137 (2004).

Person Other Than Offender: Complaint which charged that accused, "with the intent to obtain control over property of TOTAL CONCEPT, 1420 North Main Street, Rockford, Illinois, delivered to TOTAL CONCEPT a check . . . with an intent to defraud and knowing . . . that it would not be paid", sufficiently alleged a "person" within this section to the effect that, with regard to the fact that essential elements of deceptive practice offense are the intent to defraud and obtain control over property of "another", the term "another" means a person or persons other than the offender. People v. Curtis, 22 Ill. App.3d 4, 316 N.E.2d 557 (1974).

BODILY INJURY

Motion to Dismiss for Lack of Evidence Properly Denied: Tuomala moved to dismiss a charge of partner or family member assault on grounds that there was insufficient evidence to sustain the charge. The motion was denied, and on appeal Tuomala argued that the state failed to prove that the victim suffered bodily injury in the form of pain or impairment of physical condition. The Supreme Court held that the definition of bodily injury encompasses physical pain or impairment of physical condition. Multiple witnesses testified that Tuomala struck the victim and pinned the victim against the wall. Photographic evidence showed scratches and other injuries on the victim's face and neck. Viewed in a light most favorable to the state, the evidence was sufficient for a rational trier of fact to find that Tuomala's actions caused physical pain or impairment. The Supreme Court affirmed. St. v. Tuomala, 2008 MT 330, 346 M 167, 194 P3d 82 (2008).

Sufficient Evidence to Support Conviction of Assault of Police Officer: Bay appeared in District Court on a bench warrant, was held in contempt, and, upon attempting to leave the courtroom, had an altercation with a police officer who attempted to restrain Bay, resulting in injury to the officer. Bay was subsequently convicted of assault of a police officer and appealed on grounds of insufficient evidence. However, there was sufficient evidence that Bay was aware of the high probability that shoving the officer hard enough to knock the officer backward would result in physical pain to the officer and thus acted knowingly. The conviction was affirmed. St. v. Bay, 2003 MT 224, 317 M 181, 75 P3d 1265 (2003).

CAUSATION

Physician Convicted Over Prescriptions of Dangerous Drugs — Actions Outside Course of Professional Practice — Affirmed in Part, Reversed in Part: The defendant, a general physician who practiced in Montana, was convicted of 2 counts of negligent homicide, 9 counts of criminal endangerment, and 11 counts of criminal distribution of dangerous drugs, all relating to pain medication prescriptions he administered. On appeal, the defendant raised multiple issues relating to his prosecution, including arguing that 45-9-101 did not prohibit "prescribing" of dangerous drugs and that 45-5-207 was unconstitutionally vague. The Supreme Court held that the plain language of 45-9-101 did not prohibit the defendant from being prosecuted, that 45-5-207 was not unconstitutionally vague, and that the District Court properly instructed the jury as to the offense of criminal distribution. However, the Supreme Court reversed and vacated the defendant's conviction for two counts of negligent homicide because the state did not meet its burden that the defendant was the cause-in-fact of the victims' deaths. St. v. Christensen, 2020 MT 237, 401 Mont. 247, 472 P.3d 622.

Instructions for Self-Destructive Activity Given From Afar — Elements of Aggravated Assault Satisfied Given Foreseeability of Injury: Posing as a doctor, Sherer made numerous telephone calls from Florida to Montana women, asking the women to do destructive things to their bodies under the guise of performing self-tests to diagnose possible infection. Three women harmed themselves at Sherer's suggestion, for which Sherer was convicted of two counts of criminal endangerment and one count of aggravated assault and ordered to register as a violent offender. Sherer appealed the aggravated assault charge, arguing that encouraging "someone to injure themselves does not constitute aggravated assault" and that the causation element was too remote to form the basis of an aggravated assault charge. The Supreme Court disagreed. Sherer's instructions to the victims were intended to produce the precise injuries suffered, and by admitting to the facts in the information, Sherer could not credibly claim that he did not intend the injuries because the injuries flowed directly from Sherer's instructions. Statutes defining aggravated assault, cause, act, and conduct gave fair warning that the nature of Sherer's conduct constituted the offense of aggravated assault if that conduct resulted in the intended injuries. The definition of aggravated assault does not require a defined parameter of proximity between defendant and victim or require that a defendant personally direct force toward the victim, but specifically contemplates that any form of communication may itself be sufficient conduct. Sherer was successful in causing the intended injury, and his attempts to blame the victim for falling for the deceptive, illegal activity were meritless. The aggravated assault conviction was affirmed. St. v. Sherer, 2002 MT 337, 313 M 299, 60 P3d 1010 (2002).

Jury Instructions on Proximate Cause Not Appropriate in Criminal Case: Defendant in a homicide case argued that refusal to give his offered instructions on proximate causation deprived him of the opportunity for the jury to consider his theory that the victim's death was a result of the victim's own negligence. Proximate cause is not a term that is generally used in criminal jury instructions. Problems created by concepts of proximate cause should be faced as problems of the culpability required for conviction and not as problems of causation. St. v. Magruder, 234 M 492, 765 P2d 716, 45 St. Rep. 2075 (1988).

Negligent Homicide and Causation Proven — Shooting Victim in Third Party's House: Proof of causation of death and of negligent homicide was shown beyond a reasonable doubt where defendant left his apartment in a depressed state at about 12:20 a.m., left his lawyer's telephone number with his live-in girlfriend in case he got into trouble, took a loaded .357 magnum handgun with him, indicated he wanted to photograph his recently divorced ex-wife's boyfriend's auto, which he had earlier seen at her home, went to her home, did not photograph the auto, was not permitted to be at her home, opened a locked door with a key, took pictures of his ex-wife and boyfriend in an intimate position, ordered them to sit down, threatened them with the gun, and struggled with the boyfriend, who was shot and killed. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

COMMON SCHEME

Youth Offender Jointly and Severally Liable for Restitution Award — Failure to Consider Youth's Ability to Pay — Plain Error Warranting New Restitution Hearing: At his plea hearing, the youth defendant admitted to having committed criminal mischief as part of a common scheme, in violation of 45-6-101 and 45-2-101. The youth admitted his participation in 2 nights of vandalism, causing $16,020.63 in damages, out of 11 total nights of vandalism, worth total damages of $78,702.09. At the restitution hearing, the Youth Court held the youth jointly and severally liable for the entire $78,702.09 without inquiring into the extent of the youth's assets or prospects for future earnings. On appeal, the Supreme Court held that it was plain error for the Youth Court to fail to consider the youth's ability to pay the restitution. The Supreme Court took up the issue sua sponte because the error implicated the youth's fundamental constitutional rights under Article II, sec. 15, Mont. Const., as a youth in the Youth Court system faces a different disposition and therefore is not similarly situated to an adult who commits the same offense. Additionally, the criminal mischief statute at 45-6-101(2) expressly requires the court to impose restitution only after fully considering the convicted person's ability to pay. The Supreme Court held that the Youth Court's failure to consider the youth's ability to pay raised questions of the fundamental fairness of the proceedings against him and remanded for a new restitution hearing to consider the youth's ability to pay the full amount of restitution. In re K.E.G., 2013 MT 82, 369 Mont. 375, 298 P.3d 1151.

Admissibility of Evidence of Other Crimes — "Plan" Synonymous With "Common Scheme" — Sixteen-Year Period Since Prior Acts Considered Too Remote to Constitute Common Scheme: To prevent convictions based merely on a jury finding that someone has a propensity to do certain things, Rule 404, M.R.Ev. (Title 26, ch. 10), provides that evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity with character on a particular occasion. One exception to that rule allows admission of character evidence when other crimes prove a defendant's plan. Although the word "plan" is not a defined term of art in the context of the criminal code, the Supreme Court determined that a plan is encompassed within the definition of common scheme in this section. In the present case, character evidence was admitted on the basis that the sexual assault committed by Aakre upon his stepgranddaughter was sufficiently similar to an assault by Aakre upon his stepdaughter 16 years earlier to establish a plan or modus operandi because of the similarity of the incidents, and because both involved a continuous pattern of conduct rather than a single instance of conduct. Following conviction, Aakre moved for a new trial on grounds that the other crimes evidence was improperly admitted under St. v. Sweeney, 2000 MT 74, 299 M 111, 999 P2d 296 (2000), and the motion was granted. The state appealed, but the Supreme Court affirmed. Aakre's alleged plan did not meet the definition of common scheme for several reasons. Evidence of the prior crimes did not prove that Aakre was motivated by a purpose to accomplish a single criminal objective or by a common purpose or plan resulting in the repeated commission of the same offense. Further, incidents occurring 16 years apart were not considered near enough in time to establish a common scheme. St. v. Aakre, 2002 MT 101, 309 M 403, 46 P3d 648 (2002).

Joinder of Criminal Counts of Similar Character — Factors in Determining Similarity of Crimes: Southern was charged with two counts of kidnapping, one count of burglary, one count of theft, and five counts of sexual intercourse without consent. Southern moved to sever the nine counts in the information into four separate trials, pursuant to 46-13-211, based on there being four different victims. Southern claimed a lack of similarity of the alleged crimes. The motion to sever was denied, and Southern was convicted on all nine counts and subsequently appealed. Although not determinative, some factors that are relevant to whether charges in an information are of the same or similar character include whether: (1) the charges are brought under the same statute; (2) the charges involve similar victims, locations, or modus operandi; (3) the conduct charged occurred in a narrow timeframe; and (4) the conduct charged occurred in a limited geographical area. Southern sought to differentiate the crimes by pointing out that the rapes occurred at different times of day, that some involved use of a knife while others did not, and that not all the rapes took place in the victims' homes. The Supreme Court held that despite these differences, the five counts of sexual intercourse without consent were properly joined because the crimes were of sufficiently similar character, being charged under the same statute. Counts may also be joined if the offenses constitute parts of a common scheme or plan. Thus, the kidnapping, burglary, and theft counts were also properly joined because, by definition, they were part of a common scheme linked by motive and because one charge precipitated the second charge, so overlapping proof would have been required regarding those counts and the accompanying counts of sexual intercourse without consent. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999), following St. v. Richards, 274 M 180, 906 P2d 222, 52 St. Rep. 1176 (1995).

Consecutive Sentences Upon Conviction for Multiple Thefts, Common Scheme — Prosecutorial Discretion Correctly Exercised — No Double Jeopardy Found: During a 5-day period in April 1994, Savaria issued bad checks upon the same nonexistent checking account to numerous retail merchants in the Missoula area. He was charged with six counts of theft, common scheme, to which he pleaded guilty. The District Court sentenced Savaria to consecutive 10-year sentences on each of the counts, which Savaria argued constituted multiple punishments for commission of the same offense, in violation of the constitutional prohibition against double jeopardy. The Supreme Court recognized that the U.S. Constitution prohibits both multiple punishments for the same offense and multiple prosecutions for offenses arising out of the same transaction, but, after application of the test announced in Blockburger v. U.S., 284 US 299 (1932), and in reliance upon St. v. Crowder, 248 M 169, 810 P2d 299 (1991), and Stilson v. St., 278 M 20, 924 P2d 238 (1996), held that the prosecutor had the discretion to charge each of the bad check writing incidents as an individual felony theft, common scheme, pointing out that each of the multiple common schemes was supported by separate and distinct evidence. The Supreme Court held that the District Court therefore did not err in imposing consecutive sentences on the separate charges because they were not prohibited by the constitutional prohibition against double jeopardy. St. v. Savaria, 284 M 216, 945 P2d 24, 54 St. Rep. 852 (1997).

Common Scheme Bad Check Writing:

Defendant was convicted of issuing bad checks, common scheme, a felony, after issuing or delivering a total of nine checks to various businesses and individuals over the course of a year, knowing the checks would not be paid by his bank. The court held that the repeated issuance of one bad check after another fits the definition of common scheme as found in this section. St. v. Fleming, 225 M 48, 730 P2d 1178, 44 St. Rep. 31 (1987).

Acts alleged to be a common scheme must be either individually incomplete, such that they show a single crime has been committed, or they must be acts which closely follow one another, evidencing a criminal design. The writing of bad checks on one bank in April and May of 1983 and on another bank in the fall of 1983 were acts which closely followed one another and thus established a common scheme. The fact that the banks paid some checks and dishonored other checks was irrelevant to the finding of a continuing criminal design in this case. St. v. McHugh, 215 M 296, 697 P2d 466, 42 St. Rep. 371 (1985).

Sufficient Evidence of Common Scheme Felony Theft: Evidence was sufficient to prove common scheme felony theft when defendant committed 19 related acts of misappropriation of school district property for personal gain over a 5-year period after being warned orally and in writing that his activities were unauthorized and unacceptable. St. v. Milhoan, 224 M 505, 730 P2d 1170, 43 St. Rep. 2371 (1986).

Instruction Restating Statute: Appellant asserted that the court's instruction on "common scheme" was an inadequate statement of the law. The instruction was taken directly from the definition of the term in this section, and it is not reversible error to give an instruction which restates statutory language. St. v. Hankins, 209 M 365, 680 P2d 958, 41 St. Rep. 762 (1984).

Common Scheme Forgery — Affidavit to Support Information: The District Court held that the affidavit accompanying an information charging common scheme forgery was insufficient. An affidavit must include sufficient facts to convince a judge that there is probable cause to believe the named defendant may have committed the crime described in the information. Proof of "common scheme" requires proof that the suspect series of acts constitute a common criminal scheme. These acts must be either individually incomplete, such that they show that a single crime had been committed, or be acts which follow one another evidencing a continuing criminal design. In this case the affidavit had an insufficient connection between activities. There was no showing of continuous design between the money orders, building permits, forgery activity, and defendant's other activities described in the affidavits. St. v. Renz, 192 M 306, 628 P2d 644, 38 St. Rep. 720 (1981).

Similar Offenses — Not to Be Combined to Charge Felony — Not Same for Venue: Defendants were charged with theft of coins from a juke box in Roosevelt County and also with the same offense in Blaine County. Defendants were originally charged with misdemeanor theft in Blaine County and later charged with felony theft in an amended information combining the offense in Roosevelt County. Defendants objected, claiming the offenses were unrelated and that venue for the Roosevelt County theft did not properly lie in Blaine County. The general venue rule is that in criminal actions venue is proper only in the jurisdiction where the crime occurred. The State claimed that the offense fit into the "common scheme" exception, where the acts requisite to the commission of a crime, occurring in more than one jurisdiction, establish proper venue in any one of the affected counties. The court held that the offenses were linked by similarity and nothing else. The court held that two separate and distinct offenses had occurred in two different jurisdictions. Under Montana law, the crimes must be charged and tried in the counties where they occurred. St. v. Adams, 190 M 233, 620 P2d 856, 37 St. Rep. 2053 (1980).

CONDUCT

Criminal Endangerment and Failure to Act — Parent-Child Duty Applicable to Children in Cohabiting Households: A jury convicted the defendant of criminal endangerment for swinging her boyfriend's 6-month-old child headfirst against the child's crib, causing serious bodily injury to the child. On appeal, the defendant argued that the District Court erred in instructing the jury on criminal endangerment predicated on the defendant's failure or omission to act because the defendant had no legal duty to aid the child. Following the rationale of St. ex rel. Kuntz v. District Court, 2000 MT 22, 298 Mont. 146, 995 P.2d 951, which recognized a mutual reliance duty owed between two people who were not closely related but lived together, the Supreme Court held that the parent-child duty applies to children present in households of cohabiting adults. Because the defendant established a personal relationship similar to that of a parent with the victim, a common-law duty to protect the victim from harm existed, and the defendant's breach of that duty constituted an appropriate basis for her conviction of criminal endangerment. St. v. Hocter, 2011 MT 251, 362 Mont. 215, 262 P.3d 1089.

Instructions for Self-Destructive Activity Given From Afar — Elements of Aggravated Assault Satisfied Given Foreseeability of Injury: Posing as a doctor, Sherer made numerous telephone calls from Florida to Montana women, asking the women to do destructive things to their bodies under the guise of performing self-tests to diagnose possible infection. Three women harmed themselves at Sherer's suggestion, for which Sherer was convicted of two counts of criminal endangerment and one count of aggravated assault and ordered to register as a violent offender. Sherer appealed the aggravated assault charge, arguing that encouraging "someone to injure themselves does not constitute aggravated assault" and that the causation element was too remote to form the basis of an aggravated assault charge. The Supreme Court disagreed. Sherer's instructions to the victims were intended to produce the precise injuries suffered, and by admitting to the facts in the information, Sherer could not credibly claim that he did not intend the injuries because the injuries flowed directly from Sherer's instructions. Statutes defining aggravated assault, cause, act, and conduct gave fair warning that the nature of Sherer's conduct constituted the offense of aggravated assault if that conduct resulted in the intended injuries. The definition of aggravated assault does not require a defined parameter of proximity between defendant and victim or require that a defendant personally direct force toward the victim, but specifically contemplates that any form of communication may itself be sufficient conduct. Sherer was successful in causing the intended injury, and his attempts to blame the victim for falling for the deceptive, illegal activity were meritless. The aggravated assault conviction was affirmed. St. v. Sherer, 2002 MT 337, 313 M 299, 60 P3d 1010 (2002).

Separate Acts:

Double jeopardy was held not to be a bar to convictions for both attempted escape and criminal mischief although proof of the digging of a hole in the jail wall established the requisite act for each offense. The Montana court held that the defendants could be prosecuted for both offenses because the crimes had different elements and the prosecution was required to establish differing facts in proving two distinct mental states and two separate criminal results. St. v. Davis, 176 M 196, 577 P2d 375 (1978).

Where defendants robbed an occupant of an apartment and then beat him up and stabbed him, the beating and stabbing were held to be independently motivated and accompanied by a different mental state from the initial threat of force and did not constitute the same "conduct", thus, the imposition of sentences for both armed robbery and aggravated battery was not improper. People v. Whitley, 18 Ill. App.3d 995, 311 N.E.2d 282 (1974).

Separate offenses may arise from a series of closely related acts which consist of crimes which are clearly distinct and require different elements of proof. People v. Montgomery, 18 Ill. App.3d 828, 310 N.E.2d 760 (1974).

Where battery immediately precedes robbery, it is normally held to be a component of a robbery; if it follows the robbery, it is usually regarded as a separate offense. People v. Ashford, 17 Ill. App.3d 592, 308 N.E.2d 271 (1974).

Where second theft of item from an automobile in a parking lot was separate and distinct, even though closely related in time and space from the first theft of another item from another automobile in the same lot, the offenses were held not to have arisen out of the same conduct and it was not error to sentence defendant for each offense with the sentences to run consecutively. People v. Sykes, 10 Ill. App.3d 657, 295 N.E.2d 323 (1973).

Separate sentences may be imposed for distinct acts which are independently motivated or otherwise separable although they arise out of the same conduct. People v. Thompson, 3 Ill. App.3d 684, 278 N.E.2d 1 (1972). In People v. Gates, 123 Ill. App.2d 50, 259 N.E.2d 631, 635 (1970), in which the Illinois court held that where the three offenses charged involved three different mental states, the offenses did not result from the same conduct and the defendant's conviction did not improperly amount to convictions of several offenses arising from the same transaction. Similarly, in People v. Walker, 2 Ill. App.3d 1026, 279 N.E.2d 23 (1971), defendant's actions in threatening complainant with death, raping her twice, then slitting her throat and abdomen and thereafter robbing her and leaving her to the elements were held to constitute three separate acts for which consecutive sentences could be imposed upon conviction of rape, armed robbery, and attempted murder, since the three offenses, although not wholly unrelated, involved three distinct mental states and hence did not result from the same "conduct".

In a bar holdup where the defendant's companion shot the bartender after the bartender sought to prevent the robbery, firing of a fatal shot represented the commencement of a new, distinct, and separable course of action from the attempted robbery. People v. Tolliver, 133 Ill. App.2d 266, 273 N.E.2d 274, 278 (1971).

Single Act: It is often difficult to determine at which point one course of conduct ends and another begins. An Illinois court has ruled that aggravated battery and an ensuing rape resulted from the same conduct so that imposition of separate sentences for the two crimes was improper and conviction for the lesser crime of aggravated battery had to be reversed. People v. Weaver, 93 Ill. App.2d 31, 236 N.E.2d 362, 365 (1968). Similarly, concurrent sentences on charges of rape and burglary with intent to commit rape were held to be not authorized, where burglary with intent to commit rape was held to be a lesser included offense. People v. Ritchie, 66 Ill. App.2d 302, 213 N.E.2d 651, 657 (1966), affirmed 36 Ill.2d 392, 222 N.E.2d 479 (1967). Where defendant was apprehended in the act of attempting to pry open a door with two screwdrivers, the offenses of attempted burglary and possession of burglary tools were held to have resulted from the same "conduct" or "same transaction". People v. Gaines, 11 Ill. App.3d 14, 295 N.E.2d 569 (1973). Where defendant was demanding victim's money as he hit him with a board, there was only one act of misconduct and the sentence should have been for attempted armed robbery only. People v. Ashford, 17 Ill. App.3d 592, 308 N.E.2d 271 (1974).

In General: The U.S. Supreme Court has recently ruled that where the defendant was acquitted of robbing one of four men who were robbed in the same transaction, the fifth amendment guarantees against double jeopardy and the doctrine of collateral estoppel prohibited prosecution of the defendant for robbing another of the men when prosecution was based upon the same conduct as previously litigated. Ashe v. Swenson, 397 US 436, 443 (1970). However, when several offenses are based upon the "same conduct" of the defendant, he may be convicted of each, but only concurrent sentences may be imposed; when several offenses are not based upon the same conduct they may be prosecuted separately and sentence may be concurrent or consecutive. People v. Lerch, 131 Ill. App.2d 900, 268 N.E.2d 901, 904 (1971), reversed on other grounds, 52 Ill.2d 78, 284 N.E.2d 293 (1972). Conduct for which only one sentence may be imposed can involve a series of unlawful acts on part of defendant. People v. Walton, 13 Ill. App.3d 492, 301 N.E.2d 114 (1973). Whether two offenses have resulted from the same "conduct", so that more than one sentence cannot be imposed, must depend upon the circumstances in any given case unless one of the two offenses is necessarily involved in the other. People v. Sykes, 10 Ill. App.3d 657, 295 N.E.2d 323 (1973). The word "conduct" is used in the same sense as the "same transaction". People v. Weaver, 93 Ill. App.2d 31, 236 N.E.2d 362, 364 (1968). See also People v. Limauge, 89 Ill. App.2d 307, 231 N.E.2d 599, 601 (1967), in which the court held that prosecution and conviction of defendant for driving while his license was revoked did not prevent subsequent prosecution of the defendant for reckless homicide.

CONVICTION

National Crime Information Center Record — Competent Proof of Prior Conviction: The District Court denied the defendant's motion to strike a prior conviction for purposes of enhancing the defendant's DUI charge to a felony. The conviction occurred out of state and was listed in the defendant's National Crime Information Center (NCIC) record. The defendant challenged the conviction's existence, noting the lack of a disposition or sentence in the record. The District Court found that a presumption of regularity attaches to the prior record that defendant failed to rebut. On appeal, the Supreme Court affirmed, stating that the NCIC criminal record is competent proof that the prior conviction occurred. St. v. Holder, 2020 MT 61, 399 Mont. 214, 459 P.3d 1282.

Consideration of Idaho Offenses Proper When Third Offense Amended to Second Offense Through Plea Bargain — No Violation of Full Faith and Credit Clause: The defendant moved to dismiss his felony DUI offense, arguing that his previous DUI offenses in Idaho that served as the underlying offenses for the felony charge in Montana were counted incorrectly since he reached a plea agreement in Idaho that amended his third offense to a second offense. The District Court denied the defendant's motion to dismiss and the Supreme Court affirmed, holding that the District Court was required to count all three of his prior convictions in Idaho when sentencing him for his Montana DUI since the Idaho convictions had not been expunged, dismissed, or vacated. The Supreme Court also held that the full faith and credit clause of the U.S. Constitution did not prohibit Montana from enforcing Idaho's judgment according to Montana's statutory scheme for DUI penalties. St. v. Barrett, 2015 MT 303, 381 Mont. 299, 358 P.3d 921, following St. v. Blue, 2009 MT 304, 352 Mont. 382, 217 P.3d 82, and distinguishing St. v. Cleary, 2012 MT 113, 365 Mont. 142, 278 P.3d 1020.

Out-of-State DUI — No Conviction for Felony DUI Purposes: The suspended imposition of sentence that the defendant received following his plea of guilty to a DUI per se offense in South Dakota did not constitute a conviction for the purpose of enhancing the defendant's charges to a felony DUI because, pursuant to another South Dakota law to which Montana has no similar counterpart, the South Dakota suspended imposition of sentence was vacated and completely expunged from the defendant's record, thereby precluding it from counting as a previous conviction. St. v. Cleary, 2012 MT 113, 365 Mont. 142, 278 P.3d 1020.

"Conviction" Based on Verdict and Sentence in District Court — Petition for Postconviction Relief Time-Barred: Redcrow was convicted in February 1988, and sentence was imposed in October 1988. Following affirmation of the conviction by the Supreme Court in 1990, Redcrow filed a petition for postconviction relief in District Court in March 1995. The petition was denied as untimely. Redcrow appealed, asserting that the date of conviction was in 1990 on the date on which the Supreme Court affirmed the original murder conviction in St. v. Redcrow, 242 M 254, 790 P2d 449, 47 St. Rep. 672 (1990), rather than the date of the District Court conviction in 1988, which would render the statutory filing bar inapplicable. Applying the definition of "conviction" in this section and Beach v. Day, 275 M 370, 913 P2d 622, 53 St. Rep. 184 (1996), the Supreme Court held that Redcrow was considered convicted when the jury rendered the guilty verdict and sentence was imposed in District Court in 1988; thus, the petition for postconviction relief, filed 6½ years later, was time-barred under the 1988 version of 46-21-102. St. v. Redcrow, 1999 MT 95, 294 M 252, 980 P2d 622, 56 St. Rep. 409 (1999).

Dangerous Offender Designation — Prior Conviction Required: Defendant was convicted of robbery and designated a dangerous offender. The felony burglary conviction upon which the defendant's dangerous offender designation was based was not a conviction for these purposes, because the burglary conviction did not occur until some time after he was found to be a dangerous offender. The fact that the defendant had pleaded guilty to burglary at the time of his designation as a dangerous offender was of no consequence because the statute required a felony conviction within the 5 years preceding the commission of the offense for which the defendant was being sentenced. St. v. Fisher, 190 M 295, 620 P2d 1215, 37 St. Rep. 1988 (1980).

Probable Cause Hearing: Defendant was not placed in jeopardy at a proceeding before a judge which was nothing more than a probable cause hearing, clearly defined and described as such, and where no finding of guilt or innocence was made, although the judge had jurisdiction to try misdemeanor cases. People v. Tate, 47 Ill. App.3d 33, 361 N.E.2d 748 (1977).

Imposition of Sentence: Conviction is not final for purposes of appeal until the sentence is imposed. People v. Pruitt, 45 Ill. App.3d 399, 359 N.E.2d 1051 (1976).

Defendant's Admission of Violation of Probation: Defendant's admission of a violation of probation was held to be a "conviction" entitling defendant to a postconviction hearing on his contention that his admission was induced by an unfulfilled promise by the state's attorney to recommend a different sentence than was imposed. People v. Pier, 51 Ill.2d 96, 281 N.E.2d 289 (1972).

Finding of Guilt: The term "conviction" means the finding of guilt by a court or jury and an adjudication of that fact. That occurred here. There was a finalized judgment of conviction in the trial court. If the term "conviction" means anything at all, it means a conviction finalized on the trial court level. People v. Spears, 83 Ill. App.2d 18, 226 N.E.2d 67, 71 (1967).

Convictions in Other Jurisdictions: A conviction under federal law cannot be the basis for disqualifying a voter unless such conviction would be classified as a felony under Montana law. Melton v. Oleson, 165 M 424, 530 P2d 466 (1974), overruling State ex rel. Anderson v. Fousek, 91 M 448, 8 P2d 791 (1932).

DECEPTION

Theft of Benefits by Deception — Induced Consent Ineffective Defense: After conviction of conspiracy to commit theft for obtaining workers' compensation benefits by deception, the defendant appealed, alleging that the State Fund consented to the defendant's actions by failing to diligently investigate false claims and by entering into a settlement for claims. The Supreme Court affirmed the District Court decision, ruling that consent induced by deception constitutes an ineffective defense. St. v. Young, 259 M 371, 856 P2d 961, 50 St. Rep. 839 (1993).

In General: In applying this definition to the Illinois theft section, which is substantially the same as the new Montana theft law, the Illinois courts have ruled that the theft section prohibits obtaining goods or property by false promises of future payments. People v. Kamsler, 67 Ill. App.2d 33, 214 N.E.2d 562, 565 (1966). In People v. Earles, 130 Ill. App.2d 695, 264 N.E.2d 550, 551 (1970), the Illinois court ruled that where the defendant had continually represented to the complaining witness that he was conducting a business, in order to deceive the complaining witness and induce him to invest in such business, the indictment charged a crime although the first misrepresentation and the only investment occurred before the law making such an activity an offense was enacted, where the misrepresentation had continued after the statute was in effect.

Instructions: The Illinois appellate court has held that instructions which define deception in language from which this section was derived were not erroneous because they failed to contain part of the section which stated that failure to perform standing alone was not evidence that the offender did not intend to perform, where the evidence showed eight failures to perform. People v. Kamsler, 67 Ill. App.2d 33, 214 N.E.2d 562, 567 (1966).

DEPRIVE

Permanent Deprivation Not Required to Establish Theft: In his job as a vacuum salesman, Doyle was allowed to check out vacuums in order to demonstrate and sell them, but instead he held himself out as the owner of the vacuums and pawned them, securing cash loans. Doyle maintained that he did not intend to permanently deprive the real owner of the vacuums, but rather intended to return them within the 30-day checkout period. However, the term "deprive" in the theft statute is not limited to permanent deprivations. Doyle withheld the property for a sufficient period to appropriate a portion of the value of the property, thereby using the property for the purpose of depriving the owner, in violation of 45-6-301. Doyle's theft conviction was affirmed. St. v. Doyle, 1999 MT 318, 297 M 270, 993 P2d 9, 56 St. Rep. 1270 (1999). See also St. v. Long, 227 M 199, 738 P2d 487, 44 St. Rep. 1008 (1987), and St. v. Mills, 2018 MT 254, 393 Mont. 121, 428 P.3d 834.

Definition of "Deprive" Not Mentioned in Felony Theft Case — Conviction Upheld on Evidence: Although the definition of "deprive" was not mentioned in the information or warrant charging felony theft and defendant contended he therefore did not understand the charge against him and was improperly allowed to plead guilty, there was substantial credible evidence through defendant's own admission of facts to support the plea and the legal conclusion that the rightful owners had been deprived of their property. St. v. Long, 227 M 199, 738 P2d 487, 44 St. Rep. 1008 (1987).

Terms Not Unconstitutionally Vague — Deprive and Reasonable Apprehension: Defendant challenged the terms "reasonable apprehension" in the aggravated assault statute and "deprive" in the theft statute as unconstitutionally vague. The court rejected the contention, indicating that the first term had been construed by the court before and that the second term was defined in 45-2-101. St. v. Campbell, 219 M 194, 711 P2d 1357, 42 St. Rep. 1948 (1985).

Theft From Store: The definitions of "deprive" are alternative definitions, and court in trial for theft of rings from jewelry store properly gave instruction giving a different definition than that contained in the instruction offered by defendant. The instruction offered by defendant referred to the permanent withholding of property of another. The instruction given adequately defined "deprive" as it applied to the facts, and defendant denied asserting any control whatsoever, so that there was no issue as to permanency. St. v. Johnson, 199 M 211, 646 P2d 507, 39 St. Rep. 1014 (1982).

DEVIATE SEXUAL RELATIONS

Deviate Sexual Relations: This definition and those contained in 45-2-101 (sexual contact and sexual intercourse) and section 94-2-101(68), R.C.M. 1947, (now 45-5-501, definition of "without consent"), when read into 45-5-505 (renumbered 45-8-218), prohibiting deviate sexual conduct, are sufficient to protect 45-5-505 (renumbered 45-8-218) from the contention that it is unconstitutional for vagueness. St. v. Ballew, 166 M 270, 532 P2d 407 (1975). See Gryczan v. St., 283 M 433, 942 P2d 112, 54 St. Rep. 699 (1997), holding that noncommercial, same-sex, consensual sex between adults is constitutionally protected. (See 2013 amendments to 45-2-101 and 45-8-218.)

FELONY

Defendant Properly Sentenced as Repeat Persistent Felony Offender — Notice Proper — All Statutory Requirements Satisfied: The District Court did not err when it sentenced the defendant as a repeat persistent felony offender (PFO) under 46-18-502(2). The prior conviction specified in the PFO notice was a conviction for which the defendant was designated a PFO. That was sufficient notice that the defendant was a PFO at the time of his previous felony conviction, which placed him under 46-18-502(2) for sentencing purposes. Additionally, the defendant satisfied all of the requirements to be sentenced under 46-18-502: (1) robbery by accountability and assault with a weapon are both felonies within the meaning of 45-2-101; (2) the defendant was previously designated a PFO; (3) less than 5 years had elapsed between his 2012 felony conviction for which he was designated a PFO and the present felony offenses; (4) the defendant was over 21 years of age when he committed the present offense; and (5) the defendant was not pardoned, and his sentence was not commuted. Thus, the District Court correctly concluded that it had no choice but to sentence the defendant pursuant to 46-18-502(2) and (4). St. v. Martin, 2019 MT 44, 394 Mont. 351, 435 P.3d 73.

Trafficking as Misdemeanor by Classification: Regardless of the statement in 87-3-111 (now repealed, but see 87-6-202) that trafficking in game animals is a felony (see 1991 amendment), because the jail sentence for a trafficking violation does not exceed 1 year, under classification rules provided by the Legislature, trafficking may not be considered a felony. St. v. Gibbs, 244 M 251, 797 P2d 928, 47 St. Rep. 1584 (1990).

Convictions in Other Jurisdictions: Under this section, the sentence actually imposed after conviction determines whether the defendant is guilty of a felony or a misdemeanor. Melton v. Oleson, 165 M 424, 530 P2d 466 (1974). This definition relates only to crimes under state law and does not apply to crimes classified by federal statutes. A conviction under federal law cannot be the basis for disqualifying a voter unless such conviction would be classified as a felony under Montana law.

Federal Law: Under federal law, the maximum potential punishment determines whether an offense constitutes a felony or misdemeanor as contradistinguished from the prevailing Montana rule under which crimes are classified as felonies or misdemeanors by the punishment actually imposed. State ex rel. Anderson v. Fousek, 91 M 448, 8 P2d 791, 84 ALR 303 (1932), overruled on other grounds in Melton v. Oleson, 165 M 424, 530 P2d 466 (1974).

Felony or Misdemeanor: The potential maximum sentence determined the grade of the crime until sentence was imposed where the offense was neither divisible into degrees nor inclusive of lesser offenses and punishment was in the discretion of the court or jury; if the sentence imposed was other than imprisonment in the state prison, the offense was considered a misdemeanor under 94-114, R.C.M. 1947 (since repealed). St. v. Atlas, 75 M 547, 244 P 477 (1926).

FELONY-MURDER

Felony-Murder Statute as Supplying Causal Connection Element: Turner facilitated a burglary during a riot at the state prison by feloniously propping open an entrance gate, which conduct subsequently contributed to the deaths of several inmates. Turner contended that the state failed to establish a causal connection between the felonious act and the deaths. However, the felony-murder rule itself supplies the causal connection element by requiring that the death occur "in the course of the forcible felony or flight thereafter". St. v. Turner, 265 M 337, 877 P2d 978, 51 St. Rep. 467 (1994).

FORCIBLE FELONY

Adequacy of Jury Instructions — Definition of Statutory Term — Case-by-Case Determination: Defendant in a deliberate homicide case argued that a proposed jury instruction defining "forcible felony" was refused incorrectly. As in an earlier case, the Montana Supreme Court held that a definition of every term in an applicable statute need not be given but rather, by necessity, each case must be considered on its own facts as to the adequacy of instructions on every theory having support in the evidence presented. Here, the definition of "forcible felony" added nothing to the term being defined and the lack of the instruction could not prevent the defendant from fully presenting his case to the jury. Therefore, there was no error in refusing the proposed instruction. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Threat of Violence: Defendant's advice to the victim that defendant had been hired to kill the victim but if given a certain sum would leave the city was reasonably construed as a "threat of physical force or violence" under this section, despite its conditional character. People v. Rhodes, 38 Ill. App.2d 389, 231 N.E.2d 400, 404 (1967).

HUMAN BEING

Conspiracy to Commit Deliberate Homicide — Fictitious Victim — Distinction Between Factual and Legal Impossibility — Factual Impossibility No Defense: Defendant was charged with conspiracy to commit deliberate homicide when he accepted money to kill an individual who was fictitious. Legal impossibility is a defense to conspiracy but factual impossibility is not. This is a case of factual impossibility. While the intended victim of the deliberate homicide was fictitious, there appears to be a basis for proving the elements of conspiracy. The fact that the homicide could not have been carried out is immaterial. St. v. Houchin, 235 M 179, 765 P2d 178, 45 St. Rep. 2290 (1988).

INTOXICATING SUBSTANCE

Vodka: While this subsection (94-35-107, R.C.M. 1947), does not use the word vodka, any beverage containing more than 0.5% of alcohol is an intoxicating liquor and court could take judicial notice of commonly accepted and generally understood definition of word "vodka" under section 93-501-1, R.C.M. 1947 (since repealed). St. v. Wild, 130 M 476, 305 P2d 325 (1956).

INVOLUNTARY ACT

Volitionally Impaired Defendant — Due Process Met: Defendant was charged with attempted deliberate homicide and aggravated assault. He gave notice of his intent to rely on a mental disease or defect to prove he did not have the particular state of mind that is an essential element of the offense charged. After conviction defendant appealed, contending that Montana's statutory insanity defense scheme did not recognize those who lack the ability to conform their conduct to the law. He contended that this elimination of the involuntariness defense violated due process. The Supreme Court held that the volitional aspect of mental disease or defect has not been eliminated from Montana law. Consideration of that factor has been transferred from the jury to the sentencing judge under 46-14-311. Section 45-2-202 provides that a voluntary act is a material element of every offense. That section and the definition of involuntary act in 45-2-101(31) adequately provide for an involuntariness defense. St. v. Korell, 213 M 316, 690 P2d 992, 41 St. Rep. 2141 (1984).

KNOWINGLY

Physician Convicted Over Prescriptions of Dangerous Drugs — Actions Outside Course of Professional Practice — Affirmed in Part, Reversed in Part: The defendant, a general physician who practiced in Montana, was convicted of 2 counts of negligent homicide, 9 counts of criminal endangerment, and 11 counts of criminal distribution of dangerous drugs, all relating to pain medication prescriptions he administered. On appeal, the defendant raised multiple issues relating to his prosecution, including arguing that 45-9-101 did not prohibit "prescribing" of dangerous drugs and that 45-5-207 was unconstitutionally vague. The Supreme Court held that the plain language of 45-9-101 did not prohibit the defendant from being prosecuted, that 45-5-207 was not unconstitutionally vague, and that the District Court properly instructed the jury as to the offense of criminal distribution. However, the Supreme Court reversed and vacated the defendant's conviction for two counts of negligent homicide because the state did not meet its burden that the defendant was the cause-in-fact of the victims' deaths. St. v. Christensen, 2020 MT 237, 401 Mont. 247, 472 P.3d 622.

Effect of Giving Improper "Conduct" Jury Instruction Instead of "Result" Instruction — Harmless Error When Substantial Rights Unaffected: A defendant was charged with attempted deliberate homicide and aggravated assault, both of which require a result-based mental state instruction to the jury. However, the jury was given conduct-based instructions for "knowingly" and "purposely," and the defendant was convicted on all counts. On appeal, the defendant argued that the jury was given improper instructions, which the state admitted to be true. The Supreme Court affirmed the conviction, finding that no facts were presented in the case from which an argument could be made that the defendant intended to shoot the victims but did not intend any harm to result from that conduct, and thus there was no prejudice to the defendant. St. v. Ilk, 2018 MT 186, 392 Mont. 201, 422 P.3d 1219.

Cruelty to Animals Conviction Proper — Horse Trailer Boarding Not Acceptable — Obvious Malnourishment — Knowledge of Owner: In a bench trial, the defendant was found guilty of three misdemeanor counts of cruelty to animals for housing two stallions and a mare in a small stock trailer. She appealed the conviction and claimed that the state did not offer sufficient evidence to prove that she acted knowingly or negligently because a doctor testified that "in her mind" she was caring for the horses appropriately. The Supreme Court affirmed the conviction, reasoning that the defendant's actions demonstrated awareness that conditions in the trailer were inadequate. Additionally, multiple witnesses testified that the horses were obviously malnourished, unable to stand in the horse trailer, and visibly wounded and bleeding. The evidence was sufficient to allow a rational trier of fact to conclude beyond a reasonable doubt that the defendant knew, consciously disregarded the risk, or should have known there was a risk that she was cruelly confining the horses and failing to provide them with adequate food, water, and medical care. St. v. Beaudet, 2014 MT 152, 375 Mont. 295, 326 P.3d 1101.

Creating Reasonable Apprehension of Bodily Injury — Defendant's Subjective Intent to Create Apprehension Not Relevant: The defendant was convicted of partner or family member assault, in violation of 45-5-206. On appeal, the defendant argued that the District Court should have instructed the jury that the state was required to prove that the defendant intended his actions to cause his mother and brother a reasonable apprehension of bodily injury. The Supreme Court disagreed and held that the defendant was not entitled to a jury instruction regarding his subjective intent to cause a reasonable apprehension of bodily injury. Instead, the state was required to prove only that the defendant acted purposely or knowingly with regard to his conduct, not to the results of his conduct. St. v. Birthmark, 2013 MT 86, 369 Mont. 413, 300 P.3d 1140, following St. v. Martin, 2001 MT 83, 305 Mont. 123, 23 P.3d 216.

Jury Instructions Properly Reflecting Law — Plain Error Review Declined: The Supreme Court declined to invoke plain error review of the District Court's jury instructions when the Supreme Court had already concluded the jury instructions properly reflected the law regarding the requisite mental state for partner or family member assault in violation of 45-5-206, and thus there was no error. St. v. Birthmark, 2013 MT 86, 369 Mont. 413, 300 P.3d 1140.

Knowing Participation — Obtains or Exerts Control: Knowing participation, by acting as a lookout during a burglary of a computer and van keys and by driving a stolen van that the minor knew did not belong to him, met the definition of "obtains or exerts [unauthorized] control", "purposely", and "knowingly" under this section to satisfy the elements of felony theft under 45-6-301(1)(a). In re S.F., Jr., 2010 MT 244, 358 Mont. 185, 244 P.3d 316.

Deficient Representation Established for Failure to Object to Erroneous Instruction on What "Knowingly" Means: A jury instruction for the offense of obstructing a police officer that instructed the jury that "[a] person acts knowingly when the person is aware of his or her conduct" was erroneous since an obstruction charge could be established by merely proving that a person gave a dishonest answer. When a criminal offense requires that a defendant act "knowingly", a court must instruct the jury on what the term "knowingly" means in the context of the particular crime. In an obstruction charge, the prosecution must show that the defendant was aware that the conduct would impede the performance of the officer's lawful duty. St. v. Johnston, 2010 MT 152, 357 Mont. 46, 237 P.3d 70.

Proposed Instruction on Lesser Included Offense Properly Denied: In a Youth Court proceeding in which the defendant was charged with felony criminal endangerment, the defendant's proposed jury instruction on a lesser included negligent endangerment instruction was properly denied when the evidence established that the defendant knowingly took aim and fired a gun at moving vehicles and a pedestrian. In re T.J.B., 2010 MT 116, 356 Mont. 342, 233 P.3d 341.

Jury Instruction on Mental State of Knowingly With Respect to Sexual Contact Proper: At Gerstner's trial for sexual assault, the court instructed the jury that a person who knowingly subjects another person to sexual contact without consent commits the offense of sexual assault and that sexual contact means the touching of the sexual or other intimate parts of the person of another, directly or through clothing, in order to purposely or knowingly cause bodily injury to or to humiliate, harass, or degrade another or to arouse or gratify the sexual response or desire of either party. Gerstner admitted touching the intimate parts of a minor but contended that because the touching was not sexual in nature, giving the instruction on sexual contact was error. The Supreme Court disagreed. The trial court further instructed the jury that to convict, the state had to prove beyond a reasonable doubt that Gerstner made sexual contact with the victim, so the court gave the correct definition of sexual contact. Gerstner's intent to gratify his sexual desire could be inferred from his conduct alone, and it was not necessary that the jury be instructed that Gerstner had to know that it was highly probable that Gerstner's contact would be sexual contact. The jury's conclusion that Gerstner's actions constituted sexual contact and its rejection of Gerstner's contention that the contact was not sexual necessarily meant that the state proved that Gerstner knew that the conduct was sexual in nature. Taken as a whole, the jury instructions fully and fairly instructed the jury as to the applicable law and Gerstner was not prejudiced by the instructions. The trial court was affirmed. St. v. Gerstner, 2009 MT 303, 353 M 86, 219 P3d 866 (2009).

Sufficient Evidence of Defendant's Conscious Intent to Strike Victim — Aggravated Assault Conviction Affirmed: Nick contended that there was inadequate evidence of a conscious object to strike the victim with a screwdriver when Nick was attacked by the victim while sitting in a vehicle. The Supreme Court disagreed. Despite Nick's assertion of self-defense, there was ample evidence for the jury to conclude beyond a reasonable doubt that it was Nick's conscious object to grasp the screwdriver as a weapon and strike the attacker and that Nick was aware that doing so could cause serious bodily injury, thus satisfying the mental state element of aggravated assault. St. v. Nick, 2009 MT 174, 350 M 533, 208 P3d 864 (2009).

Evidence of Knowing or Purposeful Action Despite Mental Disease or Defect — Aggravated Assault Conviction Affirmed: Meckler was convicted of aggravated assault and committed to the Department of Public Health and Human Services for life. Meckler contended that he could not be found guilty of aggravated assault because he lacked the ability to conform his conduct to the requirements of the law due to a mental disease or defect. It was undisputed that Meckler suffered from paranoid schizophrenia and was not taking his medications at the time he committed the offense; however, the presence of a mental disease or defect does not necessarily preclude that person from acting purposely or knowingly. Evidence showed that Meckler knew that he struck the victim and that the victim suffered serious bodily injury as a result and showed that Meckler was lucid, coherent, and functional prior to and after the attack. Thus, the trial court correctly concluded that Meckler's volitional act was done knowingly or purposely, and the assault conviction was affirmed. The mental disease or defect was properly considered at sentencing rather than as an element of the offense. St. v. Meckler, 2008 MT 277, 345 M 302, 190 P3d 1104 (2008).

Sufficient Evidence That Defendant Knowingly or Purposely Caused Death: Roedel asserted that the state failed to prove that he knowingly or purposely killed his wife with a handgun. The Supreme Court declined to disturb the jury's guilty verdict based on evidence that neighbors heard three shots fired in rapid succession, Roedel admitted firing all three shots, including the shot that killed his wife, and the gun used in the shooting was incapable of discharging unless the trigger was pulled. St. v. Roedel, 2007 MT 291, 339 M 489, 171 P3d 694 (2007).

Sufficient Evidence of Mental State to Support Conviction of Aggravated Assault Despite Claim of Self-Defense: Dunfee contended that because his actions were in self-defense, therefore precluding the mental state required to sustain a conviction for aggravated assault, the trial court should have vacated his conviction because the jury may not have applied the purposely or knowingly mental state to all elements of the offense. However, there was sufficient evidence to support the conviction, given Dunfee's admission that he hit the victim hard several times and that, being an experienced boxer, he knew it was highly probable that the blows would inflict serious bodily injury. The requisite mental state was proved, and the conviction was affirmed. St. v. Dunfee, 2005 MT 147, 327 M 335, 114 P3d 217 (2005).

Sufficient Evidence of Attempted Obstruction of Peace Officer — Jury Properly Instructed Regarding Mental Standards of Offense: When she saw heavily armed officers approaching a neighbor's residence, Baker called the neighbor and left a recorded message that it would be in the neighbor's interests to peek out the window. The message was subsequently confiscated, and Baker was charged with and convicted of attempted obstruction of a police officer. On appeal, Baker challenged the use of evidence regarding the neighbor's history and arrest, the purpose and use of the high-risk unit in arresting the neighbor, and an officer's outrage at Baker's interference with the police, contending that the evidence was irrelevant and unfairly prejudicial. The Supreme Court disagreed. Under the transaction rule set out in St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371 (1999), the trial court did not err in allowing the evidence because it enabled the jury to understand the circumstances surrounding the police activity and how Baker's interference could have affected the outcome. Baker also contested the jury instructions. Under 45-7-302, a person obstructs an officer when the person knowingly hinders the enforcement of the criminal law, so for a person to commit the offense of attempted obstruction, the person need only perform any act toward the commission of obstruction while aware of the fact that the person is performing the act. The instructions to the jury contained an explanation of the "knowingly" standard and multiple instructions on Baker's purpose for making the call and thus were a fair and full instruction on the law. The conviction was affirmed. St. v. Baker, 2004 MT 393, 325 M 229, 104 P3d 491 (2004).

Admission by Counsel That Defendant Resisted Arrest When Defendant Charged With Assaulting Peace Officer — Not Ineffective Assistance of Counsel: Audet was charged with assaulting a peace officer and resisting arrest. At the time of trial, Audet told the court that he wished to plead guilty to the resisting arrest charge but to go to trial on the assault charge, even though his attorney had advised otherwise. The court entered not guilty pleas for both counts. Counsel informed the jury in opening and closing statements that Audet was not contesting the resisting arrest charge, but lacked the purposeful and knowing elements required to commit officer assault. The prosecutor then convinced the jury that Audet had essentially conceded the mental state by conceding guilt for resisting arrest, and Audet was convicted on both counts. On appeal, Audet contended that counsel's conduct constituted ineffective assistance, warranting reversal. The Supreme Court applied the Strickland test and dismissed the claim. The record did not reveal why counsel chose to concede the resisting arrest charge to the jury, so the court was unable to determine whether the decision constituted an unreasonable defense strategy that would overcome the presumption that counsel's actions fell within the range of reasonable professional conduct. Pursuant to St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), Audet's direct appeal was dismissed without prejudice to the ineffective assistance issue being raised in a postconviction relief proceeding. St. v. Audet, 2004 MT 224, 322 M 415, 96 P3d 1144 (2004). See also St. v. Hendricks, 2003 MT 223, 317 M 177, 75 P3d 1268 (2003), and St. v. Greene, 2015 MT 1, 378 Mont. 1, 340 P.3d 551.

Sufficient Evidence to Support Conviction of Assault of Police Officer: Bay appeared in District Court on a bench warrant, was held in contempt, and, upon attempting to leave the courtroom, had an altercation with a police officer who attempted to restrain Bay, resulting in injury to the officer. Bay was subsequently convicted of assault of a police officer and appealed on grounds of insufficient evidence. However, there was sufficient evidence that Bay was aware of the high probability that shoving the officer hard enough to knock the officer backward would result in physical pain to the officer and thus acted knowingly. The conviction was affirmed. St. v. Bay, 2003 MT 224, 317 M 181, 75 P3d 1265 (2003).

Elements of Criminal Endangerment Satisfied: Porter was convicted of criminal endangerment and appealed on grounds that the state failed to prove that Porter was aware of the high probability that his conduct would cause a substantial risk of death or serious bodily injury to others. The Supreme Court disagreed and affirmed the conviction. Porter shot his rifle five times at night, while angry and intoxicated, from a county road adjacent to an occupied public campground and then admittedly "beaded down" on the human occupants of the campground. One of the campers testified that Porter's admission of taking aim at the campground occupants was frightening. Even though it was never proved that the safety was off on the rifle or that Porter's finger was on the trigger, it was reasonable for a jury to assume that Porter was capable of discharging the rifle when aiming at the campers and that Porter was aware of the high probability that his conduct would cause a substantial risk of death or serious bodily injury. Thus, Porter's motion for a directed verdict on grounds of insufficient evidence was properly denied. Porter v. St., 2002 MT 319, 313 M 149, 60 P3d 951 (2002).

Failure to Follow Officer's Instructions — No Evidence of Impairment of Police Investigation to Warrant Charge of Obstructing Peace Officer: Cameron was a passenger in Swartzenberger's truck when the vehicle was observed by two Kalispell police officers, who decided to investigate Swartzenberger's erratic driving. Swartzenberger parked the vehicle at a restaurant, and both he and Cameron had exited the truck when the officers approached. One officer approached Cameron as he was walking into the restaurant, and directed him to get back into the truck. Cameron refused, saying he was going to get something to eat. When the officer repeated the command, Cameron swore at the officer and turned to go into the restaurant. While the other officer was arresting Swartzenberger unassisted, Cameron was also arrested for obstructing a peace officer. At trial, Cameron moved for a directed verdict, but the motion was denied, and the jury found Cameron guilty as charged. Cameron appealed, contending that failure to follow an officer's instructions does not constitute obstructing a peace officer. The Supreme Court agreed and reversed. There was no evidence that Cameron knew that the officers were investigating the possibility that Swartzenberger was impaired, or that Cameron in any way impaired the investigation, which was successfully concluded without incident. Thus, the city failed to prove the elements of the crime by showing that Cameron knowingly impeded the performance of a peace officer's lawful duty. Cameron did not interfere with Swartzenberger's arrest, and there was no reason to arrest Cameron. Cameron's motion for a directed verdict should have been granted, and the Supreme Court directed that a verdict acquitting Cameron be entered. Kalispell v. Cameron, 2002 MT 78, 309 M 248, 46 P3d 46 (2002), followed in St. v. Bennett, 2022 MT 73, 408 Mont. 209, 507 P.3d 1154.

Sufficient Evidence of Mental State and Reasonable Apprehension to Prove Assault With a Weapon: When attempting to flee from pursuing officers, Martin ducked into the back door of a bakery and then ran out the front door in a further attempt to get away, seeking a hiding place in a small enclosure that was boarded up with plywood. There was a hole in the plywood, and as a pursuing officer stooped to look in the hole, Martin looked out directly at him. Recognizing Martin as the man he had chased out of the bakery, the officer identified himself and ordered Martin to drop his gun and show his hands. Instead, Martin looked out the hole two more times and then pointed the gun through the hole directly at the officer. Thinking he was about to be fired upon, the officer fired a shot. Martin disappeared from view and then threw the gun out of the hole. Martin was convicted of felony assault (now assault with a weapon), but contended on appeal that the state did not establish that he purposely or knowingly intended to create an apprehension of serious bodily injury in the officer. Martin argued that his mental state, not the officer's perception of it, controlled as to the "purposely or knowingly" element of felony assault. The Supreme Court agreed in part with Martin's reasoning, in that that element of the crime is controlled by the perpetrator's mental state, not that of the victim. However, the mental state element goes to the defendant's actions, not to whether those actions caused reasonable apprehension of injury in another. Thus, it was sufficient for the jury to find that Martin saw the officer and deliberately aimed a gun at him. Given the circumstances of the pursuit and the fact that the officer knew that Martin had just shot a fellow officer, coupled with the way Martin pointed the gun, the evidence was sufficient for the jury to find that the officer felt a reasonable apprehension of serious bodily injury, and Martin's conviction for felony assault was affirmed. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001). See also St. v. Birthmark, 2013 MT 86, 369 Mont. 413, 300 P.3d 1140.

Sufficient Evidence to Support Attempted Homicide Verdict — State of Mind: Martin was convicted of attempted deliberate homicide after shooting a police officer who was in pursuit following Martin's attempt to cash a forged check. Martin contended that the evidence was insufficient to prove that he acted with the purpose of causing the officer's death. Martin argued that he only intended to scare the officer and that if he had intended to kill the officer, he would not have looked surprised or confused after the shooting, as some witnesses testified. However, other witnesses testified that Martin appeared calm during the chase and even slowed before turning to shoot. Another witness testified that Martin always carried a gun and had boasted that he would shoot anyone who got in his way, "even a cop". In deference to the jury's resolution of the conflicting evidence, the Supreme Court affirmed, concluding that a rational trier of fact could have found the essential elements of attempted deliberate homicide beyond a reasonable doubt. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Allowing Child Access to Medication Considered Criminal Endangerment: A mother left her child's headache medicine on the table with her own allergy medication, instructing the child to take his headache medicine and then leaving the room. The child took the allergy medicine instead and overdosed. The mother was subsequently convicted of criminal endangerment. On appeal, she contended that there was insufficient evidence to support the conviction because her conduct did not actually create a substantial risk of death or serious bodily injury and that the state had failed to prove that she knowingly made the medication available to her son, resulting in his injury. However, the state did not have to prove actual bodily injury, but rather that there was a high probability that the mother's conduct created a substantial risk of death or serious bodily injury. A rational jury could have found that substantial risk existed, and the state presented sufficient evidence that the mother knowingly made the medication available by leaving it in an open bottle on the table with the same medication that she instructed her son to take. The criminal endangerment conviction was affirmed. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Jury's Finding That Defendant Purposely or Knowingly Put Another in Fear of Bodily Injury Sufficient Support for Robbery Conviction: As he left a store with stolen merchandise, Merrick was stopped by store security, who told him that the alarm had been triggered and asked Merrick to return to the store. Merrick refused, telling the security person that it was his gun that set off the alarm. When Merrick unzipped his coat and inserted his hand inside, the security person testified that she thought Merrick was going to pull out a gun and use it to shoot her or scare her away. Merrick was convicted of robbery and sentenced to prison for 40 years. On appeal, Merrick maintained that there was insufficient evidence that he acted purposely or knowingly to put the security person in fear of immediate bodily injury. The Supreme Court disagreed and affirmed the conviction, noting that the sufficiency of the evidence turned on credibility. The jury chose to believe that Merrick was not simply making a joke when he referred to the gun nor was he adjusting the stolen merchandise when he reached toward his coat, but rather that he mentioned a gun and moved toward his coat with the awareness that it was highly probable that the security person would fear immediate bodily injury on account of his conduct. St. v. Merrick, 2000 MT 124, 299 M 472, 2 P3d 242, 57 St. Rep. 509 (2000). See also St. v. Santos, 273 M 125, 902 P2d 510 (1995).

Culpability for Criminal Endangerment Created by Appreciation of Probable Risks Posed by One's Conduct — "Knowingly" Misapplied: The mental state element of "knowingly" in criminal endangerment contemplates a defendant's awareness of the high probability that the conduct in which the defendant is engaging, whatever that conduct might be, will cause a substantial risk of death or serious bodily injury to another. Because there is no particularized conduct that gives rise to criminal endangerment, it is incorrect to apply to that offense's mental element the definition of knowingly—that an accused need only be aware of the accused's conduct. It is the appreciation of the probable risks to others posed by one's conduct that creates culpability for criminal endangerment. Pursuant to 45-2-103, "knowingly" applies in this case to both conduct and the result of that conduct. Therefore, the District Court's application of the definition of knowingly—that an accused need only be aware of the accused's conduct—as the offense's mental element constituted reversible error. St. v. Lambert, 280 M 231, 929 P2d 846, 53 St. Rep. 1379 (1996). See also St. v. Crisp, 249 M 199, 814 P2d 981 (1991), St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998), and St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Knowing Control of Content of Unopened Box Containing Marijuana Proved From Circumstances: After police discovered that an undelivered UPS package contained marijuana, they delivered the package to Arthun's home and it was accepted by his wife. Police later observed Arthun at his home but did not see the package disposed of. When officers later went to the home, they observed drug paraphernalia in the house and Arthun led police to an unopened box hidden behind farm tools in another building. Arthun's motion to suppress was denied by the District Court, and the denial was affirmed by the Supreme Court. The Supreme Court held that although possession is not alone sufficient to prove knowing control, that control may be inferred by the trier of fact from the totality of the circumstances. St. v. Arthun, 274 M 82, 906 P2d 216, 52 St. Rep. 1133 (1995).

Knowing, Purposeful Act Not Precluded by Psychotic State: Charges of attempted deliberate homicide and aggravated burglary both require proof of conduct committed purposely and knowingly. Cowan conceded that the alleged conduct occurred but contended that he did not have the requisite state of mind during the conduct because he had suffered for years from a serious mental disorder. However, the issue before the trial court was not whether Cowan was in a psychotic state, but whether he acted purposely and knowingly. The existence of a mental disease or defect does not necessarily preclude a person from acting purposely and knowingly. Although the testimony of all medical experts was consistent as to the presence of a mental defect, there was not a consensus that Cowan was suffering from an acute psychotic episode at the time of the incident. A rational trier of fact could have found beyond a reasonable doubt that Cowan possessed the requisite mental state to be convicted of the crimes. St. v. Cowan, 260 M 510, 861 P2d 884, 50 St. Rep. 1153 (1993).

Constitutionality of Statutory Definitions: The Supreme Court has consistently upheld the constitutionality of the statutory definitions of "knowingly" and "purposely". St. v. Briner, 253 M 158, 831 P2d 1365, 49 St. Rep. 402 (1992); St. v. Beach, 217 M 132, 705 P2d 94 (1985); St. v. Sharbono, 175 M 373, 563 P2d 61 (1977).

Pistol Brandished — Felony Assault (now Assault With a Weapon) Affirmed: In the process of arrest, defendant picked up a pistol and began swinging it toward the arresting officer. Defendant claimed his subsequent conviction for felony assault (now assault with a weapon) was unwarranted because he was only trying to surrender the pistol and did not knowingly intend to cause apprehension of serious bodily injury. However, it was not necessary for defendant to cause apprehension. He committed the offense if he was aware that his conduct would probably cause that result. St. v. Cope, 250 M 387, 819 P2d 1280, 48 St. Rep. 949 (1991).

Evidence of Other Crimes — Admission of Prior Sexual Assault Conviction Upheld to Prove Defendant Acted Knowingly: In 1989, the defendant was charged with sexually assaulting his 15-year-old daughter. At trial, the defendant was convicted after evidence of a 1984 conviction of sexual assault upon the same daughter was admitted into evidence. On appeal, the state argued that admission of the 1984 conviction was appropriate to prove that the defendant acted knowingly because it showed the defendant's motive, intent, absence of mistake or accident, and knowledge. The Supreme Court examined the factors required by St. v. Just, 184 M 262, 602 P2d 957 (1979), balanced the probative value of the evidence against the possibility of prejudice, and concluded that evidence of the 1984 conviction was properly admitted by the District Court. St. v. Medina, 245 M 25, 798 P2d 1032, 47 St. Rep. 1832 (1990).

Jury Entitled to Complete Definition of "Knowledge": Defendant, who was convicted of felony assault (now assault with a weapon) under 45-5-202, argued that not all of the definitions contained in this statute's definition of "knowingly" apply to every alleged criminal violation and that the trial court erred in giving the entire definition to the jury. The Supreme Court held that the requisite intent was "knowledge" or "purpose" and that the jury was entitled to a complete definition of "knowledge" as set forth in this section. St. v. Ottwell, 239 M 150, 779 P2d 500, 46 St. Rep. 1580 (1989).

Overwhelming Evidence of Purposeful or Knowing Behavior: Although the defendant may have suffered from mental disease, evidence is overwhelming that he acted purposely or knowingly when he committed felony assault (now assault with a weapon). He purchased the gun shortly before he committed the assault, performed all acts necessary to bring him to the victims' trailer, parked his vehicle so he could get away quickly, cut the victims' telephone wire, fled the scene after firing directly at the victims, and then buried the weapon. A person acts "knowingly" when he is aware that it is highly probable a particular result will be caused by his conduct. St. v. Trask, 234 M 380, 764 P2d 1264, 45 St. Rep. 1988 (1988).

Unlawful Entry — Ignorance of Law No Denial of Defense to Element of "Knowingly": Defendant convicted of criminal trespass had no knowledge that the posting of a 12- by 5-inch fluorescent orange sign indicated no trespassing and, therefore, claimed that he could not have knowingly entered unlawfully onto the posted land. However, one need not form the intent to commit a specific crime or intend the result that occurs to be found guilty of knowingly committing a crime. Further, because no argument was made that the sign was not in accordance with the posting statute, defendant was assumed to have had legal notice. Ignorance of the law has never been a defense in Montana. St. v. Blalock, 232 M 223, 756 P2d 454, 45 St. Rep. 1008 (1988).

Defendant With Mental Defect — "Knowing" State of Mind: Although defendant was suffering from paranoid schizophrenia at the time he committed deliberate homicide, the mental defect did not render him unable to appreciate the criminality of his conduct or render him unable to conform his conduct to the requirements of law. Any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. St. v. Tibbitts, 226 M 36, 733 P2d 1288, 44 St. Rep. 439 (1987).

No Requirement of Actual Knowledge That Checks Will Not Be Paid by Bank: Section 45-6-316 does not require actual knowledge that checks will not be paid by the bank but rather that the defendant act "knowingly" as that term is defined in this section. St. v. McHugh, 215 M 296, 697 P2d 466, 42 St. Rep. 371 (1985).

Prima Facie Showing of Knowledge of Insufficient Funds in Checking Account: Sufficient evidence was presented in the prosecution's case in chief to indicate that defendant was aware that it was highly probable that his checks would not be paid by the banks upon which they were written. This evidence included bank statements showing significant negative balances, numerous overdraft notices mailed to the defendant, numerous certified letters sent to defendant notifying him of the overdrafts and requesting payment, and the fact that numerous checks remained unpaid at the time of the trial. St. v. McHugh, 215 M 296, 697 P2d 466, 42 St. Rep. 371 (1985).

Purpose and Knowledge — Aggravated Assault: Defendant appeared at the home of the victim and rang the doorbell. When the victim answered, defendant entered, chased her through the house, cornered her, and strangled her for 10 to 20 seconds with a rope. Defendant fled, and the victim asked two construction workers for help. The workers chased and caught defendant. Defendant notified the prosecution of his intention to rely on mental disease or defect as a defense.

Defendant contended that he did not possess the requisite mental elements of purposely or knowingly. Defendant was convicted of aggravated assault. On appeal, the defendant contended the evidence was insufficient to prove purpose or knowledge. The Supreme Court found that defendant remembered the entire incident. He was aware of his conduct. He tried to conceal his reason for fleeing, which tended to prove he had done something wrong. This evidence supported a finding that he acted knowingly. Defendant also acted purposely. His conduct was not the result of reflex. He possessed the rope prior to entering the home and harmed the woman because he thought she owed him money. This tended to prove his conscious object to engage in strangling the victim. The evidence was sufficient to support the finding that defendant acted purposely or knowingly. St. v. Raty, 214 M 114, 692 P2d 17, 41 St. Rep. 2354 (1984).

"Knowingly" and "Negligently" Not Mutually Exclusive Mental States: The defendant's involvement in a vehicular accident resulted in his being convicted of knowingly causing serious bodily injury to one of the occupants of a car and negligently causing bodily injury to the remaining occupants. The two mental states are not mutually exclusive, as proof of knowledge necessarily proves the elements of criminal negligence. St. v. Pierce, 199 M 57, 647 P2d 847, 39 St. Rep. 1205 (1982).

"Knowingly" — Vehicular Accident — Circumstantial Evidence: After being involved in a vehicular accident, the defendant admitted consuming 12 beers, being intoxicated, that he shouldn't have been driving, and fleeing from the scene of the accident. Witnesses testified as to the defendant's high rate of speed and illegal passing maneuvers. There was sufficient circumstantial evidence for a jury to conclude that the defendant "knowingly" caused bodily injury. St. v. Pierce, 199 M 57, 647 P2d 847, 39 St. Rep. 1205 (1982).

Child Beating Death — Proof of Specific Intent Not Required: Each of four defendants, while caring for a child at different times, engaged in incidences of child beating eventually leading to the child's death. The defendants acted knowingly because they were aware of the high probability that death would result from the repeated beating of the victim. Because the defendants engaged in a common design or course of conduct to accomplish an unlawful purpose, proof of specific intent to kill was not required to prove deliberate homicide. St. v. Powers, 198 M 289, 645 P2d 1357, 39 St. Rep. 989 (1982).

Purposely or Knowingly — Review of Sufficiency of Evidence in Federal Habeas Corpus Proceeding: Prior to a shooting, the petitioner had engaged in acts of surveillance, harassment, and threatening behavior towards the victim. This evidence was sufficient to support a finding by the jury that the petitioner had purposely or knowingly intended to shoot the victim. Bashor v. Risley, 539 F. Supp. 259, 39 St. Rep. 960 (D.C. Mont. 1982).

Theft — Knowledge of Probabilities: Defendant was convicted of felony theft for knowingly obtaining and exercising control over stolen property, a truckload of lumber. Defendant contended that the State failed to establish that he "knew" the lumber had been stolen. The State first had to establish that defendant "knowingly" obtained control of the lumber. This was proven by establishing that he "was aware of his conduct in doing the act". Second, the State had to prove that he obtained control "knowing" the property to have been stolen. This was established by showing he was "aware of a high probability" that the lumber was stolen. Third, the State had to show he used the lumber "knowing" his use would deprive the owner of the property. This was proven by showing it was "highly probable that the result caused by his conduct" would deprive the owner of his property. The State could prove this through the use of circumstantial evidence. In looking at all the facts, there was sufficient evidence to sustain defendant's conviction. St. v. Weaver, 195 M 481, 637 P2d 23, 38 St. Rep. 2050 (1981).

Jury Instructions:

The District Court does not invade the factfinding duty of the jury to find the intent for a crime when it instructs that "a person acts knowingly with respect to the result of conduct [constituting a crime] when he is aware that it is highly probable that such result [would]. . .be caused by his conduct". The jury is not called upon to determine "high probability" in place of "reasonable doubt" but rather the existence of defendant's awareness, beyond a reasonable doubt, of a high probability that the result of his conduct makes his conduct criminal. It is consistent with modern concepts of intent to define knowledge as an awareness of probable consequences, so that no error was committed in giving this instruction. St. v. Coleman, 185 M 299, 605 P2d 1000 (1979). For full appellate history of Coleman, see case note at 45-2-101, SERIOUS BODILY INJURY, *Evidence.*

Definition of "knowingly" set forth in this section, including "high probability" language, was properly included in instructions in a prosecution for mitigated deliberate homicide and aggravated assault. St. v. Larson, 175 M 395, 574 P2d 266 (1978). Instructions which incorporated the statutory definitions of "knowingly" and "purposely" were approved in a burglary case. St.

v. Radi, 176 M 451, 578 P2d 1169 (1978). Such instructions were also approved in a capital case for aggravated kidnapping resulting in the victim's death after she was raped. The Montana court also upheld the trial court's refusal to give an instruction explaining the criminal intent and premeditation necessary for a conviction of deliberate homicide, citing and reaffirming its hold in St. v. Sharbono, 175 M 373, 563 P2d 61 (1977), that the Legislature had changed the requirements of mens rea and that instructions should properly reflect the new definitions. St. v. Coleman, 177 M 1, 579 P2d 732 (1978), followed in St. v. Smith, 220 M 364, 715 P2d 1301, 43 St. Rep. 449 (1986). For full appellate history of Coleman, see case note at 45-2-101, SERIOUS BODILY INJURY, *Evidence.*

Court held, inter alia, it was not error for trial court to refuse jury instructions concerning specific intent in regard to word "intent" in addition to consideration of words "purposely" or "knowingly" as "purposely" implies a design, thereby replacing the word "intentionally" as used in the old code. Court reasoned that the Legislature intended words "purposely" and "knowingly" be substituted for the words "felonious", i.e., "intentionally" as used in old code. St. v. Klein, 169 M 350, 547 P2d 75 (1976).

Under 94-117, R.C.M. 1947 (now 45-2-101, 45-2-103, 45-2-201, and 45-2-202), an instruction charging the jury that when an unlawful act is shown to have been deliberately committed for the purpose of injuring another it is presumed to have been committed with a malicious and guilty intent, in that the law presumes that a person intends the ordinary consequences of any voluntary act committed by him, may mislead the jury and should not be given in a prosecution for assault in the first degree, the very gist of which is the intent with which it was committed. St. v. Schaefer, 35 M 217, 88 P 792 (1907), distinguished in St. v. Board, 135 M 139, 337 P2d 924 (1959).

Evidence:

Evidence that defendant knew the items in his possession were stolen, of defendant's furtive actions in displaying the property, and of the isolated spot chosen for displaying the property was held sufficient to establish that defendant was aware of a "high probability" that he was exerting unauthorized control over the property of the claimants, with an intent to deprive them of the property, and to sustain a conviction under 45-6-301 on theft. St. v. Jackson, 180 M 195, 589 P2d 1009 (1979).

Evidence from which a jury can find that the defendant was aware of a high probability that a horse was stolen is sufficient to sustain a conviction for theft. St. v. Farnes, 171 M 368, 558 P2d 472 (1976).

In General:

Acting "knowingly", as defined in this section, is not acting accidentally, and a defendant who is convicted of knowingly engaging in criminal conduct is not being held criminally liable for accidental conduct. St. v. Seitzinger, 180 M 136, 589 P2d 655 (1979).

This definition and that of the term "purposely" contained in 45-2-101(58) were intended by the Legislature as substitutes for the terms "feloniously" and "intentionally" employed in the old code. St. v. Klein, 169 M 350, 547 P2d 75 (1976).

Mental State Supported by Evidence: There was sufficient evidence to establish that defendant knowingly attempted to inflict serious bodily injury or reasonable apprehension of serious bodily injury by shooting into a bar. Even conceding that defendant might not have been able to actually see anyone inside the bar does not negate the possibility that he acted knowingly. There was still the jury question of whether he was necessarily aware of a high probability that someone was in the bar at 4:30 in the afternoon. St. v. Gone, 179 M 271, 587 P2d 1291 (1978).

Burden of Proof: In a prosecution for deliberate homicide, the State must prove that defendant acted "knowingly" or "purposely" as those terms are defined in the criminal code. The state need not prove that the defendant does not suffer from mental disease or defect which would prevent defendant from doing the act purposely or knowingly. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978). For full appellate history of McKenzie, see case note at 45-5-102, INFORMATION and INDICTMENT, *Felony Murder Alleged.*

Specific Intent: Under 45-2-203 (formerly 94-119, R.C.M. 1947), finding of jury that defendant was able to form specific intent to commit first-degree assault as required by statute was supported by evidence that, although intoxicated, defendant turned off lights inside apartment, reached into a nearby drawer and prepared revolver for action, surrendered to police, walked out of apartment under own power with hands in air, and after arrest had no difficulty recounting recent events to police. St. v. Lukus, 149 M 45, 423 P2d 49 (1967).

Fraudulent Intent: Under section 94-118, R.C.M. 1947 (since repealed), proof of intent to defraud could consist of reasonable inferences drawn from affirmatively established facts;

defendant who was sufficiently conscious to recognize fraudulent nature of check was of adequate mental ability to form an intent to defraud by issuing the check, knowing of its fraudulent nature. St. v. Cooper, 146 M 336, 406 P2d 691 (1965).

Manifestation of Intent: Evidence that defendant accosted a 9-year-old girl on the street and asked her to come to his room and play with him, on arriving there locked the door, asked her to remove her dress, and then placed his hand upon her shoulder in an attempt to remove her dress, was sufficient to warrant a finding by the jury that the defendant intended to arouse his sexual desires in a depraved manner. St. v. Kocker, 112 M 511, 119 P2d 35 (1941).

Presumption of Intent: Intent is conclusively presumed from the occurrence of a statutory offense such as collection of unlawful fees from a county. State ex rel. Rowe v. District Court, 44 M 318, 119 P 1103 (1911).

MENTALLY DEFECTIVE

Evidence of Insanity:

Under 94-201, R.C.M. 1947 (now in Title 46, ch. 14), defendant was entitled to plead insanity as bar to conviction for first-degree murder but failed to sustain burden of proof by preponderance of evidence as required by statute, in view of evidence that his activities on the day of shooting were normal, that he was quite calm after shooting occurred, and that he knew right from wrong at the time of the shooting according to a psychiatrist. St. v. Sanders, 149 M 166, 424 P2d 127 (1967).

Despite expert testimony that the defendant was suffering from epilepsy rendering him incapable of knowing of or remembering his actions during the incident giving rise to prosecution for second-degree assault, evidence that defendant, after striking his victim with a gun, warned her not to say anything about it, concealed himself thereafter, and 1 month later detailed the entire event to a medical expert was sufficient to support guilty verdict. St. v. DeHaan, 88 M 407, 292 P 1109 (1930).

Opinion of Lay Witness: Under 94-119, R.C.M. 1947 (now in Title 46, ch. 14), lay witnesses' opinion testimony as to defendant's sanity prior to the event giving rise to defendant's prosecution for homicide was admissible where lay witnesses were intimately acquainted with the defendant, as in many instances such testimony is more helpful in arriving at conclusion as to defendant's sanity than expert opinion testimony based on hypothetical questions. St. v. Simpson, 109 M 198, 95 P2d 761 (1939), overruled on other grounds in St. v. Knox, 119 M 449, 175 P2d 774 (1946).

Definition of Insanity: Under 94-119, R.C.M. 1947 (now in Title 46, ch. 14), insanity constituted any defect, weakness, or disease of the mind which rendered it incapable of entertaining, in the particular instance, the criminal intent which is an ingredient of all crimes. St. v. Narich, 92 M 17, 9 P2d 477 (1932).

Instructions to Jury: Trial courts in instructing juries on defense of insanity should make their instructions as plain and simple as possible, incorporate therein the appropriate code sections, supplement the definition of insanity as indicated in the case of St. v. Peel, 23 M 358, 59 P 169 (1899), and avoid numerous instructions which may be confusing and serve no useful purpose. St. v. Narich, 92 M 17, 9 P2d 477 (1932).

Burden of Proof: Under 94-119, R.C.M. 1947 (now in Title 46, ch. 14), the burden of proving insanity pleaded by a defendant charged with a crime was upon the defendant; an instruction that the state was required to prove beyond a reasonable doubt that defendant was sane at the time of the commission of the offense was error. St. v. DeHaan, 88 M 407, 292 P 1109 (1930); St. v. Vettere, 76 M 574, 248 P 179 (1926).

MENTALLY INCAPACITATED

Mental Incapacitation of Voluntarily Intoxicated Sexual Assault Victim: The definition of "mentally incapacitated" is clear on its face. By its terms, it does not differentiate between voluntary and involuntary intoxication and is not limited to the latter. The definition includes the voluntary intoxication of the victim of sexual intercourse without consent, whose voluntary intoxication did not preclude the state from proving that mental incapacitation due to voluntary intoxication kept her from consenting. St. v. Gould, 273 M 207, 902 P2d 532, 52 St. Rep. 930 (1995).

Sufficient Evidence of Mental Incapacitation, Due to Intoxication, of Victim of Sexual Intercourse Without Consent: Mental incapacitation, due to voluntary intoxication, of the victim of sexual assault and therefore her lack of consent were uncontroverted. There was evidence that she had a blood alcohol content of at least 0.45, ran into things and fell, and needed help in getting up. A toxicologist also opined that the victim was in the comatose-to-death phase of intoxication. St. v. Gould, 273 M 207, 902 P2d 532, 52 St. Rep. 930 (1995).

Intoxication: Evidence that defendant's reason had been clouded by intoxication during the earlier hours of the day on which the homicide was committed and that he suffered from periodic heart attacks did not warrant an instruction upon the question of his sanity. St. v. Kuum, 55 M 436, 178 P 288 (1919).

MISDEMEANOR

Federal Law: Under federal law, the maximum potential punishment determines whether an offense constitutes a felony or misdemeanor as contradistinguished from the prevailing Montana rule under which crimes are classified as felonies or misdemeanors by the punishment actually imposed. State ex rel. Anderson v. Fousek, 91 M 448, 8 P2d 791, 8 ALR 303 (1932), overruled on other grounds in Melton v. Oleson, 165 M 424, 530 P2d 466 (1974).

Felony or Misdemeanor: The potential maximum sentence determined the grade of the crime until sentence was imposed where the offense was neither divisible into degrees nor inclusive of lesser offenses, and punishment was within the discretion of the court or jury; if the sentence imposed was other than imprisonment in the state prison, the offense was considered a misdemeanor. St. v. Atlas, 75 M 547, 244 P 477 (1926).

NEGLIGENTLY

Car Speeding up to 150 MPH — Criminal Endangerment — Jury Instruction on Negligent Endangerment Properly Denied: The defendant was driving up to 150 miles an hour on the interstate and passing numerous vehicles. Ultimately, the defendant stopped after his car ran over spike strips and he was charged with criminal endangerment. At trial, the defendant proposed a jury instruction to the lesser included offense of negligent endangerment, which the District Court did not permit. Following his conviction, the defendant appealed, arguing that the District Court abused its discretion in not allowing the instruction because a rational jury could have found that he had acted negligently. The Supreme Court examined the record and agreed it did not support the finding that the defendant had acted negligently and affirmed the ruling. St. v. Jensen, 2019 MT 60, 395 Mont. 119, 437 P.3d 117.

Cruelty to Animals Conviction Proper — Horse Trailer Boarding Not Acceptable — Obvious Malnourishment — Knowledge of Owner: In a bench trial, the defendant was found guilty of three misdemeanor counts of cruelty to animals for housing two stallions and a mare in a small stock trailer. She appealed the conviction and claimed that the state did not offer sufficient evidence to prove that she acted knowingly or negligently because a doctor testified that "in her mind" she was caring for the horses appropriately. The Supreme Court affirmed the conviction, reasoning that the defendant's actions demonstrated awareness that conditions in the trailer were inadequate. Additionally, multiple witnesses testified that the horses were obviously malnourished, unable to stand in the horse trailer, and visibly wounded and bleeding. The evidence was sufficient to allow a rational trier of fact to conclude beyond a reasonable doubt that the defendant knew, consciously disregarded the risk, or should have known there was a risk that she was cruelly confining the horses and failing to provide them with adequate food, water, and medical care. St. v. Beaudet, 2014 MT 152, 375 Mont. 295, 326 P.3d 1101.

No Error in Jury Instructions on Criminal Negligence at Trial for Vehicular Homicide While Under the Influence: At Coluccio's trial for vehicular homicide while under the influence, the trial court gave the jury an instruction on the definition of negligence. In another instruction the court told the jury that in order to convict Coluccio the jury had to find that the state proved that Coluccio was in physical control of a vehicle on state public roadways while under the influence and negligently caused a death, but the court omitted the requirement that the jury conclude that Collucio was criminally negligent, which Coluccio contended took away his defense that he was not criminally negligent while driving after drinking. The Supreme Court disagreed. Considering the instructions as a whole, the second instruction was not misleading. The court also noted that after jury instructions were given, the prosecutor argued that Coluccio was both under the influence and criminally negligent, and that Coluccio's counsel pointed out that the state had to prove not only that Coluccio was at fault, but also that his conduct was a gross deviation from the standard of care. Thus, the jury was fairly instructed and Coluccio was not deprived of his defense. St. v. Coluccio, 2009 MT 273, 352 M 122, 214 P3d 1282 (2009).

Sufficient Evidence of Vehicular Homicide While Under the Influence: After the state presented its case in chief at Coluccio's trial for vehicular homicide while under the influence, Coluccio moved to dismiss for lack of sufficient evidence on grounds that a reasonable juror could not conclude that his actions rose to the level of criminal negligence simply because he committed a minor traffic violation by failing to yield to another vehicle when making a left turn. The motion was denied, and on appeal the Supreme Court affirmed. The traffic offense was only part of the evidence. Other evidence showed that Coluccio drank at least three beers just before driving and then turned in front of a visible oncoming motorcycle, killing the rider. Coluccio's alcohol consumption and driving were sufficient evidence for a reasonable juror to conclude that turning in front of the motorcycle was a gross deviation from ordinary care. St. v. Coluccio, 2009 MT 273, 352 M 122, 214 P3d 1282 (2009).

No Right to Civil Negligence Instruction: Pol was driving his pickup truck on a city street in Missoula, Montana. His truck struck a motorcycle carrying two riders, Bernard Kuhns and his wife, Teresa Kuhns. Teresa Kuhns was killed, and Bernard Kuhns was injured. Pol drove away without stopping. Pol was charged with negligent vehicular assault and vehicular homicide while under the influence of alcohol, and a jury convicted him on both counts. The District Court instructed the jury on the definition of negligence contained in this section and declined to give an additional instruction on the difference between civil negligence and criminal negligence. On appeal, Pol argued that the District Court should have given this instruction. In the instruction given it was clear that criminal negligence is not the same as ordinary lack of care. The jury instructions, as a whole, fully and fairly instructed the jury on the law applicable to the case. The District Court did not err in refusing to instruct the jury on the difference between civil and criminal negligence. St. v. Pol, 2008 MT 352, 346 M 322, 195 P3d 807 (2008).

Intoxication Instruction Properly Given in Negligent Homicide Case: The trial court in English's negligent homicide case instructed the jury that intoxication is not an essential element of negligent homicide, but rather one factor to be considered in determining whether English caused the victim's death. English contended that the instruction was an incorrect statement of the law, but the Supreme Court disagreed. Section 45-5-104 provides that intoxication is not an essential element of negligent homicide. Coupled with other instructions defining negligently and clarifying that a finding of negligence was required in order to convict, the jury was properly allowed to consider whether English's intoxication contributed to his negligence. St. v. English, 2006 MT 177, 333 M 23, 140 P3d 454 (2006).

Jury Properly Instructed on Definition of Criminal Negligence — Mental State Not at Issue: In Larson's negligent homicide trial, the court instructed the jury that a person acts negligently when an act is done with a conscious disregard of the risk of death or when a person disregards a risk of causing death that the person should be aware that the result will occur or that the circumstance exists. Larson contended that the instruction erroneously omitted the word "consciously" before the word "disregards". The Supreme Court disagreed. Under St. v. Gould, 216 M 455, 704 P2d 20 (1985), mental state is not at issue in negligent homicide cases. Contrary to Larson's contention, the instruction did not effectively lower the standard of proof for proving negligence, but rather constituted a correct statutory definition. Larson had a full opportunity to argue his defense, and the jury was properly instructed. St. v. Larson, 2004 MT 345, 324 M 310, 103 P3d 524 (2004).

Motion to Dismiss Based on Insufficient Evidence of Negligent Homicide Properly Denied — Deviation From Reasonableness Standard Sufficient to Support Finding of Negligent Conduct: After consuming at least five shots of brandy and four beers at a tavern, Davis hit and killed a pedestrian on the way home, then left the accident scene. Upon arriving home, he told his girlfriend that he had hit a deer, ate dinner, and went to bed. Davis was later charged with negligent homicide and failure to remain at the scene of an accident that resulted in death or personal injuries. Following presentation of the state's case, Davis moved for dismissal based on insufficient evidence, which was denied. Davis was convicted and appealed. The Supreme Court affirmed, concluding that a rational trier of fact could have found the essential elements of negligent homicide beyond a reasonable doubt based on evidence that Davis consciously disregarded the risk posed by his driving under the influence of alcohol (even though blood alcohol content could not be tested because he left the scene) and that Davis's conduct immediately before, during, and after the accident revealed a gross deviation from the standard of conduct that a reasonable person not under the influence of alcohol would have observed. St. v. Davis, 2000 MT 199, 300 M 458, 5 P3d 547, 57 St. Rep. 773 (2000), followed in St. v. English, 2006 MT 177, 333 M 23, 140 P3d 454 (2006).

Failure to Stop at Scene of Automobile Accident Not Cause of Death of Another — Elements of Negligent Homicide Not Proved: It was a dark and stormy night. Schipman was on his way home from a Dillon bar, through open range, when a dark horse lunged out of the barrow pit and hit the side of his vehicle. Schipman did not stop but, looking back, did not see the horse on the highway and, assuming it was dead, proceeded home. Two other vehicles did stop. The driver of one vehicle found the horse, dead, in the southbound lane, so he parked in the northbound lane and turned on his flashers in an attempt to warn oncoming traffic. About the same time, two recent high school graduates, Keller and Dorvall, were returning home after an evening with friends in Virginia City. They noticed the two vehicles in the northbound lane and slowed down but could not see any reason why the two men were standing by the road, so they made a conscious decision to proceed. They swerved into the barrow pit to avoid the horse, and Dorvall was killed. When Schipman called authorities the following day to report the accident, he was charged with felony negligent homicide and misdemeanor negligent endangerment for leaving the scene of the accident, was convicted, and subsequently appealed. As a material element of either offense, the state was required to prove that Schipman's conduct was criminally negligent. Schipman argued that had he stayed at the accident scene instead of proceeding home to tend to his own injuries, the actual result would not have been any different. He contended that the jury should not have been allowed to speculate as to whether the graduates would have slowed down or stopped had there been three men and three vehicles instead of two and that the death of Dorvall should not be allowed to influence his criminal culpability. The Supreme Court held that cause in fact was not sufficiently established to sustain the negligent homicide conviction. The court assumed, without deciding, that Schipman's actions were criminally negligent by definition, but there was no basis to speculate that the road hazard would have been avoided had there been three men instead of two alongside the road that night. Absent evidence that Schipman's negligent act did, in fact, cause Dorvall's death, the conviction for negligent homicide was reversed. St. v. Schipman, 2000 MT 102, 299 M 273, 2 P3d 223, 57 St. Rep. 409 (2000).

Criminal Liability Based on Failure to Act When Self-Preservation at Issue — No Legal Duty to Perform Legal Duty at Personal Risk: For criminal liability to be based on a failure to act, there must be a legally imposed duty to act and the person must be physically capable of performing the act. When self-preservation is at stake, the law does not require a person to save another's life by sacrificing one's own. No crime is committed by a person who in saving one's own life in the struggle for the only means of safety causes the death of another. Accountability may still exist for the results of the peril into which one person places another, but the law does not require a person to risk serious bodily injury to perform a legal duty. (See 40 Am. Jur. Homicide § 116 (1999).) State ex rel. Kuntz v. District Court, 2000 MT 22, 298 M 146, 995 P2d 951, 57 St. Rep. 111 (2000), following St. v. Mally, 139 M 599, 366 P2d 868 (1961), and distinguishing People v. Beardsley, 113 NW 1128 (1907). See also Burns v. Fisher, 132 M 26, 313 P2d 1044 (1957).

Justifiable Use of Force — No Duty to Assist Aggressor in Zone of Risk — Revival of Duty to Summon Aid: Kuntz was charged with negligent homicide for stabbing Becker and then failing to immediately call for medical assistance. Kuntz pleaded justifiable use of force. The state contended that even if the use of force was justified, a proved subsequent failure by Kuntz to summon aid could constitute a gross deviation from ordinary care. The Supreme Court held that when a person justifiably uses force to fend off an aggressor, that person has no duty to assist the aggressor in any manner that could conceivably create the risk of bodily injury to that person or to other persons. This absence of a duty necessarily includes any conduct that would require the person to remain in or return to the zone of risk created by the original aggressor. The victim has but one duty after fending off an attack, and that is the duty owed to one's self, as a matter of self-preservation, to seek and secure safety away from the place where the attack occurs. Thus, a person who justifiably acts in self-defense is temporarily afforded the same status as an innocent bystander (see Pope v. St., 396 A2d 1054 (Md. 1979)). However, the duty to summon aid may in fact be revived but only after the victim has fully exercised the right to secure safety from personal harm. Only then may a legal duty be imposed to summon aid for the person placed in peril by an act of self-defense, and before that duty is imposed, there must be a showing that: (1) the person had knowledge of the facts indicating a duty to act; and (2) the person was physically capable of performing the act. Even so, a proved breach of the legal duty may still fall short of negligent homicide, which requires a gross deviation from an ordinary or reasonable standard of care. To find a person who justifiably acts in self-defense criminally culpable for causing the death of the aggressor, the failure to summon aid must be the cause in fact of the aggressor's death, not the justified use of force itself. State ex rel. Kuntz v. District Court, 2000 MT 22, 298 M 146, 995 P2d 951, 57 St. Rep. 111 (2000), following St. v. Bier, 181 M 27, 591 P2d 1115, 36 St. Rep. 466 (1979), and followed in St. v. Bowen, 2015 MT 246, 380 Mont. 433, 356 P.3d 449.

Deliberate Homicide Charged — Insufficient Evidence to Support Instruction on Negligent Homicide — No Purpose to Instruction on Definition of "Negligently": Goulet, Nelson, and Running Crane became intoxicated after drinking at several bars, and Goulet, after pushing Running Crane away when he tried to borrow a cigarette, stabbed Running Crane in the stomach, then in the chest, and finally in the back. During trial on charges of deliberate homicide, Goulet requested an instruction on negligent homicide, but the instruction was refused by the District Court. The Supreme Court held that the District Court did not err in refusing the requested instruction. The

Supreme Court noted that a defendant is entitled to an instruction on a lesser included offense when the jury would be warranted in convicting on the lesser offense and acquitting on the greater offense. However, the Supreme Court noted that the only evidence that even approached evidence of negligence was that as he was stabbing Running Crane, Goulet was thinking that he hoped that he wasn't hurting Running Crane too badly. The Supreme Court called this evidence self-serving and insufficient to support the requested instruction. The Supreme Court also affirmed the District Court in its refusal to give an instruction on the definition of "negligently", saying that the District Court refused the instruction on the definition for the same reason that it refused the instruction on negligent homicide and that an instruction on the definition of a word standing alone, that is, not used in the instruction, would serve no purpose. St. v. Goulet, 283 M 38, 938 P2d 1330, 54 St. Rep. 482 (1997), followed in St. v. Fuqua, 2000 MT 273, 302 M 99, 13 P3d 34, 57 St. Rep. 1141 (2000).

Definition of "Negligently" as Applied to Negligent Homicide — Not Unconstitutionally Vague: Defendant contended that the definition of "negligently", as applied to negligent homicide, is unconstitutionally vague when compared and contrasted with other terms like "gross negligence", "lack of ordinary care", and "reckless disregard for consequences". Defendant asserted the statute is vague because it did not require a conscious deviation from a known risk. After considering 45-5-104 and the definition of "negligently" in 45-2-101, the court found no indefiniteness on the face of the statutes sufficient to require a holding of unconstitutionality and no unconstitutional application by the lower court. The court enumerated the facts indicating that defendant's conduct was properly classified as a gross deviation, meaning a deviation that was considerably greater than the lack of ordinary care. St. v. Gould, 216 M 455, 704 P2d 20, 42 St. Rep. 946 (1985).

"Knowingly" and "Negligently" Not Mutually Exclusive Mental States: The defendant's involvement in a vehicular accident resulted in his being convicted of knowingly causing serious bodily injury to one of the occupants of a car and negligently causing bodily injury to the remaining occupants. The two mental states are not mutually exclusive, as proof of knowledge necessarily proves the elements of criminal negligence. St. v. Pierce, 199 M 57, 647 P2d 847, 39 St. Rep. 1205 (1982).

Degree of Neglect — Failure to Provide Child With Medical Attention: The defendant is guilty of negligent homicide where, by failing to provide medical attention for her son, she disregarded a risk of which she should have been aware, and the risk was so great that to disregard it was a gross deviation from a reasonable standard of conduct. St. v. Hoffman, 196 M 268, 639 P2d 507, 39 St. Rep. 79 (1982).

Analogous to Gross Negligence in Torts: A gross deviation under the statutory definition of "negligently" was held analogous to gross negligence in the law of torts which is generally considered to fall short of a reckless disregard for consequences and differs from ordinary negligence only in degree, not in kind. St. v. Bier, 181 M 27, 591 P2d 1115 (1979).

Miscellaneous Offenses:

Defendant's conduct in pulling out, cocking, and throwing a loaded gun within reach of his intoxicated wife was held to clearly qualify as a gross deviation from the standard of conduct that a reasonable person would have observed and to rise to criminal culpability. St. v. Bier, 181 M 27, 591 P2d 1115 (1979).

Criminally negligent homicide occurs when defendant fails to perceive a substantial and unjustifiable risk of death to the victim. People v. Walker, 58 A.D.2d 737, 396 N.Y.S.2d 121 (1977).

Liability for criminally negligent homicide cannot be predicated upon every careless act merely because its carelessness results in another's death. People v. Lewis, 53 A.D.2d 963, 385 N.Y.S.2d 828 (1976).

Where a passenger train engineer was prosecuted for criminally negligent homicide, his conduct as an engineer of a public conveyance of great size, weight, and passenger capacity was to be examined in the context of more specialized standards of care applicable to his profession. People v. Tate, 87 Misc.2d 6, 382 N.Y.S.2d 941 (1976).

Combination of State of Mind and Conduct: Criminal negligence is a combination of defendant's subjective state of mind or mental state and conduct which involves a substantial and unjustifiable risk that a result or circumstance described by a penal statute will occur or exist and a gross deviation from the standard of conduct or care that a reasonable person would observe. People v. Fitzgerald, 45 N.Y.2d 574, 412 N.Y.S.2d 102, 284 N.E.2d 649 (1978).

Evidence of Negligence:

Evidence was sufficient to warrant jury finding that "usual and ordinary caution" was not exercised where doctor testified that basal skull fracture and fatal transection of liver were caused by an extensive and severe force. St. v. Henrich, 159 M 365, 498 P2d 124 (1972).

Evidence in a prosecution for involuntary manslaughter arising out of an automobile accident in city at nighttime, showing defendant driving at 15 miles per hour, that he did not see deceased, that he had not been drinking, that he was looking straight ahead but saw nothing to indicate the presence of the pedestrian, etc., was insufficient to warrant a verdict of guilty of such reckless disregard of human life as was required to constitute the offense under 94-2507, R.C.M. 1947 (now negligent homicide under 45-5-104), and the information should have been dismissed. St. v. Powell, 114 M 571, 138 P2d 949 (1943), distinguished in St. v. Pankow, 134 M 519, 333 P2d 1017 (1958).

Whether defendant, while intoxicated and in the act of exhibiting his revolver to the deceased, also under the influence of liquor, exercised that usual and ordinary caution in handling the weapon to render the killing excusable was for determination by the jury. St. v. Kuum, 55 M 436, 178 P 288 (1919), distinguished in St. v. Chavez, 85 M 544, 281 P 352 (1929).

Involuntary Act Not Criminal — Exception: The Legislature may prescribe that an act is criminal without regard to the doer's intent or knowledge, but an involuntary act is not criminal, with certain exceptions such as involuntary acts resulting from voluntary intoxication. People v. Shaughnessy, 66 Misc.2d 19, 319 N.Y.S.2d 626 (1971).

Disregard for Human Life: In prosecution for involuntary manslaughter under 94-2507, R.C.M. 1947 (now negligent homicide under 45-5-104), criminality of the act resulting in death was established if the act was done negligently in such a manner as to evince a disregard for human life or an indifference to consequences irrespective of whether unlawful act was malum in se or merely malum prohibitum. St. v. Strobel, 130 M 442, 304 P2d 606 (1956), overruled on other grounds, St. v. Pankow, 134 M 519, 525, 333 P2d 1017 (1958).

OBTAIN

Theft of Services: Where the defendant had allegedly moved around a ticket agent and entered a transit authority train platform without paying his fare, the Illinois court held that the defendant could not be convicted of the crime of theft of services before he had boarded the train. People v. Davis, 5 Ill. App.3d 95, 283 N.E.2d 317, 318 (1972).

OBTAINS OR EXERTS CONTROL

Knowing Participation — Obtains or Exerts Control: Knowing participation, by acting as a lookout during a burglary of a computer and van keys and by driving a stolen van that the minor knew did not belong to him, met the definition of "obtains or exerts [unauthorized] control", "purposely", and "knowingly" under this section to satisfy the elements of felony theft under 45-6-301(1)(a). In re S.F., Jr., 2010 MT 244, 358 Mont. 185, 244 P.3d 316.

In General:

The Illinois Supreme Court has ruled that the term "unauthorized control" in the theft section, which is substantially the same as the Montana theft law, was not unconstitutionally vague by failing to define what conduct was proscribed, in view of this definition and the requirement of a "knowing" mental state. People v. Harden, 42 Ill.2d 301, 247 N.E.2d 404, 406 (1969). The "obtaining of unauthorized control" was held to include the initial taking or carrying away of property, but unauthorized possession need not begin at the time of the original taking. People v. Snow, 21 Ill. App.3d 873, 316 N.E.2d 216 (1974).

Citing People v. Nunn, 63 Ill. App.2d 465, 212 N.E.2d 342, 344 (1965), the Montana court upheld a conviction for theft where defendant agreed to sell a stray cow which the purchaser believed belonged to defendant and made out a bill of sale forging the true owner's name. The court held that defendant had "obtained or exerted control" over the cow by bringing about a transfer of title and possession to one other than the owner through a wrongful sale which deprived the owner of his property. St. v. McCartney, 179 M 49, 585 P2d 1321 (1978).

Evidence: Evidence which did not conclusively establish defendant's regular occupancy of or his control over the residence in which the stolen property was seized and its contents during the period in which the burglaries occurred, or prior to search associated defendant with the goods but was held insufficient to prove the essential element of control over the stolen property required for conviction of theft. St. v. Campbell, 178 M 15, 582 P2d 783 (1978).

Instructions: Substitution of the phrase "exerts control" for statutory words "obtains control" in instructions relating to offense of theft was held not to be reversible error. People v. Collins, 48 Ill. App.3d 643, 362 N.E.2d 1118 (1977).

OCCUPIED STRUCTURE

Prison Cellblock as Occupied Structure Within Context of Burglary Charge: Gollehon was charged with burglary because of his involvement in a prison riot in which he and several other inmates took over the maximum security unit, entered one of the cell blocks, and killed five protective custody inmates. He contended that the trial court should have dismissed the burglary charge, and thus the extenuating deliberate homicide charges, because the definition of occupied structure was inapplicable to his entry into the cell block. However, the definition of occupied structure in this section clearly states that each unit of a building that consists of two or more separately secured units is a separate occupied structure. Notwithstanding Gollehon's arguments that the definition does not enumerate specific structures or types of buildings to which it applies, that the prison handbook fails to mention that the presence of an inmate in an unauthorized area of the prison could result in a burglary charge, and that the definition does not take into account the unique circumstances of a prison environment, Gollehon's unauthorized conduct in entering into a cellblock intended for human habitation, with the intent to commit a crime, fits squarely within the burglary statute. St. v. Gollehon, 262 M 293, 864 P2d 1257, 50 St. Rep. 1564 (1993), followed in St. v. Turner, 265 M 337, 877 P2d 978, 51 St. Rep. 467 (1994).

Unused Bunkhouse With No Utilities Regularly Used for Storage: No one had lived or stayed overnight in a farmhouse or bunkhouse since 1964. Neither structure had electricity, heat, or running water. The house smelled strongly of wild animals and had a leaky roof. The bunkhouse was tight and of sound construction. Each had a door with a padlock that defendants broke. The owner and lessee each lived a quarter mile away. The owner used both structures to store furniture and appliances, the lessee used the bunkhouse to store fenceposts for his farming business, and each visited the structures regularly for those purposes. The bunkhouse was a building suitable for carrying on a business and used regularly for that purpose and was an "occupied structure" as that term is used in 45-6-204. St. v. Pierce, 255 M 378, 842 P2d 344, 49 St. Rep. 992 (1992).

Interpretation of "Occupied Structure" Definition: In appealing his conviction for burglary and theft, defendant argued that he was entitled to a directed verdict on the burglary count because the furnished mobile home located on the sales lot of a dealer was not an "occupied structure" for purposes of 45-6-204. The Supreme Court found that the mobile home satisfied the definition set forth in 45-2-101. The court noted that the furnished mobile home was an integral part of the business, was a structure suitable for carrying on business, and was so used. Because the trial judge properly determined that the mobile home was an "occupied structure", he correctly denied the defendant's motion for a directed verdict on the burglary charge. St. v. Kyle, 192 M 374, 628 P2d 260, 37 St. Rep. 1447 (1980).

Jury Instruction on "Occupied Structure"— Coverage of Vehicles: On appeal from a conviction for deliberate homicide, the defendant claimed his proposed jury instruction on "occupied structure" was correct because the statutory definition includes "vehicle". However, the Chevrolet Blazer in which the defendant was sitting when he shot the victim was not covered by the definition since the structure must be suitable for human occupancy or night lodging of persons or for carrying on business and the Blazer was not so suitable. A defendant is entitled to an instruction having support in the evidence presented but not if there is no such support. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

"Occupied Structure" as Integral Part of Business: Defendant maintained that the State failed to prove that he committed a burglary since the tack shed from which he took saddles and riding gear was not an "occupied structure" as required by 45-6-204. The legislative intent of the burglary statute was to prohibit wrongful intrusions into those places where the threat to people was most alarming. The definition of "occupied structure" includes a place suitable for "carrying on a business". The deceased used the tack shed as an integral part of the horse rental business, and as such it came within the definition of "occupied structure". St. v. Sunday, 187 M 292, 609 P2d 1188 (1980).

Semitrailer and Sleeper Cab: A semitrailer attached to a sleeper cab tractor was an "occupied structure", and therefore defendant who entered it and removed a number of cases of beer was properly convicted of burglary. St. v. Shannon, 171 M 25, 554 P2d 743 (1976).

OFFENSE

Ordinance Violation:

An action by a city instituted in its police court by the filing of a complaint charging a violation of one of its ordinances and seeking the imposition of a fine was criminal in nature; the court acquired jurisdiction over defendant by the issuance and service of a warrant of arrest. State ex rel. Marquette v. Police Court, 86 M 297, 283 P 430 (1929), modifying Bozeman v. Nelson, 73 M 147, 237 P 528 (1925).

A valid city ordinance passed by the municipality with the design of the Legislature was a "law" as that term was used in 94-112, R.C.M. 1947 ("public offense" no longer defined), which defined a public offense as an act committed or omitted in violation of a law, and such ordinance had, within the territorial jurisdiction of the municipality, the same force and was to be treated as a legislative act. State ex rel. Marquette v. Police Court, 86 M 297, 283 P 430 (1929).

The threatened violation of a town ordinance was not a "public offense" within the meaning of 94-112, R.C.M. 1947 ("public offense" no longer defined). State ex rel. Streit v. Justice Court, 45 M 375, 123 P 405 (1912).

Removal From Office:

An officer (County Clerk) charged with willful neglect of duty was not entitled to jury trial in proceeding for his removal from office under 94-112, R.C.M. 1947 ("public offense" no longer defined). State ex rel. Bullock v. District Court, 62 M 600, 205 P 955 (1922).

A proceeding for the summary removal of a County Attorney for misconduct, even though instituted by a private person, was a public proceeding, and though it was summary in its nature, was classified as a prosecution for a crime under 94-112, R.C.M. 1947 ("public offense" no longer defined). State ex rel. McGrade v. District Court, 52 M 371, 157 P 1157 (1916).

Contempt of Court: A contempt of court, punishable by fine or imprisonment, or both, was a public offense under 94-112, R.C.M. 1947 ("public offense" no longer defined). State ex rel. Flynn v. District Court, 24 M 33, 60 P 493 (1900).

OWNER

Rebuttable Presumption That Prison Escapee Abandoned Personal Property: Hawkins escaped from the state prison. Immediately following the escape, officials packed up Hawkins' personal property, sealed it in boxes with security tape and Hawkins' name on each box, and placed it in the prison storage room. After 2 days, Hawkins was apprehended and returned to prison. He was found guilty of escape, but his property was not ordered destroyed. Over the next 30 days, Hawkins requested the return of his personal property several times. Eventually, Hawkins was escorted to the storage room and allowed to remove his legal papers but was informed that, by policy, when a prisoner escapes, all personal property is considered abandoned, so the remainder of his property was destroyed or sold. Hawkins filed an action for the value of the property, alleging that prison officials destroyed his property without affording him due process, which constituted cruel and unusual punishment and violated a gratuitous bailment that Hawkins had formed. The District Court, concluding that Hawkins had abandoned his property by his escape and that the abandonment constituted a complete defense to any action brought by Hawkins that depended on his ownership of the property, dismissed the action based on failure to state a claim for which relief could be granted. On appeal, the Supreme Court cited Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939), for the proposition that in determining whether one has abandoned property or rights, intention is the first and paramount object of inquiry. If there is no expressed intent to abandon, then intent must be inferred from the acts of the property owner. The presumption or inference of intent to abandon one's property based solely on the acts of the owner is a rebuttable presumption. Here, upon returning to prison and requesting the return of his property, Hawkins effectively rebutted the presumption that he intended to abandon it, and when he reclaimed his property by requesting its return, he regained his status as owner of his personal property against all others. The District Court committed reversible error when it found that Hawkins abandoned the property by escape and dismissed the action based on failure to state a claim for which relief could be granted. Hawkins v. Mahoney, 1999 MT 296, 297 M 98, 990 P2d 776, 56 St. Rep. 1185 (1999), distinguishing Herron v. Whiteside, 782 SW 2d 414 (1989). See also 1 C.J.S. Abandonment § 12 (1985).

Poaching of Wild Game Animals — Ownership Interest of State Held Sufficient: Defendants Richard and David Fertterer were convicted of felony criminal mischief for illegally killing game. They contended on appeal that the state did not have title ownership in the animals killed and that Fertterers could therefore not be convicted of damaging the property of another. The Supreme Court held that St. v. Tome, 228 M 398, 742 P2d 479 (1987), and the statutory definitions require only that the property be held by another with an interest superior to the person who damages that property and that the property need not be held in title ownership. Relying upon Baldwin v. Mont., 436 US 371 (1978), the Supreme Court held that wild animals are public property within the meaning of the criminal mischief statute and that the state's ownership interest in wild animals for the use and benefit of the people was a sufficient ownership interest, superior to Fertterers', to sustain the conviction. St. v. Fertterer, 255 M 73, 841 P2d 467, 49 St. Rep. 846 (1992).

Evidence Sufficient to Support Conviction — Possession Sufficient to Show Ownership: A defendant convicted of criminal mischief for damaging a vending machine and clubhouse during a burglary contended evidence was insufficient because the only loss sustained by the city was $191 damage to the clubhouse. However, the vending machine was leased to the golf pro (who was a city employee) and was located on city property. The state properly introduced an itemized repair bill for $359. The golf pro maintained possessory control of the machine and was personally responsible for repair costs. Mere possession was sufficient to show ownership in this property crime, and the conviction was affirmed. St. v. Tome, 228 M 398, 742 P2d 479, 44 St. Rep. 1629 (1987).

Proof of Ownership: Proof that one other than the accused either owns or has superior possessory interest in property allegedly stolen was held to be an essential element of the offense of theft. People v. Cowan, 49 Ill. App.3d 367, 364 N.E.2d 362 (1977). Ownership of property which is alleged to have been stolen must be alleged in the information and proved in the trial to safeguard the accused against double jeopardy. People v. Insolata, 112 Ill. App.2d 269, 251 N.E.2d 73, 74 (1969). Despite that general rule, however, an earlier court held that proof that the corporate owner of a burglarized building was the owner of money stolen from that building was not necessary to convict the party taking the money of burglary. People v. Griffin, 48 Ill. App.2d 148, 198 N.E.2d 115, 119 (1964).

Sufficiency of Interest: Cotrustees of a premium trust fund were held to have a sufficient possessory interest in the funds represented by three checks obtained by defendant to qualify as owners under the theft statute at the time of the theft. People v. Decker, 19 Ill. App.3d 86, 311 N.E.2d 228 (1974).

Construction and Application: The Illinois courts have given this definition a broad interpretation. For example, the resident manager of a hotel was held to have sufficient control over the hotel's property and thus was an "owner" within the definition of this section. People v. Smith, 90 Ill. App.2d 388, 234 N.E.2d 161, 166 (1967). Similarly, the payee of an allegedly stolen check was found to have sufficient interest in the check and the proceeds of the check to meet the requirements of this definition. People v. Jones, 123 Ill. App.2d 389, 259 N.E.2d 393 (1970). However, a defendant in possession of stolen drugs was held not to be "an owner" as defined by this section. People v. Marino, 95 Ill. App.2d 369, 238 N.E.2d 245, 254 (1968). Also "owner" has been held to include an unincorporated association. People v. Woods, 15 Ill. App.3d 221, 303 N.E.2d 562 (1973).

Sufficiency of Evidence: In general, Illinois courts have been liberal in holding that evidence which indicates that the ownership of stolen property was in one other than the defendant is sufficient to support a conviction under indictment charging theft. See, for example, People v. Demos, 3 Ill. App.3d 284, 278 N.E.2d 89, 90 (1971); People v. Insolata, 112 Ill. App.2d 269, 251 N.E.2d 73, 74 (1969); People v. Kurtz, 69 Ill. App.2d 282, 216 N.E.2d 254, reversed in part on other grounds in 37 Ill.2d 103, 224 N.E.2d 817 (1966); People v. Tomaszek, 54 Ill. App.2d 254, 204 N.E.2d 30, 33 (1964), certiorari denied 382 US 827 (1965).

Indictment and Information: It is necessary in every indictment or information charging theft that the ownership of the stolen property be set forth with accuracy. People v. Baskin, 119 Ill. App.2d 18, 255 N.E.2d 42, 43 (1969). However, slight variations between the actual ownership of the property and the ownership of the property as listed in the complaint is not fatal to the indictment. See, for example, People ex rel. Insolata v. Pate, 46 Ill.2d 268, 263 N.E.2d 44, 45 (1970); People v. Harden, 42 Ill.2d 301, 247 N.E.2d 404, 406 (1969); People v. Tomaszek, 54 Ill. App.2d 254, 204 N.E.2d 30, 34 (1964), certiorari denied 382 US 827 (1965).

Constitutionality: The Illinois court has held that this definition and the Illinois section on theft which has substantial similarities with 45-6-301, defining theft, were not repugnant or vague in providing that an owner can never be an offender. People v. Kamsler, 78 Ill. App.2d 349, 223 N.E.2d 237 (1966).

PEACE OFFICER

In General: "Peace officer" includes only those individuals who are required by their employment to give full time to the preservation of public order. People v. Perry, 27 Ill. App.3d 230, 327 N.E.2d 167 (1975). A police officer is at all times and in all places vested by duty to maintain public order and by duty to effectuate arrests by virtue of his office, and that duty is not affected by whether the officer is in or out of uniform. People v. Bouse, 46 Ill. App.3d 465, 360 N.E.2d 1340 (1977). A university security officer was held authorized to make an arrest for disorderly conduct while on duty and in uniform. People v. Picha, 44 Ill. App.3d 759, 358 N.E.2d 937 (1976). But security guards employed by the Chicago housing authority were earlier held not to be "peace officers" within the criminal code and could not make an arrest for disorderly conduct. Thus, one guard's attempt to handcuff defendant was held to constitute a battery justifying defendant's efforts to resist the force by kicking the guard. People v. Perry, 27 Ill. App.2d 230, 327 N.E.2d 167 (1975). A statute which allows police officers to carry arms at any time but allows prison guards to carry arms only in performance of their duties and when commuting to and from their place of work was held not to be invalid as setting forth an arbitrary and unreasonable distinction, since police officers have a duty to maintain public order wherever they may be and their duties are not confined to a specific time or place as are those of prison guards. Arrington v. Chicago, 45 Ill.2d 316, 259 N.E.2d 22 (1970).

PERSON

Information Charging Death of Newborn Child Sufficient in Alleging Probability of Homicide Despite Lack of Evidence That Child Born Alive: Elliott was charged with deliberate homicide of her newborn child. She moved to dismiss the information as insufficient because the state medical examiner offered no opinion as to whether the child was ever born alive and, without proof that the child was a person who was born and was alive, she should not have been charged with the death of a human being. The Supreme Court affirmed. The sufficiency of the charging documents is established by reading the information together with the affidavit in support of the motion for leave to file the information. The affidavit need not make out a prima facie case that defendant committed an offense. A mere probability that the offense was committed is sufficient. Thus, to withstand a motion to dismiss, the state needed only to show a probability that the baby was born alive and that Elliott committed the offense charged. In this case, the circumstances of the delivery of the baby, Elliott's hospitalization, her differing stories, the skull fractures suffered by the baby, and the concealment of the baby's body, all provided a sufficient basis to find probable cause for the deliberate homicide charge, and the District Court did not err in denying the motion to dismiss the information. St. v. Elliott, 2002 MT 26, 308 M 227, 43 P3d 279 (2002), followed, with regard to sufficiency of information, in St. v. Harlson, 2006 MT 312, 335 M 25, 150 P3d 349 (2006).

In General:

Although the term "person" ordinarily refers to a living human being, it has long been the law in Montana that the definition of person includes corporations as well as natural persons. In re Beck's Estate, 44 M 561, 121 P 784 (1912).

Notwithstanding the broad language of this section, the Illinois court has recently ruled that this section did not alter the existing law concerning whether or not an unincorporated association could be sued in its own name in a civil action. Boozer v. U.A.W., A.F.L.-C.I.O., Local 457, 4 Ill. App.3d 611, 279 N.E.2d 428, 432 (1972). But an "unincorporated association" is included in the concept of "owner" or "person" from whom theft of property is proscribed. People v. Woods, 15 Ill. App.3d 221, 303 N.E.2d 562 (1973).

PHYSICALLY HELPLESS

Massage Therapist Guilty of Sexual Intercourse Without Consent — Totality of Circumstances — Definition of Sexual Intercourse — Penetration Analyzed — Threat of Physical Force Supported: A jury found the defendant, a licensed massage therapist, guilty of sexual intercourse without consent while giving his victim a massage. The defendant argued on appeal that the prosecution did not present sufficient evidence to the jury to support the elements of penetration and force. The defendant further argued that testimony of clitoral rubbing did not prove that the vulva was penetrated. The Supreme Court determined that the defendant's arguments that clitoral rubbing did not constitute penetration under the law were without legal merit pursuant to the definition of sexual intercourse in 45-2-101. The Supreme Court held that, viewed in a light most favorable to the prosecution, a rational trier of fact could conclude that the totality of the circumstances communicated a threat to the defendant's victim: the two were isolated in an empty office building after hours, the defendant was much larger than his victim, and the defendant persisted in his assault despite the victim's repeated objections. The victim testified that she told the defendant she was uncomfortable before he digitally penetrated her. After the penetration, she told the defendant pointedly to stop. Instead, the defendant returned to her groin area and started rubbing her clitoris. Montana law did not require the victim to push the defendant away, strike out at him, or attempt to flee. A rational jury could find that the defendant's actions communicated a threat of physical force to the victim. Viewing the evidence in the light most favorable to the prosecution, the Supreme Court affirmed the District Court's decision that a rational trier of fact could find all elements of sexual intercourse without consent beyond a reasonable doubt. St. v. Lerman, 2018 MT 5, 390 Mont. 117, 408 P.3d 1008, distinguishing St. v. Haser, 2001 MT 6, 304 Mont. 63, 20 P.3d 100, and St. v. Stevens, 2002 MT 181, 311 Mont. 52, 53 P.3d 356.

Jury Question as to Whether Rape Victim Asleep and Physically Helpless — Conflicting and Uncorroborated Victim Testimony: Shields contended that the state failed to show that Shields had sexual intercourse with a woman by force. The victim testified that she was asleep and did not realize what was happening until she awoke and did not realize who was in the room with her until she turned on the light, while Shields testified that the victim was not asleep, but was in fact an active participant in the act. However, the mere existence of conflicting evidence did not render the state's evidence insufficient to support a guilty verdict, nor was Shields' conviction rendered infirm by the fact that the state presented no evidence corroborating the victim's testimony that she was asleep. It was within the province of the jury to decide which of the conflicting evidence would prevail, and only in cases in which a witness's testimony is so inherently improbable, or is so nullified by material self-contradiction that no fair-minded person could believe it, will the Supreme Court say that no firm foundation exists for a verdict based on that testimony. In this case, any rational trier of fact could have found that the victim was asleep during the sexual intercourse, despite the fact that the victim may have had some sensory perception during the incident, and was therefore physically helpless and incapable of consent. Shields' conviction was affirmed. St. v. Shields, 2005 MT 249, 328 M 509, 122 P3d 421 (2005).

Massage Patients Not Incapable of Consent Because of Force or Physical Helplessness — Conviction for Sexual Intercourse Without Consent Improper: Stevens was convicted of two counts of sexual intercourse without consent after having sexual contact with two female patients at his massage clinic. Stevens appealed on grounds that the state failed to prove the "without consent" element beyond a reasonable doubt. Stevens asserted that the victims were not physically helpless even though they were in a dream state of total relaxation and that there was no evidence that Stevens used any force or threat of force even though the victims were surprised or fearful. The Supreme Court agreed, concluding that no rational trier of fact could have found that the victims were unconscious or otherwise physically unable to communicate unwillingness to act or that the victims' fear was a result of Stevens' infliction, attempted infliction, or threatened infliction of bodily injury. The court reduced the offenses to sexual assault and remanded for further proceedings. St. v. Stevens, 2002 MT 181, 311 M 52, 53 P3d 356 (2002). See also St. v. Haser, 2001 MT 6, 304 M 63, 20 P3d 100 (2001).

Sleeping Victim of Sexual Intercourse Without Consent Considered Physically Helpless: A sleeping victim of sexual intercourse without consent is physically helpless within the definitions in 45-5-501 and this section. The statutory definition of physically helpless is broadly worded to encompass a person who is sleeping because a sleeping person is temporarily unconscious or otherwise physically unable to communicate unwillingness to act. Therefore, a sleeping person cannot consent to sexual intercourse. Whether a person was indeed sleeping, and thus physically helpless, is a question of fact for the jury to decide. St. v. Stevens, 2002 MT 181, 311 M 52, 53 P3d 356 (2002).

POSSESSION

Presence of Drugs in Borrowed Vehicle Sufficient Evidence for Conviction of Possession of Dangerous Drugs: Clark was loaned a vehicle by his supervisor so that he could report promptly for fire suppression duty. Over the course of the summer, Clark treated the vehicle virtually as his own, even loaning it to a friend for a month. Clark was later stopped on the highway by a highway patrol officer. Dangerous drugs, for which Clark didn't have a prescription but the person to whom Clark loaned the vehicle did, were found in the vehicle, and Clark was charged with and convicted of unlawful possession of a dangerous drug. The Supreme Court held that there was sufficient evidence of Clark's control over everything in the borrowed vehicle to support his conviction. St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

Ingestion of Dangerous Drugs Considered Constructive Possession When Accompanied by Evidence of Knowing and Voluntary Possession: The state sought to revoke a juvenile youth's probation on grounds that the youth's urinalysis tested positive for methamphetamines, opiates, and marijuana. The youth argued that once the drugs were ingested, the youth no longer had dominion or control over them and thus could not be considered to be in possession of drugs. In a case of first impression, the Supreme Court considered whether constructive possession can be proved by a positive urinalysis. The court agreed with the youth that once a substance is ingested and then assimilated into a person's bloodstream, the person who ingested it ceases to exercise dominion and control over the substance, but the court also concluded that the presence of an illegal substance in the body constitutes circumstantial evidence of prior possession of that substance, if even for a short time. However, based on statutory definitions, the presence of a dangerous drug in one's body, standing alone, is insufficient to sustain a conviction for possession of dangerous drugs because possession also requires proof that the drug was knowingly or voluntarily ingested. Thus, the presence of a controlled substance in a person's blood or urine constitutes sufficient circumstantial evidence to prove prior possession beyond a reasonable doubt only when accompanied by other corroborating evidence of knowing and voluntary possession, such as admission of drug use. Here, the youth admitted using methamphetamine, which provided direct evidence that the youth knowingly and voluntarily possessed methamphetamine as charged. However, the youth made no admission of using opiates or marijuana, so there was no corroborating evidence to support the positive urinalysis for those substances. Thus, the determination that the youth illegally possessed opiates and marijuana was reversed. In re R.L.H., 2005 MT 177, 327 M 520, 116 P3d 791 (2005), distinguished in St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

Proof of Constructive Possession of Firearm Sufficient to Show Possession in Violation of Probationary Condition: Caekaert, who had been earlier placed on probation subject to the condition that he "not own, possess, or be in control of any firearms . . . as defined by State or Federal law", was found to have firearms in an outbuilding on real property that he owned. Caekaert possessed a key to the building in which the firearms were found but claimed that the firearms belonged to friends or relatives and that he did not exercise control over the firearms because the owners had not given him permission to do so. The District Court found Caekaert to have violated the terms of his probation and revoked the probation. Citing St. v. Meader, 184 M 32, 601 P2d 386 (1979), the Supreme Court found that the District Court did not abuse its discretion in revoking the probation because there was sufficient evidence that Caekaert was in possession of the weapons because he exercised constructive possession over the weapons. St. v. Caekaert, 1999 MT 147, 295 M 42, 983 P2d 332, 56 St. Rep. 583 (1999).

Evidence of Knowing Control to Be Weighed by Jury: Lopez and Curitan were guests in Harper's home near Helena and, during their stay with him, divided part of a bag of methamphetamine for sale. After a probation search by police officers disclosed the drugs in Harper's freezer and after a bag of marijuana was found in Harper's underwear, Harper was charged with possession of a dangerous drug. Harper contended that there was insufficient proof of "knowing control" of the drugs to uphold his conviction. The Supreme Court noted that Officer Jungers testified as to statements made by others that tended to prove Harper's knowledge of the drugs in his home and that if Harper wanted to be rid of the drugs, all he had to do was to ask Lopez and his companion to leave his home or at least to remove the drugs. Based upon the testimony of the police officer, which the jury was free to believe or to disregard, the Supreme Court held that there was sufficient evidence from which the jury could find beyond a reasonable doubt that Harper committed the offense of possession. St. v. Harper, 284 M 185, 943 P2d 1255, 54 St. Rep. 837 (1997).

Evidence of Constructive Possession Held Sufficient — Circumstantial Evidence of Prior Use: Arthun was convicted of constructive possession of marijuana paraphernalia based upon his knowledge of the whereabouts of an unopened package containing marijuana and evidence in his home of marijuana, two marijuana pipes, and two glass bowls of marijuana roaches. The Supreme Court held that when circumstantial evidence is capable of two interpretations, one that supports guilt and one that supports innocence, the trier of fact determines which is most reasonable. St. v. Arthun, 274 M 82, 906 P2d 216, 52 St. Rep. 1133 (1995), followed in St. v. Hall, 1999 MT 297, 297 M 111, 991 P2d 929, 56 St. Rep. 1190 (1999).

Knowing Control of Content of Unopened Box Containing Marijuana Proved From Circumstances: After police discovered that an undelivered UPS package contained marijuana, they delivered the package to Arthun's home and it was accepted by his wife. Police later observed Arthun at his home but did not see the package disposed of. When officers later went to the home, they observed drug paraphernalia in the house and Arthun led police to an unopened box hidden behind farm tools in another building. Arthun's motion to suppress was denied by the District Court, and the denial was affirmed by the Supreme Court. The Supreme Court held that although possession is not alone sufficient to prove knowing control, that control may be inferred by the trier of fact from the totality of the circumstances. St. v. Arthun, 274 M 82, 906 P2d 216, 52 St. Rep. 1133 (1995).

Grounds for Inferring Knowledge: Knowledge, within the meaning of possession as knowing control, cannot be inferred from mere possession alone. Knowledge can be proved by possessor's acts, declarations, or conduct from which an inference may be drawn. St. v. Hall, 249 M 366, 816

P2d 438, 48 St. Rep. 774 (1991), followed in St. v. Arthun, 274 M 82, 906 P2d 216, 52 St. Rep. 1133 (1995).

Marijuana in Duffle Bag in Defendant's Closet — Possession Shown: A search revealed marijuana in a duffle bag in defendant's closet. Defendant stated that the bag was his. Defendant shared the residence with another. When a controlled substance is found in a place subject to dominion and control of two persons, possession may be imputed to either or both. In this case, evidence supported the jury's finding of possession. St. v. Hall, 249 M 366, 816 P2d 438, 48 St. Rep. 774 (1991).

Evidence of Possession of Methamphetamine in Cocaine Container Sufficient to Support Guilty Verdict of Possession of Methamphetamine: During a pat-down search for weapons, the arresting officer felt a round container in Bernhardt's clothing, which he assumed to be a tobacco container. On the ride to the station, Bernhardt was moving around and rocking back and forth in the back seat of the squad car. On arrival at the jail parking lot, the officer heard a noise that sounded like a hard container dropping against metal. During the search at the jail, paraphernalia customarily used for taking drugs was found in Bernhardt's pocket. The officer returned to the back seat of the squad car where he found a round plastic container, which contained residue that later tested for cocaine, and two bindles, which contained residue that later tested for methamphetamine. Upon subsequent conviction for possession of methamphetamine, Bernhardt maintained that evidence could support a conviction for possession of cocaine because that was what was found in the container but maintained that evidence did not directly link him with the bindles of methamphetamine. The evidence, although circumstantial, was nevertheless substantial enough to support the jury's verdict of guilt for methamphetamine possession. St. v. Bernhardt, 249 M 30, 813 P2d 436, 48 St. Rep. 563 (1991).

Unopened Package — Knowledge and Termination of Control: Defendant obtained a bank loan of $2,000 for the stated purpose of repaying his parents. On that date, his own resources together with the loan were insufficient to allow him to accumulate cash in the amount of nearly the $4,000 that he wired to Florida. A police informant told police that defendant was sending money to Florida to buy drugs. A package containing marijuana was sent from Florida to defendant. The return address on the package was nonexistent. The postmaster informed police the package had arrived. Defendant contended that since he was taken into custody at the post office before the package was opened, he did not have sufficient time to terminate control over the package. The court found that defendant's control of the contraband began at the time he wired the money to Florida. He could have terminated control at any time thereafter. The court found there was substantial credible evidence to support the finding that defendant knew of the contents of the package and that he controlled the contents for a sufficient time to have the opportunity to terminate control. St. v. Smith, 203 M 346, 661 P2d 463, 40 St. Rep. 494 (1983).

Constructive Possession:

Detectives saw defendant place a garbage bag in his truck and drive away. They followed defendant, and although he eluded them briefly, they caught up with him and searched his vehicle. There was no garbage bag in the vehicle so the officers retraced the route of the vehicle and discovered a garbage bag similar to the bag seen in defendant's possession earlier. Supreme Court found facts sufficient to sustain conviction based on theory of constructive possession. St. v. Stemple, 198 M 409, 646 P2d 539, 39 St. Rep. 1085 (1982).

Exclusive, immediate personal possession is not essential to establish constructive possession. There is constructive possession when the person charged with possession has dominion and control over the goods although they were not in his actual, physical possession. St. v. Trowbridge, 157 M 527, 487 P2d 530 (1971). Possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control or to the joint dominion and control of the accused and another. St. v. Meader, 184 M 32, 601 P2d 386 (1979), followed in St. v. Van Voast, 247 M 194, 805 P2d 1380, 48 St. Rep. 160 (1991), and St. v. Caekaert, 1999 MT 147, 295 M 42, 983 P2d 332, 56 St. Rep. 583 (1999).

Proof of Crimes Charged — Proof of Ownership of Stolen Money — Disbelief of Portion of Witness' Testimony as Not Requiring Total Disbelief: Defendant charged with robbery and theft was convicted of theft but found not guilty of robbery. One ground of his appeal was the assertion that the prosecution's evidence was insufficient to prove theft. Defense counsel argued that the jury must have distrusted the testimony of the truckstop cashier who was held up because they found the defendant not guilty of robbery. Further, since the cashier's testimony was critical to prove a theft was committed, the evidence was insufficient to prove theft if the jury disbelieved the cashier. The Supreme Court dismissed this argument because sufficient disbelief of the cashier's testimony to find the defendant not guilty of robbery would not require the jury to disbelieve all of the cashier's testimony. The jury had instructions about its right to believe or disbelieve any portion of a witness' testimony. As long as there was substantial evidence to support the verdict, it will not be disturbed on appeal. The Supreme Court found sufficient evidence to convict here and sufficient evidence to refute the defendant's argument that the truckstop did not possess the stolen money. Here, proof of possession sufficed to prove ownership because the defendant's jury instruction to that effect was accepted by the court. St. v. Dolan, 190 M 195, 620 P2d 355, 37 St. Rep. 1860 (1980).

PROPERTY

Wild Animals: Defendants Richard and David Fertterer were convicted of felony criminal mischief for illegally killing game. They contended on appeal that wild animals did not constitute "property", arguing that while the definition was not exclusive, it evidenced a legislative intent to include only domestic animals and not wild animals. The Supreme Court held that property was defined broadly enough to include wild animals and, additionally, that the definitions in Title 70 were not controlling. St. v. Fertterer, 255 M 73, 841 P2d 467, 49 St. Rep. 846 (1992).

Something of Value: Indictment for theft must show that something of value was stolen even though an allegation of value is not essential. People v. Brouilette, 92 Ill. App.2d 168, 236 N.E.2d 12 (1968).

Promissory Notes: In a prosecution for the larceny of promissory notes, an instruction which stated that the amount of money due on the notes or secured to be paid thereby and remaining unsatisfied was their value, was correct. An instruction offered by defendant to the effect that evidence relating to the instrument should be disregarded because it had not been shown that they had any value was properly refused since one of the notes was introduced in evidence and the value of the other was shown by books of account, thus making out a prima facie case for the state. St. v. Cassill, 71 M 274, 229 P 716 (1924).

PROPERTY OF ANOTHER

Poaching of Wild Game Animals — Ownership Interest of State Held Sufficient: Defendants Richard and David Fertterer were convicted of felony criminal mischief for illegally killing game. They contended on appeal that the state did not have title ownership in the animals killed and that Fertterers could therefore not be convicted of damaging the property of another. The Supreme Court held that St. v. Tome, 228 M 398, 742 P2d 479 (1987), and the statutory definitions require only that the property be held by another with an interest superior to the person who damages that property and that the property need not be held in title ownership. Relying upon Baldwin v. Mont., 436 US 371 (1978), the Supreme Court held that wild animals are public property within the meaning of the criminal mischief statute and that the state's ownership interest in wild animals for the use and benefit of the people was a sufficient ownership interest, superior to Fertterers', to sustain the conviction. St. v. Fertterer, 255 M 73, 841 P2d 467, 49 St. Rep. 846 (1992).

PUBLIC SERVANT

Nonpolice Officer: Authority to issue an appearance ticket renders a nonpolice officer a "public servant". People v. Lewis, 87 Misc.2d 806, 386 N.Y.S.2d 560 (1976).

PURPOSELY

Inapplicable Jury Instructions — Self-Defense Issue Clearly Argued to Jury — No Review Under Plain Error or Ineffective Assistance: The District Court's specific purpose jury instruction instead of a more appropriate self-defense instruction did not warrant review under either the doctrine of plain error or ineffective assistance of counsel. Given the trial record, the Supreme Court was not firmly convinced that failure to review the inapplicable instruction would have resulted in a manifest miscarriage of justice, left unsettled the question of fundamental fairness of the trial, or compromised the integrity of the judicial process. The Supreme Court also determined that the instruction did not derail what was a clearly directed trial about the defendant's intentions and his assertion that his actions of stabbing the victim with a knife multiple times were justified by self-defense. St. v. St. Marks, 2020 MT 170, 400 Mont. 334, 467 P.3d 550.

Belief in General Self-Help Right Insufficient to Claim Fact Defense to Theft: Evidence of an honest, good faith belief, even if mistaken, that a defendant had a legal right to take or withhold the property of another to satisfy or secure a claimed debt is a cognizable fact defense to theft as defined in 45-2-101 and 45-6-301. The good faith belief precludes the state's contrary assertion that the defendant acted with knowledge that the defendant had no lawful authority to conditionally withhold the property for payment or as security on the debt. However, a mere belief in a general self-help right to satisfy or secure a claimed debt from nonspecific property owned by a debtor is insufficient to claim the defense. Rather, a defendant must prove a good faith belief in a civil law right to take or withhold specific, identifiable property. St. v. Mills, 2018 MT 254, 393 Mont. 121, 428 P.3d 834.

Effect of Giving Improper "Conduct" Jury Instruction Instead of "Result" Instruction — Harmless Error When Substantial Rights Unaffected: A defendant was charged with attempted deliberate homicide and aggravated assault, both of which require a result-based mental state instruction to the jury. However, the jury was given conduct-based instructions for "knowingly" and "purposely," and the defendant was convicted on all counts. On appeal, the defendant argued that the jury was given improper instructions, which the state admitted to be true. The Supreme Court affirmed the conviction, finding that no facts were presented in the case from which an argument could be made that the defendant intended to shoot the victims but did not intend any harm to result from that conduct, and thus there was no prejudice to the defendant. St. v. Ilk, 2018 MT 186, 392 Mont. 201, 422 P.3d 1219.

Definition of Mental State Applied by District Court Not Identified in Legal Conclusions — No Reversible Error: Following a bench trial, the District Court convicted the defendant of aggravated assault. In its legal conclusions, the District Court found that the defendant had committed the assault purposely or knowingly but did not specify which definition of mental state it had applied, 45-2-101(35) or 45-2-101(65). On appeal, the defendant argued that the court's failure to identify which definition it had applied required the reversal of his conviction. The state argued that even if the District Court had applied the incorrect definition, the error was harmless. The Supreme Court agreed, concluding that based on the evidence and testimony presented at trial, the District Court could reasonably infer that the defendant acted with the requisite mental state. St. v. Reim, 2014 MT 108, 374 Mont. 487, 323 P.3d 880.

Creating Reasonable Apprehension of Bodily Injury — Defendant's Subjective Intent to Create Apprehension Not Relevant: The defendant was convicted of partner or family member assault, in violation of 45-5-206. On appeal, the defendant argued that the District Court should have instructed the jury that the state was required to prove that the defendant intended his actions to cause his mother and brother a reasonable apprehension of bodily injury. The Supreme Court disagreed and held that the defendant was not entitled to a jury instruction regarding his subjective intent to cause a reasonable apprehension of bodily injury. Instead, the state was required to prove only that the defendant acted purposely or knowingly with regard to his conduct, not to the results of his conduct. St. v. Birthmark, 2013 MT 86, 369 Mont. 413, 300 P.3d 1140, following St. v. Martin, 2001 MT 83, 305 Mont. 123, 23 P.3d 216.

Jury Instructions Properly Reflecting Law — Plain Error Review Declined: The Supreme Court declined to invoke plain error review of the District Court's jury instructions when the Supreme Court had already concluded the jury instructions properly reflected the law regarding the requisite mental state for partner or family member assault in violation of 45-5-206, and thus there was no error. St. v. Birthmark, 2013 MT 86, 369 Mont. 413, 300 P.3d 1140.

Knowing Participation — Obtains or Exerts Control: Knowing participation, by acting as a lookout during a burglary of a computer and van keys and by driving a stolen van that the minor knew did not belong to him, met the definition of "obtains or exerts [unauthorized] control", "purposely", and "knowingly" under this section to satisfy the elements of felony theft under 45-6-301(1)(a). In re S.F., Jr., 2010 MT 244, 358 Mont. 185, 244 P.3d 316.

Sufficient Evidence of Defendant's Conscious Intent to Strike Victim — Aggravated Assault Conviction Affirmed: Nick contended that there was inadequate evidence of a conscious object to strike the victim with a screwdriver when Nick was attacked by the victim while sitting in a vehicle. The Supreme Court disagreed. Despite Nick's assertion of self-defense, there was ample evidence for the jury to conclude beyond a reasonable doubt that it was Nick's conscious object to grasp the screwdriver as a weapon and strike the attacker and that Nick was aware that doing so could cause serious bodily injury, thus satisfying the mental state element of aggravated assault. St. v. Nick, 2009 MT 174, 350 M 533, 208 P3d 864 (2009).

Evidence of Knowing or Purposeful Action Despite Mental Disease or Defect — Aggravated Assault Conviction Affirmed: Meckler was convicted of aggravated assault and committed to the Department of Public Health and Human Services for life. Meckler contended that he could not be found guilty of aggravated assault because he lacked the ability to conform his conduct to the requirements of the law due to a mental disease or defect. It was undisputed that Meckler suffered from paranoid schizophrenia and was not taking his medications at the time he committed the offense; however, the presence of a mental disease or defect does not necessarily preclude that person from acting purposely or knowingly. Evidence showed that Meckler knew that he struck the victim and that the victim suffered serious bodily injury as a result and showed that Meckler was lucid, coherent, and functional prior to and after the attack. Thus, the trial court correctly concluded that Meckler's volitional act was done knowingly or purposely, and the assault conviction was affirmed. The mental disease or defect was properly considered at sentencing rather than as an element of the offense. St. v. Meckler, 2008 MT 277, 345 M 302, 190 P3d 1104 (2008).

Sufficient Evidence That Defendant Knowingly or Purposely Caused Death: Roedel asserted that the state failed to prove that he knowingly or purposely killed his wife with a handgun. The Supreme Court declined to disturb the jury's guilty verdict based on evidence that neighbors heard three shots fired in rapid succession, Roedel admitted firing all three shots, including the shot that killed his wife, and the gun used in the shooting was incapable of discharging unless the trigger was pulled. St. v. Roedel, 2007 MT 291, 339 M 489, 171 P3d 694 (2007).

Sufficient Evidence of Mental State to Support Conviction of Aggravated Assault Despite Claim of Self-Defense: Dunfee contended that because his actions were in self-defense, therefore precluding the mental state required to sustain a conviction for aggravated assault, the trial court should have vacated his conviction because the jury may not have applied the purposely or knowingly mental state to all elements of the offense. However, there was sufficient evidence to support the conviction, given Dunfee's admission that he hit the victim hard several times and that, being an experienced boxer, he knew it was highly probable that the blows would inflict serious bodily injury. The requisite mental state was proved, and the conviction was affirmed. St. v. Dunfee, 2005 MT 147, 327 M 335, 114 P3d 217 (2005).

Sufficient Evidence of Mental State and Reasonable Apprehension to Prove Assault With a Weapon: When attempting to flee from pursuing officers, Martin ducked into the back door of a bakery and then ran out the front door in a further attempt to get away, seeking a hiding place in a small enclosure that was boarded up with plywood. There was a hole in the plywood, and as a pursuing officer stooped to look in the hole, Martin looked out directly at him. Recognizing Martin as the man he had chased out of the bakery, the officer identified himself and ordered Martin to drop his gun and show his hands. Instead, Martin looked out the hole two more times and then pointed the gun through the hole directly at the officer. Thinking he was about to be fired upon, the officer fired a shot. Martin disappeared from view and then threw the gun out of the hole. Martin was convicted of felony assault (now assault with a weapon), but contended on appeal that the state did not establish that he purposely or knowingly intended to create an apprehension of serious bodily injury in the officer. Martin argued that his mental state, not the officer's perception of it, controlled as to the "purposely or knowingly" element of felony assault. The Supreme Court agreed in part with Martin's reasoning, in that that element of the crime is controlled by the perpetrator's mental state, not that of the victim. However, the mental state element goes to the defendant's actions, not to whether those actions caused reasonable apprehension of injury in another. Thus, it was sufficient for the jury to find that Martin saw the officer and deliberately aimed a gun at him. Given the circumstances of the pursuit and the fact that the officer knew that Martin had just shot a fellow officer, coupled with the way Martin pointed the gun, the evidence was sufficient for the jury to find that the officer felt a reasonable apprehension of serious bodily injury, and Martin's conviction for felony assault was affirmed. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001). See also St. v. Birthmark, 2013 MT 86, 369 Mont. 413, 300 P.3d 1140.

Sufficient Evidence to Support Attempted Homicide Verdict — State of Mind: Martin was convicted of attempted deliberate homicide after shooting a police officer who was in pursuit following Martin's attempt to cash a forged check. Martin contended that the evidence was insufficient to prove that he acted with the purpose of causing the officer's death. Martin argued that he only intended to scare the officer and that if he had intended to kill the officer, he would not have looked surprised or confused after the shooting, as some witnesses testified. However, other witnesses testified that Martin appeared calm during the chase and even slowed before turning to shoot. Another witness testified that Martin always carried a gun and had boasted that he would shoot anyone who got in his way, "even a cop". In deference to the jury's resolution of the conflicting evidence, the Supreme Court affirmed, concluding that a rational trier of fact could have found the essential elements of attempted deliberate homicide beyond a reasonable doubt. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Jury's Finding That Defendant Purposely or Knowingly Put Another in Fear of Bodily Injury Sufficient Support for Robbery Conviction: As he left a store with stolen merchandise, Merrick was stopped by store security, who told him that the alarm had been triggered and asked Merrick to return to the store. Merrick refused, telling the security person that it was his gun that set off the alarm. When Merrick unzipped his coat and inserted his hand inside, the security person testified that she thought Merrick was going to pull out a gun and use it to shoot her or scare her away. Merrick was convicted of robbery and sentenced to prison for 40 years. On appeal, Merrick maintained that there was insufficient evidence that he acted purposely or knowingly to put the security person in fear of immediate bodily injury. The Supreme Court disagreed and affirmed the conviction, noting that the sufficiency of the evidence turned on credibility. The jury chose to believe that Merrick was not simply making a joke when he referred to the gun nor was he adjusting the stolen merchandise when he reached toward his coat, but rather that he mentioned a gun and moved toward his coat with the awareness that it was highly probable that the security person would fear immediate bodily injury on account of his conduct. St. v. Merrick, 2000 MT 124, 299 M 472, 2 P3d 242, 57 St. Rep. 509 (2000). See also St. v. Santos, 273 M 125, 902 P2d 510 (1995).

Erroneous Instruction — Harmless Error: The defendant was charged with deliberate homicide and convicted of mitigated deliberate homicide. At trial, the District Court erroneously instructed the jury that the state merely needed to prove that the defendant acted purposely, without regard to the result that was intended. The giving of the instruction, when potential prejudice could occur if the defendant had acted purposely but without intent to cause harm, was harmless error when there were no facts presented from which an argument could be made that when the defendant struck the victim in the face, and kicked the victim in the head while the victim was lying on the ground, the defendant intended no harm to the victim. The instruction was, at worst, superfluous. The jury was correctly instructed on the meaning of deliberate homicide, the lesser included offense of mitigated deliberate homicide, and on the statutory provision that purposeful and knowing causation can occur without intending a specific result, so long as the same type of harm or injury was contemplated. Because the challenged instruction did not apply to any facts offered as proof in the case, the error in giving the instruction was harmless beyond a reasonable doubt. St. v. Rothacher, 272 M 303, 901 P2d 82, 52 St. Rep. 772 (1995), followed in St. v. Patton, 280 M 278, 930 P2d 635, 53 St. Rep. 1402 (1996), and St. v. Schaff, 1998 MT 104, 288 M 421, 958 P2d 682, 55 St. Rep. 396 (1998). Patton was followed in St. v. Nick, 2009 MT 174, 350 M 533, 208 P3d 864 (2009).

Instruction — Prior Decisions Overruled: The defendant was charged with deliberate homicide and convicted of mitigated deliberate homicide. At trial, the District Court instructed the jury that it was not necessary for the state to prove that the defendant intended to cause the death of the victim. The Supreme Court held that the District Court erred when it instructed the jury that the state needed to prove that the defendant acted purposely, without regard to the result that was intended. To the extent that prior decisions in Sigler, McKimmie, and Byers are inconsistent with this opinion, they are overruled. St. v. Rothacher, 272 M 303, 901 P2d 82, 52 St. Rep. 772 (1995), followed in St. v. Patton, 280 M 278, 930 P2d 635, 53 St. Rep. 1402 (1996).

Knowing, Purposeful Act Not Precluded by Psychotic State: Charges of attempted deliberate homicide and aggravated burglary both require proof of conduct committed purposely and knowingly. Cowan conceded that the alleged conduct occurred but contended that he did not have the requisite state of mind during the conduct because he had suffered for years from a serious mental disorder. However, the issue before the trial court was not whether Cowan was in a psychotic state, but whether he acted purposely and knowingly. The existence of a mental disease or defect does not necessarily preclude a person from acting purposely and knowingly. Although the testimony of all medical experts was consistent as to the presence of a mental defect, there was not a consensus that Cowan was suffering from an acute psychotic episode at the time of the incident. A rational trier of fact could have found beyond a reasonable doubt that Cowan possessed the requisite mental state to be convicted of the crimes. St. v. Cowan, 260 M 510, 861 P2d 884, 50 St. Rep. 1153 (1993).

Constitutionality of Statutory Definitions: The Supreme Court has consistently upheld the constitutionality of the statutory definitions of "knowingly" and "purposely". St. v. Briner, 253 M 158, 831 P2d 1365, 49 St. Rep. 402 (1992); St. v. Beach, 217 M 132, 705 P2d 94 (1985); St. v. Sharbono, 175 M 373, 563 P2d 61 (1977).

Overwhelming Evidence of Purposeful or Knowing Behavior: Although the defendant may have suffered from mental disease, evidence is overwhelming that he acted purposely or knowingly when he committed felony assault (now assault with a weapon). He purchased the gun shortly before he committed the assault, performed all acts necessary to bring him to the victims' trailer, parked his vehicle so he could get away quickly, cut the victims' telephone wire, fled the scene after firing directly at the victims, and then buried the weapon. A person acts "purposely" when his conscious object is to engage in particular conduct or to cause a particular result. St. v. Trask, 234 M 380, 764 P2d 1264, 45 St. Rep. 1988 (1988).

Purpose Inferred From Acts: The general requirements of a mental state, as described in 45-2-103(3), when read together with the definition of "purposely" in this section, show that a defendant's purpose or conscious object may be inferred from his acts as well as from the facts and circumstances of the offense. The fact that an additional mental state or purpose must be shown does not bar the trier of fact from inferring such purpose from the defendant's acts. St. v. Smith, 228 M 258, 742 P2d 451, 44 St. Rep. 1503 (1987).

Purpose and Knowledge — Aggravated Assault: Defendant appeared at the home of the victim and rang the doorbell. When the victim answered, defendant entered, chased her through the house, cornered her, and strangled her for 10 to 20 seconds with a rope. Defendant fled, and the victim asked two construction workers for help. The workers chased and caught defendant. Defendant notified the prosecution of his intention to rely on mental disease or defect as a defense. Defendant contended that he did not possess the requisite mental elements of purposely or knowingly. Defendant was convicted of aggravated assault. On appeal, the defendant contended the evidence was insufficient to prove purpose or knowledge. The Supreme Court found that defendant remembered the entire incident. He was aware of his conduct. He tried to conceal his reason for fleeing, which tended to prove he had done something wrong. This evidence supported a finding that he acted knowingly. Defendant also acted purposely. His conduct was not the result of reflex. He possessed the rope prior to entering the home and harmed the woman because he thought she owed him money. This tended to prove his conscious object to engage in strangling the victim. The evidence was sufficient to support the finding that defendant acted purposely or knowingly. St. v. Raty, 214 M 114, 692 P2d 17, 41 St. Rep. 2354 (1984).

Proof of Specific Intent to Cause Death Not Required: Defendant was convicted of the deliberate homicide of the 19-month-old child of the woman with whom he was living. On appeal, he contended that the District Court improperly instructed the jury concerning the mental state "purposely". He contended the statutory definition of "purposely", coupled with the statutory definition of "deliberate homicide", confused the jury, in that if they found he purposely struck the child they need not find that he intended to cause the death or purposely cause the death. In a criminal homicide prosecution, the state must prove and the jury must find beyond a reasonable doubt that the voluntary and unjustified act of the defendant purposely, knowingly, or negligently caused the death of the victim. Proof of cause is a primary duty of the state and a necessary element to be found by the jury for a proper conviction in a criminal homicide case. It is true that under the instructions given and under the statutes defining crimes, the state was not required to prove the specific intent of the defendant to cause the death of the child. Our criminal law proscribes purposely doing an act which causes the death of another. Death may not be the intended result, but if the act which causes the death is done purposely, deliberate homicide is committed. The jury instructions were proper, and the evidence presented was strong enough to sustain the jury's finding that the defendant purposely engaged in conduct which resulted in the death of the child. St. v. Sigler, 210 M 248, 688 P2d 749, 41 St. Rep. 1039 (1984), followed in St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993). Sigler and Byers were overruled in part in St. v. Rothacher, 272 M 303, 901 P2d 82, 52 St. Rep. 772 (1995).

Purposely or Knowingly — Review of Sufficiency of Evidence in Federal Habeas Corpus Proceeding: Prior to a shooting, the petitioner had engaged in acts of surveillance, harassment, and threatening behavior towards the victim. This evidence was sufficient to support a finding by the jury that the petitioner had purposely or knowingly intended to shoot the victim. Bashor v. Risley, 539 F. Supp. 259, 39 St. Rep. 960 (D.C. Mont. 1982).

Instruction to Jury:

The words "purposely" and "knowingly", although deviating from their statutory definitions in this section, did not materially depart by their usage in certain jury instructions. Instructions defining "purposely" and "knowingly" in all material respects as they are defined in the criminal code were upheld by the Montana Supreme Court. St. v. Radi, 176 M 451, 578 P2d 1169 (1978).

The court did not err by refusing repetitious instructions regarding self-defense and defense of another or by giving an instruction further defining "knowledge" beyond the language contained in defendant's proposed instruction. The jury was entitled to a complete definition of "knowledge" since the crimes charged require "knowledge" or "purpose" on the part of the accused. St. v. Larson, 175 M 395, 574 P2d 266 (1978).

Court held, inter alia, it was not error for trial court to refuse jury instructions concerning specific intent in regard to word "intent" in addition to consideration of words "purposely" or "knowingly" as "purposely" implies a design, thereby replacing the word "intentionally" as used in the old code. Court reasoned that the Legislature intended words "purposely" and "knowingly" be substituted for the word "felonious", i.e., "intentionally" as used in old code. St. v. Klein, 169 M 350, 547 P2d 75 (1976).

Under 94-117, R.C.M. 1947 (now 45-2-101, 45-2-103, 45-2-201, and 45-2-202), an instruction charging the jury that when an unlawful act is shown to have been deliberately committed for the purpose of injuring another it is presumed to have been committed with a malicious and guilty intent, in that the law presumes that a person intends the ordinary consequences of any voluntary act committed by him, may mislead the jury and should not be given in a prosecution for assault in the first degree, the very gist of which offense is the intent with which it was committed. St. v. Schaefer, 35 M 217, 88 P 792 (1907), distinguished in St. v. Board, 135 M 139, 337 P2d 924 (1959).

Replaces "Feloniously" and "Intentionally": State v. Klein, 169 M 350, 547 P2d 75 (1976), quotes the annotator's note in the above compiler's comment as constituting a correct interpretation of the language of the section and notes that this definition and that of the term "knowingly" replace the terms "feloniously" and "intentionally" used in the old code. The element of intent may be and generally is demonstrated by circumstantial evidence. St. v. Farnes, 171 M 368, 558 P2d 472 (1976).

State of Victim: By virtue of this subsection (formerly section 94-105, R.C.M. 1947) which included bodies politic among those entities which one could criminally intend to defraud, the crimes of grand larceny and obtaining money by false pretenses could be committed against the state, since the gravamen of each offense was to defraud the true owner of his or its property. St. v. Cline, 170 M 520, 555 P2d 724 (1976).

General Intent: Effect of this subsection (formerly 94-105, R.C.M. 1947) is to make any required "intent to defraud" a general, rather than a specific intent. St. v. Cooper, 146 M 336, 406 P2d 691 (1965).

Fraudulent Intent: Under section 94-118, R.C.M. 1947, proof of intent to defraud could consist of reasonable inferences drawn from affirmatively established facts; defendant who was sufficiently conscious to recognize fraudulent nature of check was of adequate mental ability to form an intent to defraud by issuing the check, knowing of its fraudulent nature. St. v. Cooper, 146 M 336, 406 P2d 691 (1965).

Manifestation of Intent: Evidence that defendant accosted a 9-year-old girl to whom he was a total stranger on the street, invited her to come to his room and play with him, on arriving there locked the door, asked her to remove her dress, and then placed his hand upon her shoulder in an attempt to remove her dress was sufficient to warrant a finding by the jury that the defendant intended to arouse his sexual desires in a depraved manner. St. v. Kocker, 112 M 511, 119 P2d 35 (1941).

Presumption of Intent: Intent is conclusively presumed from the occurrence of a statutory offense such as collecting unlawful fees from a county. State ex rel. Rowe v. District Court, 44 M 318, 119 P 1103 (1911).

REASONABLE APPREHENSION

Fear Not Required to Prove Reasonable Apprehension of Serious Bodily Injury: McMahon was convicted of assault with a weapon but contended that the state failed to prove the offense because the victim testified that he was not afraid during the attack and thus had no reasonable apprehension of serious bodily injury. Citing St. v. Lamere, 190 M 332, 621 P2d 462 (1980), the Supreme Court noted that fear is not required to prove reasonable apprehension. The victim testified that although he was not afraid during the actual attack, he realized later that he or another person in the room could have been shot. This reaction, coupled with the struggle to subdue McMahon because she would probably shoot the victim or someone else, sufficiently established that the victim reasonably apprehended serious bodily injury. The conviction was affirmed. St. v. McMahon, 2003 MT 363, 319 M 77, 81 P3d 508 (2003).

Manipulation of Snake Considered Use of Weapon: When officers entered Roullier's apartment, they were confronted by Roullier with a snake in his arms. Despite repeated orders to put the snake down, Roullier advanced toward the officers with the snake extended, in an effort to make them move away, telling them that a bite from the snake would be deadly. One of the officers testified that he was fearful for his life. On appeal, Roullier contended that the state may have shown that he was in possession of the snake, but failed to prove that he actually used the snake to cause reasonable apprehension of bodily injury, and that possession alone was insufficient to prove use. Roullier's manipulation of the snake in this manner amounted to more than mere possession; its use knowingly caused the officer reasonable apprehension of bodily harm, and the felony assault (now assault with a weapon) conviction was affirmed. St. v. Roullier, 1999 MT 37, 293 M 304, 977 P2d 970, 56 St. Rep. 157 (1999).

Terms Not Unconstitutionally Vague — Deprive and Reasonable Apprehension: Defendant challenged the terms "reasonable apprehension" in the aggravated assault statute and "deprive" in the theft statute as unconstitutionally vague. The court rejected the contention, indicating that the first term had been construed by the court before and that the second term was defined in 45-2-101. St. v. Campbell, 219 M 194, 711 P2d 1357, 42 St. Rep. 1948 (1985).

SERIOUS BODILY INJURY

Sufficient Evidence for Jury Instruction on Serious Bodily Injury: In a Youth Court proceeding in which the defendant was charged with felony criminal endangerment, sufficient evidence existed to submit a jury instruction on serious bodily injury when criminal endangerment, by definition, creates a substantial risk of serious bodily injury and the defendant admitted that he thought injury could result from his actions. The state was not required to prove that serious bodily injury actually resulted in order to maintain a criminal endangerment charge. In re T.J.B., 2010 MT 116, 356 Mont. 342, 233 P.3d 341.

Failure to Instruct Jury on Misdemeanor Assault as Lesser Included Offense of Assault With Weapon — Reversible Error: Feltz's attorney requested that the jury be instructed on misdemeanor assault as a lesser included offense of assault with a weapon, based on the fact that one of the victims may not have been in fear of serious bodily injury or that the fear was not reasonable in light of the circumstances. The instruction was denied and Feltz appealed. The Supreme Court held that evidence in the record supported the instruction in this case. Failure to give the instruction was reversible error, and the case was remanded for a new trial. St. v. Feltz, 2010 MT 48, 355 Mont. 308, 227 P.3d 1035, distinguishing St. v. Reiner, 179 Mont. 239, 587 P.2d 950 (1978).

Sufficient Evidence of Serious Bodily Injury to Sustain Aggravated Assault Conviction: Potter claimed that there was insufficient evidence of serious bodily injury to sustain an aggravated assault conviction. Potter's expert testified that the victim's facial discoloration, orbital rim injury, deviated septum, and ear perforation did not present a risk of death, any serious disfigurement, or the potential loss of function of a bodily member or organ. The state's witness noted these injuries also and additionally testified that the victim suffered a neck fracture and possible brain and psychological injuries. In a light most favorable to the prosecution, the jury was entitled to believe the evidence presented by the state and to rationally conclude that the victim suffered serious bodily injury. Potter's aggravated assault conviction was affirmed. St. v. Potter, 2008 MT 381, 347 M 38, 197 P3d 471 (2008).

Protracted Impairment as Part of Definition of Serious Bodily Injury Not Unconstitutionally Vague: Trull contended that the term "protracted impairment" as part of the definition of serious bodily injury was constitutionally vague and that the use of the phrase "serious bodily injury" in the aggravated assault statute was therefore misleading. Assuming the constitutionality of the statute, the Supreme Court held that the terms "protracted" and "impairment" are not obscure or incomprehensible and are terms of common usage that the jury could understand. The jury found that during the assault, Trull inflicted a serious bodily injury resulting in a protracted impairment of the victim's vision, and the court declined to disturb the verdict based on vague or misleading definitions in the aggravated assault statute. St. v. Trull, 2006 MT 119, 332 M 233, 136 P3d 551 (2006).

Allowing Child Access to Medication Considered Criminal Endangerment: A mother left her child's headache medicine on the table with her own allergy medication, instructing the child to take his headache medicine and then leaving the room. The child took the allergy medicine instead and overdosed. The mother was subsequently convicted of criminal endangerment. On appeal, she contended that there was insufficient evidence to support the conviction because her conduct did not actually create a substantial risk of death or serious bodily injury and that the state had failed to prove that she knowingly made the medication available to her son, resulting in his injury. However, the state did not have to prove actual bodily injury, but rather that there was a high probability that the mother's conduct created a substantial risk of death or serious bodily injury. A rational jury could have found that substantial risk existed, and the state presented sufficient evidence that the mother knowingly made the medication available by leaving it in an open bottle on the table with the same medication that she instructed her son to take. The criminal endangerment conviction was affirmed. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Substantial Evidence of Risk of Serious Bodily Injury if Mental Patient Released From Custody: Cooney was convicted of stalking a woman in 1994. In 1996, Cooney was charged with stalking the same woman but was found unfit to proceed and was committed to an institution for as long as the unfitness continued. Cooney ultimately pleaded not guilty by reason of mental disease or defect and was committed to the state hospital. In January 1998, the commitment was extended, but in December 1998, the state petitioned for Cooney's conditional release and the District Court ordered a mental evaluation. Following the evaluation, the state moved to dismiss the petition, citing Cooney's psychiatric decompensation. The court held that Cooney presented a substantial risk of serious bodily injury or death to himself or others and continued the commitment, and Cooney appealed. The Supreme Court affirmed, finding that the evidence presented, including the record of Cooney's history, medical opinions regarding Cooney's continuing delusional disorder, the stalking victim's statement about her fears should Cooney be released, and medical opinions about Cooney's likely actions and the victim's likely reaction if Cooney were released, clearly established that, if released, Cooney presented a substantial risk of causing serious mental impairment in another person and therefore posed a substantial risk of serious bodily injury or death to himself or others. St. v. Cooney, 2000 MT 138, 300 M 31, 1 P3d 956, 57 St. Rep. 558 (2000).

Sufficiency of Evidence:

The defendant argued that the evidence at trial as to the victim's loss of two teeth was insufficient to sustain his conviction for aggravated assault because the victim did not suffer serious bodily injury. The Supreme Court held that medical testimony was not required to establish serious bodily injury, other jurisdictions had held that the loss of a tooth was sufficient to support a charge of aggravated assault, and the victim's loss of teeth had to be considered in conjunction with his other injuries. St. v. Walsh, 281 M 70, 931 P2d 42, 54 St. Rep. 64 (1997).

Where no evidence was presented concerning the size, weight, or shape of the projectile which struck the victim or the velocity at which the slingshot was capable of propelling the projectile and where evidence indicated that the victim received a bruise on the jaw requiring no hospitalization and that no bones were broken, there was insufficient proof that the slingshot was a weapon capable of being used to produce death or serious bodily injury. St. v. Deshner, 175 M 175, 573 P2d 172 (1977).

Evidence that after being kicked by defendant complainant was admitted to the emergency room in Hamilton in a semiconscious state with extensive bruises and swelling around the face, a broken nose, and a fractured palate and where examining physician testified that complainant was transferred to Missoula because the facilities at Hamilton were not equipped "to handle seriously injured or gravely injured head-type cases" was sufficient to enable jury to find that complainant's injuries created a "substantial risk of death" although no serious complications actually resulted. St. v. Fuger, 170 M 442, 554 P2d 1338 (1976).

The New York court has held that a defendant who caused protracted impairment of function of complainant's eye could be found guilty of causing "serious physical injury" (defined as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ"). People v. Rumaner, 45 A.D.2d 290, 357 N.Y.S.2d 735 (1974).

Evidence of "Shaken Baby Syndrome" Insufficient to Prove Serious Bodily Injury: On March 2, when defendant's infant child stopped breathing, a call was placed to 9-1-1 requesting an ambulance. Upon examination, defendant was informed that the child did not appear ill enough to require ambulance transportation to the hospital. When the condition worsened, the child was hospitalized on March 8 but released 3 days later with doctors unable to determine the exact cause of the illness. When the child was transported by ambulance to the hospital on March 14, a specialist concluded that earlier examinations had missed "shaken baby syndrome". Following defendant's conviction for felony aggravated assaults occurring March 2 and March 14, defendant appealed, alleging that the state presented insufficient evidence to prove that the required element of "serious bodily injury" occurred during the March 2 alleged offense. The Supreme Court reversed, concluding that the state failed to present testimony or even to imply that the March 2 injuries resulted from shaking or were life-threatening. St. v. Andrews, 274 M 292, 907 P2d 967, 52 St. Rep. 1238 (1995).

Substantial Risk of Death, Internal Laceration, and Disfigurement: Defendant was charged with and pleaded guilty to aggravated kidnapping and sexual intercourse without consent. After sentencing, the defendant contended that there was insufficient evidence to support the District Court's finding that the victim suffered serious bodily injury, an element increasing the possible sentence. Serious bodily injury is defined as injury creating a substantial risk of death or which causes serious permanent disfigurement. The Supreme Court found that the victim had suffered a serious internal laceration requiring major surgery. Two physicians testified that the victim had faced a substantial risk of death from possible infection. The record also showed that permanent serious disfigurement had been inflicted on the victim. There was sufficient evidence to support the finding of serious bodily injury. St. v. Goodwin, 208 M 522, 679 P2d 231, 41 St. Rep. 508 (1984).

Jury Instructions on "Serious Bodily Harm" and "Serious Bodily Injury" — Applicability — Requirements: Defendant in a deliberate homicide case contended on appeal that the trial court failed to instruct the jury fully and fairly on the law of self-defense. The disagreement centered on the differences between "serious bodily harm" and "serious bodily injury", and the proper uses of instructions on the two terms. The Montana Supreme Court said that the test is whether the instructions given on justifiable force gave the defendant ample opportunity to expound to the jury in argument his theory with respect to the use of force as self-defense against an unlawful act. The court found the test had been passed in this case. Further, the court agreed that "harm" and "injury" are not necessarily synonymous and that there is no indication that the Legislature intended to integrate the definition of "serious bodily injury" into the self-defense statute. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Mental State Supported by Evidence: There was sufficient evidence to establish that defendant knowingly attempted to inflict serious bodily injury or reasonable apprehension of serious bodily injury by shooting into a bar. Even conceding that defendant might not have been able to actually see anyone inside the bar does not negate the possibility that he acted knowingly. There was still the jury question of whether he was necessarily aware of a high probability that someone was in the bar at 4:30 in the afternoon. St. v. Gone, 179 M 271, 587 P2d 1291 (1978).

Evidence: The verdict of the jury that defendant inflicted bodily injury in the course of committing sexual intercourse without consent was not supported by any evidence, thus his 40-year sentence was erroneous and he should properly have been sentenced under 45-5-503(2). St. v. Coleman (I), 177 M 1, 579 P2d 732 (1978); St. v. Coleman (II), 185 M 299, 605 P2d 1000 (1979), certiorari denied, 446 US 970, 100 S Ct 2952 (1980); Coleman v. Sentencing Review Div. of Supreme Court of Mont., 449 US 893, 101 S Ct 255 (1980) (vacating stay of execution of death sentence and denying certiorari); Coleman v. St. (III), 633 P2d 624 (Mont. 1981), certiorari denied, 455 US 983, 102 S Ct 1492 (1982); Coleman v. Risley (IV), 203 M 237, 663 P2d 1154 (1983); Coleman v. Risley, 839 F2d 434 (9th Cir. 1988) (affirmed habeas corpus petition denial); St. v. Coleman, 249 M 128, 814 P2d 48, 48 St. Rep. 610 (1991)(affirmed resentencing of 100 years for aggravated kidnapping conviction).

In General: The question of whether the victim of an assault incurred a "substantial risk of death" as a result of his injuries is one fact to be determined by the jury and does not depend on whether the victim ultimately lives or dies. St. v. Fuger, 170 M 442, 554 P2d 1338 (1976).

SEXUAL CONTACT

Massage Therapist Guilty of Sexual Intercourse Without Consent — Totality of Circumstances — Definition of Sexual Intercourse — Penetration Analyzed — Threat of Physical Force Supported: A jury found the defendant, a licensed massage therapist, guilty of sexual intercourse without consent while giving his victim a massage. The defendant argued on appeal that the prosecution did not present sufficient evidence to the jury to support the elements of penetration and force. The defendant further argued that testimony of clitoral rubbing did not prove that the vulva was penetrated. The Supreme Court determined that the defendant's arguments that clitoral rubbing did not constitute penetration under the law were without legal merit pursuant to the definition of sexual intercourse in 45-2-101. The Supreme Court held that, viewed in a light most favorable to the prosecution, a rational trier of fact could conclude that the totality of the circumstances communicated a threat to the defendant's victim: the two were isolated in an empty office building after hours, the defendant was much larger than his victim, and the defendant persisted in his assault despite the victim's repeated objections. The victim testified that she told the defendant she was uncomfortable before he digitally penetrated her. After the penetration, she told the defendant pointedly to stop. Instead, the defendant returned to her groin area and started rubbing her clitoris. Montana law did not require the victim to push the defendant away, strike out at him, or attempt to flee. A rational jury could find that the defendant's actions communicated a threat of physical force to the victim. Viewing the evidence in the light most favorable to the prosecution, the Supreme Court affirmed the District Court's decision that a rational trier of fact could find all elements of sexual intercourse without consent beyond a reasonable doubt. St. v.

Lerman, 2018 MT 5, 390 Mont. 117, 408 P.3d 1008, distinguishing St. v. Haser, 2001 MT 6, 304 Mont. 63, 20 P.3d 100, and St. v. Stevens, 2002 MT 181, 311 Mont. 52, 53 P.3d 356.

Evidence of Arousal Not Required to Prove Sexual Contact — Arousal Properly Inferred From Defendant's Acts: Rogers moved for a directed verdict at trial for felony sexual assault on two minor victims on grounds that the state failed to present sufficient evidence that Rogers touched the victims for the purpose of arousing or gratifying his sexual response or desire. However, the state need not prove direct evidence of arousal or intent to be aroused in order to prove the sexual contact element of sexual assault. The jury may infer intent of sexual arousal from the defendant's acts. In this case, the jury could infer arousal from Rogers' multiple acts of putting his hand inside the victims' underwear and touching them intimately in a manner that was not casual during an ordinary act. Denial of the motion for a directed verdict was not error. St. v. Rogers, 2007 MT 227, 339 M 132, 168 P3d 669 (2007), following St. v. Skinner, 2007 MT 175, 338 M 197, 163 P3d 399 (2007).

Definition of Sexual Contact Allowing Two Means of Satisfying Mental State, Not Two Separate Offenses: Following trial for sexual assault, Clark asserted that the District Court erred in failing to instruct the jury that it was required to unanimously find that Clark had subjected his stepdaughter to sexual contact for purposes of either subsection (67)(a) or (67)(b) of this section and that failure to do so should be reviewed under the plain error doctrine. The Supreme Court held that the definition allows for two means of satisfying the purposely or knowingly element of sexual contact, rather than articulating two separate offenses. Therefore, the District Court did not err in instructing the jury as to any unanimity required regarding the elements of sexual contact, and the Supreme Court declined to implement the plain error doctrine to discuss the issue. St. v. Clark, 2005 MT 330, 330 M 8, 125 P3d 1099 (2005), distinguishing St. v. Weldy, 273 M 68, 902 P2d 1 (1995), and St. v. Weaver, 1998 MT 167, 290 M 58, 964 P2d 713 (1998).

Jury Instruction on Sexual Contact Containing Language Regarding Touching Through Clothing Considered Fair Presentation of Law: Earl objected to a jury instruction defining sexual contact as the touching of the intimate parts of another directly or through clothing because the language regarding touching through clothing was not added to the definition until October 1, 1999, after Earl committed sexual assault. Earl contended that the jury was improperly instructed, which prejudiced his case. The Supreme Court disagreed. In criminal cases, jury instructions are reviewed as a whole, and if they fully and fairly present the law, the jury is considered to have been properly instructed. Although the statutory language regarding touching through clothing was not added until after Earl's offense, in St. v. Olson, 286 M 364, 951 P2d 571 (1997), the Supreme Court held that touching through clothing did constitute sexual contact. Olson was in effect when Earl committed the offense, so including that language in the jury instruction accurately represented the law and was a proper jury instruction. St. v. Earl, 2003 MT 158, 316 M 263, 71 P3d 1201 (2003).

Sufficient Probable Cause in Affidavit to Warrant Charge of Sexual Assault: Kern contended that the state failed to establish probable cause in its affidavit charging sexual assault. The Supreme Court noted that pursuant to St. v. Arrington, 260 M 1, 858 P2d 343 (1993), an affidavit in support of a motion to file an information need not make out a prima facie case that a defendant committed an offense; rather, a mere probability is sufficient. Evidence to establish probable cause need not be as complete as the evidence necessary to establish guilt, and the determination whether a motion to file an information is supported by probable cause is left to the discretion of the trial court. Here, the factual allegations that defendant forced the victim to engage in sexual conduct were sufficient to establish the mere probability that defendant committed the offense. Kern also asserted that it was necessary that the affidavit require allegations that he committed the touching and that he did so to gratify his sexual response. The Supreme Court disagreed with both arguments. Nothing in 45-5-502 requires that a defendant commit the actual touching, nor was the affidavit required to allege the purpose of the sexual contact because that element is incorporated by reference in the statute. St. v. Kern, 2003 MT 77, 315 M 22, 67 P3d 272 (2003), following St. v. Steffes, 269 M 214, 887 P2d 1196 (1994).

Jury Instruction Using Statutory Language — No Prejudice: In trial for sexual assault, the Supreme Court found no support for the allegation that instructing the jury on the definition of "sexual contact" in the verbatim language used in 45-2-101 unduly influenced the jury as to defendant's status as a witness. St. v. Cornell, 220 M 433, 715 P2d 446, 43 St. Rep. 505 (1986).

Touching the Back — Jury Instruction Too Broad: In a criminal prosecution for sexual assault when the testimony indicated that defendant had touched the breasts, buttocks, and vaginal areas of the alleged victims, a jury issue was created under the definition of sexual contact in this section. Because defendant admitted touching the backs of two of the alleged victims (to help them up after they fell in a hot tub), the Supreme Court ruled that a jury instruction taken from St. v. Weese, 189 M 464, 616 P2d 371, 37 St. Rep. 1620 (1980), concerning the interpretation of "sexual contact" was too broad. The instruction stated, "The term 'sexual or other intimate parts of another' is intended to be given broad application and is not intended to restrict the crime to a touching of the genitalia or female breast and includes intimate impositions upon the victim". In this case, nothing broader than the statute itself should have been given as an instruction. St. v. Kestner, 220 M 41, 713 P2d 537, 43 St. Rep. 155 (1986).

Sexual Assault Erroneously Dismissed — "Sexual Contact" Construed: The Supreme Court reversed the District Court's decision to grant defendant's motion for dismissal under 46-16-403 of a sexual assault charge and held that the sexual contact proscribed by 45-5-502 is not limited to a touching of the anal or genital area of a male or female or the breast of a female. Looking to the purpose of the statute, the court found that the definition of "sexual contact" encompasses the rubbing of the belly and chest of a prepubescent female child because of the societal concern for such impositions and their resultant outrage, disgust, or shame in the victim. (See 1999 amendment.) St. v. Weese, 189 M 464, 616 P2d 371, 37 St. Rep. 1620 (1980), followed in St. v. Gilpin, 232 M 56, 756 P2d 445, 45 St. Rep. 863 (1988), St. v. Biehle, 251 M 257, 824 P2d 268, 49 St. Rep. 47 (1992), and St. v. Olson, 286 M 364, 951 P2d 571, 54 St. Rep. 1449 (1997), and distinguished in St. v. Kestner, 220 M 41, 713 P2d 537, 43 St. Rep. 155 (1986).

Constitutionality:

A New York court has recently held that the term "intimate parts", used in this definition providing that sexual contact means any touching of the sexual or intimate parts of the person for the purpose of gratifying sexual desire of either party, was neither uncertain or vague. People v. Blodgett, 326 N.Y.S.2d 14, 37 A.D.2d 1035 (1971).

The definition of "sexual contact" and those contained in this section (deviate sexual relations and sexual intercourse) and section 94-2-101(68), R.C.M. 1947 (now 45-5-501, definition of "without consent"), when read into 45-5-505 (renumbered 45-8-218), prohibiting deviate sexual conduct, are sufficient to protect 45-5-505 (renumbered 45-8-218) from the contention that it is unconstitutional for vagueness. St. v. Ballew, 166 M 270, 532 P2d 407 (1975). (See 2013 amendments to 45-2-101 and 45-8-218.)

SEXUAL INTERCOURSE

Denial of Motion to Remove Prospective Juror — Structural Error Standard Not Met — Conduct-Based Jury Instruction Defining Mental State for Sexual Intercourse Without Consent — Incorrect Jury Instruction on Definition of Consent Not Plain Error. St. v. Deveraux, 2022 MT 130, 409 Mont. 177, 512 P.3d 1198.

Massage Therapist Guilty of Sexual Intercourse Without Consent — Totality of Circumstances — Definition of Sexual Intercourse — Penetration Analyzed — Threat of Physical Force Supported: A jury found the defendant, a licensed massage therapist, guilty of sexual intercourse without consent while giving his victim a massage. The defendant argued on appeal that the prosecution did not present sufficient evidence to the jury to support the elements of penetration and force. The defendant further argued that testimony of clitoral rubbing did not prove that the vulva was penetrated. The Supreme Court determined that the defendant's arguments that clitoral rubbing did not constitute penetration under the law were without legal merit pursuant to the definition of sexual intercourse in 45-2-101. The Supreme Court held that, viewed in a light most favorable to the prosecution, a rational trier of fact could conclude that the totality of the circumstances communicated a threat to the defendant's victim: the two were isolated in an empty office building after hours, the defendant was much larger than his victim, and the defendant persisted in his assault despite the victim's repeated objections. The victim testified that she told the defendant she was uncomfortable before he digitally penetrated her. After the penetration, she told the defendant pointedly to stop. Instead, the defendant returned to her groin area and started rubbing her clitoris. Montana law did not require the victim to push the defendant away, strike out at him, or attempt to flee. A rational jury could find that the defendant's actions communicated a threat of physical force to the victim. Viewing the evidence in the light most favorable to the prosecution, the Supreme Court affirmed the District Court's decision that a rational trier of fact could find all elements of sexual intercourse without consent beyond a reasonable doubt. St. v. Lerman, 2018 MT 5, 390 Mont. 117, 408 P.3d 1008, distinguishing St. v. Haser, 2001 MT 6, 304 Mont. 63, 20 P.3d 100, and St. v. Stevens, 2002 MT 181, 311 Mont. 52, 53 P.3d 356.

Jury Question as to Whether Rape Victim Asleep and Physically Helpless — Conflicting and Uncorroborated Victim Testimony: Shields contended that the state failed to show that Shields had sexual intercourse with a woman by force. The victim testified that she was asleep and did not realize what was happening until she awoke and did not realize who was in the room with her until she turned on the light, while Shields testified that the victim was not asleep, but was in fact an active participant in the act. However, the mere existence of conflicting evidence did not render the state's evidence insufficient to support a guilty verdict, nor was Shields' conviction rendered infirm by the fact that the state presented no evidence corroborating the victim's testimony that she was asleep. It was within the province of the jury to decide which of the conflicting evidence would prevail, and only in cases in which a witness's testimony is so inherently improbable, or is so nullified by material self-contradiction that no fair-minded person could believe it, will the Supreme Court say that no firm foundation exists for a verdict based on that testimony. In this case, any rational trier of fact could have found that the victim was asleep during the sexual intercourse, despite the fact that the victim may have had some sensory perception during the incident, and was therefore physically helpless and incapable of consent. Shields' conviction was affirmed. St. v. Shields, 2005 MT 249, 328 M 509, 122 P3d 421 (2005).

Sufficient Evidence of Penetration Based on Victim's Testimony and Defendant's Confession: Grindheim moved for a directed verdict in a felony sexual intercourse without consent trial on grounds that the state introduced insufficient evidence of penetration. The motion was denied. On appeal, the Supreme Court affirmed, finding that the victim's testimony that her mouth was on Grindheim's penis and that Grindheim's penis was in the victim's mouth was not ambiguous and that, when coupled with Grindheim's own confession that his penis was in the victim's mouth twice for about 30 seconds, there was sufficient evidence of penetration to support the conviction. St. v. Grindheim, 2004 MT 311, 323 M 519, 101 P3d 267 (2004).

Massage Patients Not Incapable of Consent Because of Force or Physical Helplessness — Conviction for Sexual Intercourse Without Consent Improper: Stevens was convicted of two counts of sexual intercourse without consent after having sexual contact with two female patients at his massage clinic. Stevens appealed on grounds that the state failed to prove the "without consent" element beyond a reasonable doubt. Stevens asserted that the victims were not physically helpless even though they were in a dream state of total relaxation and that there was no evidence that Stevens used any force or threat of force even though the victims were surprised or fearful. The Supreme Court agreed, concluding that no rational trier of fact could have found that the victims were unconscious or otherwise physically unable to communicate unwillingness to act or that the victims' fear was a result of Stevens' infliction, attempted infliction, or threatened infliction of bodily injury. The court reduced the offenses to sexual assault and remanded for further proceedings. St. v. Stevens, 2002 MT 181, 311 M 52, 53 P3d 356 (2002). See also St. v. Haser, 2001 MT 6, 304 M 63, 20 P3d 100 (2001).

Sleeping Victim of Sexual Intercourse Without Consent Considered Physically Helpless: A sleeping victim of sexual intercourse without consent is physically helpless within the definitions in 45-5-501 and this section. The statutory definition of physically helpless is broadly worded to encompass a person who is sleeping because a sleeping person is temporarily unconscious or otherwise physically unable to communicate unwillingness to act. Therefore, a sleeping person cannot consent to sexual intercourse. Whether a person was indeed sleeping, and thus physically helpless, is a question of fact for the jury to decide. St. v. Stevens, 2002 MT 181, 311 M 52, 53 P3d 356 (2002).

Evidence of Slight Oral Penetration Sufficient to Prove Sexual Intercourse: In Duffy's trial for sexual intercourse without consent and incest with his daughter, she testified that she did not touch Duffy's penis, even though she had it in her mouth. Duffy contended that there was insufficient evidence for conviction. Under the definition of sexual intercourse, touching is not necessary. Rather, penetration of the mouth, however slight, is sufficient to meet the definition. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000).

Constitutionality: This definition and those contained in this section (deviate sexual relations and sexual contact) and section 94-2-101(68), R.C.M. 1947 (now 45-5-501, definition of "without consent"), when read into 45-5-505 (renumbered 45-8-218), prohibiting deviate sexual conduct, are sufficient to protect 45-5-505 (renumbered 45-8-218) from the contention that it is unconstitutional for vagueness. St. v. Ballew, 166 M 270, 532 P2d 407 (1975). (See 2013 amendments to 45-2-101 and 45-8-218.)

SOLICIT

Jury Instruction on Solicitation Properly Given: Ray argued that the trial court erred in its instruction to the jury regarding what constituted solicitation. The Supreme Court held that while the instruction in the first trial was incorrect because it was based on the general definition in this section, the instruction in the second trial was correct because it was based on the offense of solicitation set out in 45-4-101. St. v. Ray, 267 M 128, 882 P2d 1013, 51 St. Rep. 968 (1994).

Burden of Proof: Where assistance is rendered to a crime by words of encouragement and incitement, it must be proved that actual words were addressed to or heard by the actual criminal. People v. Mitchell, 12 Ill. App.3d 960, 299 N.E.2d 472 (1973).

STOP

Particularized Suspicion Sufficient Justification for Request for Consent to Search Vehicle — No Illegal Detention — Motion to Suppress Properly Denied: Snell was stopped for speeding and was also cited for failure to carry proof of insurance. While writing out the citation in the patrol car, the officer asked Snell if he could search the vehicle, and Snell consented. The officer discovered drugs, and Snell was charged with possession and intent to distribute marijuana. Snell moved to suppress the evidence. Snell conceded that he had voluntarily consented to the search, and the state conceded that the officer did not have probable cause. The motion to suppress was denied, and Snell appealed. The Supreme Court considered both the consent and illegal detention issues. First, the court reasoned that the officer had particularized suspicion to stop the vehicle and that Montana law does not require additional justification for requesting consent, so Snell's voluntary consent was sufficient to justify the warrantless search of the vehicle (see St. v. Parker, 1998 MT 6, 287 M 151, 953 P2d 692 (1998)). Second, the court concluded that because the officer did not coerce or restrain Snell, order him to stay, or prevent Snell from exiting the patrol car, a reasonable person would have felt free to leave the patrol car upon completion of the traffic stop, so the poststop interaction between Snell and the officer was a voluntary exchange rather than an illegal detention or unlawful seizure (see St. v. Merrill, 2004 MT 169, 322 M 47, 93 P3d 1227 (2004), and St. v. Hill, 2004 MT 184, 322 M 165, 94 P3d 752 (2004)). Snell's motion to suppress was properly denied. St. v. Snell, 2004 MT 269, 323 M 157, 99 P3d 191 (2004). See also St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008), and St. v. Zeimer, 2022 MT 96, 408 Mont. 433, 510 P.3d 100.

Justifiable Stop for Daytime Check of Temporary Window Sticker Warranted — Further Police Intrusion Not Warranted Once Limited Purpose of Stop Accomplished: Following weeks of surveillance instigated by a confidential tip intimating drug activities, the Billings police observed no suspicious drug-related activities conducted by defendants, but after receiving a tip that defendants would be driving from Billings to Bozeman to sell marijuana, officers stopped defendants' vehicle because there were no license plates displayed, although a temporary sticker could be seen but not read in the tinted rear window. When the officers approached the vehicle, they noticed that the temporary sticker properly displayed in the window was current. Nevertheless, in a short time, additional officers arrived with a drug-sniffing dog. The dog indicated the presence of drugs, the vehicle was searched, marijuana was found, and defendants were arrested. Defendants contended that the evidence should be suppressed because there was no particularized suspicion to make the stop. The Supreme Court agreed that the investigative stop was warranted because the officers' inability to read the expiration date on the temporary sticker provided an objective basis to infer that the sticker was not valid. However, a quick check of the properly displayed sticker in bright daylight confirmed the sticker's validity. Defendants had committed no traffic offense or violated any other criminal law of which the officers were aware. An investigative stop is a temporary detention that may not last longer than necessary to effectuate the purpose of the stop. Once the limited purpose of the investigative stop was accomplished, no further police intrusion was warranted, and the investigative stop related to drug possession was not justified. The District Court committed reversible error in refusing to suppress the evidence of the subsequent vehicle search. St. v. Martinez, 2003 MT 65, 314 M 434, 67 P3d 207 (2003), following St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137 (1998).

THREAT

Threat of Confinement to Extract Sexual Favors Held Crime of Violence: Anderson was convicted of various offenses involving sex with his stepdaughter. The District Court held in a sentencing proceeding that Anderson committed a "crime of violence". The District Court's holding was based upon testimony taken in a mental examination of Anderson that Anderson had threatened his stepdaughter with confinement to her room unless she had sex with him. The Supreme Court affirmed, holding that Anderson's act of menacing his stepdaughter with confinement unless she had sex with him constituted a "crime of violence". St. v. Anderson, 282 M 41, 934 P2d 1037, 54 St. Rep. 232 (1997).

Control of Property: Under Illinois law, providing that a person commits theft when he knowingly obtains, by threat, control over property of an owner and intends to deprive the owner permanently of useful benefit of the property, theft occurred where plaintiff demanded and received $25,000 from a company in exchange for information concerning the location of engineering documents to which the company had legal claim, even if plaintiff had no control over the documents. Stamatiou v. U.S. Gypsum Co., 400 F. Supp. 431 (N.D. Ill. 1975).

VALUE

No Error in Failure to Give Instruction Citing Statutory Language Regarding Value When Adequately Covered in Another Instruction: In a trial for attempted theft, Maloney offered a jury instruction, drawing from the statutory definition of value in this section, which included language that if value cannot be determined beyond a reasonable doubt, the value must be considered to be less than $1,000. The District Court rejected that instruction and gave an instruction that adequately informed the jury that value was an element of attempted theft and that the jury had to find that the value in question exceeded $1,000 to find Maloney guilty of felony theft. Although Maloney's proposed instruction followed more closely the statutory definition, citing exact statutory language in an instruction is not necessary if the instructions given explain the crime. Maloney's instruction would have added little to the jury's understanding of the law, and the District Court did not err in rejecting Maloney's instruction when the element of value was adequately covered in another instruction. St. v. Maloney, 2003 MT 288, 318 M 66, 78 P3d 1214 (2003).

Sufficient Evidence Presented by Owner of Stolen Oboe to Establish Value: Pitzer tried to pawn an oboe that was stolen from a music store the previous day by an unknown person. Pitzer was charged with knowingly obtaining control over stolen property valued at more than $1,000 with the purpose to deprive the owner of the property. Pitzer was convicted and appealed on grounds that the state failed to prove the value of the stolen oboe. The state's witness was the victim of the theft and was also a music educator for 37 years, played the oboe in college, was qualified to teach oboe and all double reed and woodwind instruments, had been employed as a music consultant for 2 years prior to the theft, taught private music lessons, and coordinated with school districts in the area as a music adjudicator, guest conductor, and musical instrument salesperson. The witness estimated the value of the oboe at between $2,500 and $3,000, and Pitzer did not present evidence in support of a lower valuation. Rather, Pitzer asserted that the state could meet its burden of proving value only by presenting an independent valuation instead of a valuation by the owner. The Supreme Court disagreed. The weight and credibility of witnesses are exclusively within the province of the trier of fact, so the jury was free to rely on the owner's extensive experience with musical instruments and accept the owner's testimony regarding the unique features of the oboe that enhanced the instrument's value. Viewed in a light most favorable to the prosecution, sufficient evidence existed from which the jury could find beyond a reasonable doubt that the value of the oboe exceeded $1,000, and Pitzer's conviction was affirmed. St. v. Pitzer, 2002 MT 82, 309 M 285, 46 P3d 582 (2002).

Improper Exclusive Reliance on Replacement Value to Prove Felony Theft — Erroneous Failure to Address Ascertainment of Market Value Warranting Reversal of Felony Theft Conviction: Ohms was charged with felony theft of a masonry saw valued at over $1,000. At trial, Ohms argued that the saw was less than the statutory minimum required to obtain a felony conviction, and requested dismissal, but the request was denied. To establish the value of the saw, the state elicited expert testimony from a masonry industry salesperson, who testified as to the replacement cost of a similar saw, but could not provide a market value for the stolen saw at the time and place of the crime, nor did the state establish that the market value of the saw could not be ascertained. Under the definition of value in this section, evidence of replacement value is to be considered only when the market value cannot be satisfactorily ascertained. Thus, the state failed to establish the necessary predicate to the use of replacement value for purposes of determining the value of the saw, so no rational factfinder could have found the elements of felony theft beyond a reasonable doubt. Ohms's felony theft conviction was reversed. St. v. Ohms, 2002 MT 80, 309 M 263, 46 P3d 55 (2002), retroactively applying St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Evidence of Market Value Not Presented — Replacement Value Insufficient to Prove Elements of Felony Theft: While fleeing from a pursuing police officer, Martin shot the officer and stole his service revolver. He was convicted of felony theft for exerting unauthorized control over the weapon. At trial, the only evidence presented as to the value of the revolver was an estimate of the replacement value, but no evidence was given regarding the market value. To prove felony theft, the value of the stolen property must be shown to exceed $500. By definition, value means the market value of the property at the time and place of the crime. Replacement value is to be used only if market value cannot be satisfactorily ascertained. Here, the state relied solely on replacement value and presented no evidence of market value or evidence that market value could not be ascertained. Having failed to meet the burden of proof regarding value, the essential elements of felony theft were not shown and the conviction was reversed. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Part-Time Antique Dealer's Testimony of Retail Value: Testimony of a part-time antique dealer that the retail value of stolen items was $416 was sufficient to support the court's finding that the property exceeded "$300 in value" for purposes of 45-6-301, which provides an increased penalty for theft of property exceeding $300 in value. St. v. Pierce, 255 M 378, 842 P2d 344, 49 St. Rep. 992 (1992).

Core Value of Rebuilt Engine as Market Value: Defendant asserted a distinction between "core value" as trade-in value for the purpose of exchange discount on a used engine and market value as the purchase price in the open market. The Supreme Court disagreed, noting that if core value is the value of a rebuildable engine normally determined by an engine rebuilder and the market for a rebuildable engine is with an engine rebuilder, then core value is logically identical to market value. St. v. Milhoan, 224 M 505, 730 P2d 1170, 43 St. Rep. 2371 (1986).

Evidence of Value Several Years Prior to Crime: In a prosecution for criminal theft, the value of the property must be established as of the time and place of the crime. When the state presented evidence of the value of the property several years prior to the crime charged, it failed to meet its required burden and the District Court's refusal to instruct the jury on misdemeanor theft was reversible error. St. v. Furlong, 213 M 251, 690 P2d 986, 41 St. Rep. 2096 (1984).

Value for Tax Purposes: Value for tax purposes and fair market value may not be identical, but testimony on value for tax purposes qualifies as evidence of reduced value. St. v. Furlong, 213 M 251, 690 P2d 986, 41 St. Rep. 2096 (1984).

Expert's Opinion of Value Sufficient: Before conviction for felony theft will lie, the value of property taken must exceed $150. An expert witness testified that stolen goods were worth well in excess of $150, which was clearly sufficient to sustain a conviction of felony theft, as charge was supported by substantial evidence. St. v. Fox, 212 M 488, 689 P2d 252, 41 St. Rep. 1884 (1984).

Stealing One Boot Still Felony — No Leg to Stand On: Man who steals one boot is caught with felony loot. It's two boots' worth since there's a dearth of cowboys with just one foot. St. v. Barker, 211 M 452, 685 P2d 357, 41 St. Rep. 1485 (1984).

"Value" — Retail Price as Market Value: In determining the market value of a pair of cowboy boots for the purposes of 45-6-301, it was not error for the court to instruct the jury that the market value of the boots was their retail price. The evidence on the value of the boots was limited to their retail and wholesale price. The wholesale price could not be considered the market value; thus, the jury instruction establishing the market value as the retail price was necessary, even though the retail price is not always the market value and the instruction in this case was mandatory in nature and a comment on the evidence. St. v. Barker, 211 M 452, 685 P2d 357, 41 St. Rep. 1485 (1984).

Instructions: Where no evidence was introduced which would lead a jury to rationally believe that the stolen property was worth less than $150 and where, in fact, the uncontroverted evidence placed its value between $800 and $1,600, an instruction on misdemeanor theft was not required. St. v. Jackson, 180 M 195, 589 P2d 1009 (1979).

Sufficiency of Evidence:

Where testimony established that stolen property was purchased new a few years before the theft at a cost in excess of $1,700 and it was shown that defendant attempted to sell the property for $800, there was sufficient evidence of value in excess of $150 and the prices established by defendant were tacit admissions that the property was valued at $150 or more. St. v. Jackson, 180 M 195, 589 P2d 1009 (1979).

Where the State's proof of value of damage to a wall of the county jail consisted of two repair bills amounting to $169, but where bills admittedly contained unspecified charges for repairs not necessitated by defendants' actions, evidence was not sufficient to prove that the damage caused by defendants cost more than $150 to repair. St. v. Davis, 176 M 196, 577 P2d 375 (1978).

Criminal Mischief: Proof of value was held not to be an element of the offense of criminal mischief but is rather to be considered by the trial judge in the exercise of his sentencing discretion, and whether a defendant is sentenced for the offense of criminal mischief as a felon or a misdemeanant is directly contingent upon whether the value of the damage or destruction is shown to be greater or less than $150. St. v. Davis, 176 M 196, 577 P2d 375 (1978).

VEHICLE

Trailer Portion of Tractor-Trailer: The trailer portion of a tractor-trailer is a vehicle within the meaning of the motor vehicle code and within the meaning of this section. St. v. Shannon, 171 M 25, 554 P2d 743 (1976).

WEAPON

Officers' Apprehension of Injury From Unseen Weapon Reasonable — Assault on Peace Officer Affirmed: When police arrived at the defendant's apartment in response to a noise complaint, the defendant answered the door and admitted them, although he appeared to the officers to be distinctly agitated and belligerent. After pushing one officer and being repeatedly warned not to touch the officers, the defendant stated they would "see about" that and stepped into another room. On returning, he faced the officers in a stance that obscured his right hand. When the officers drew their weapons and ordered him to drop they gun they believed he had retrieved and was concealing, the defendant dropped a loaded shotgun from his right hand; he was subsequently charged with assault on a police officer. At the end of the prosecution's case, the defendant moved to dismiss for insufficient evidence, arguing that the police could not have had a reasonable apprehension of serious bodily injury because they had not seen the shotgun he had been holding until after he dropped it. The District Court denied the motion, and the defendant was convicted. On appeal, the Supreme Court affirmed the District Court's denial of the motion to dismiss, noting that an officer need not see a weapon to feel threatened by it. St. v. Kirn, 2012 MT 69, 364 Mont. 356, 274 P.3d 746.

Officer's Reasonable Apprehension of Injury From Unseen Weapon — Peace Officer Assault Conviction Affirmed: With officers in pursuit, Steele had one hand at the back of his waistband and one hand in front. Based on prior knowledge of Steele, Officer Baumann believed Steele might have a gun. As the officer approached, Steele turned and raised his arms from his waistband, and the officer thought that Steele was acquiring the officer as a target. The officer then heard a shot and saw Steele drop a pistol that Steele was holding behind his back, and during that interval, the officer testified that he was worried about his physical safety and feared for his life. Based on the officer's knowledge and observations, the officer did not actually have to see the gun in order to feel threatened by the weapon. There was sufficient evidence to uphold Steele's conviction of assault on a peace officer, and the Supreme Court affirmed. St. v. Steele, 2004 MT 275, 323 M 204, 99 P3d 210 (2004), following St. v. Misner, 234 M 215, 763 P2d 23 (1988), and St. v. Hagberg, 277 M 33, 920 P2d 86 (1996). See also St. v. Kirn, 2012 MT 69, 364 Mont. 356, 274 P.3d 746.

Hot, but Unlit, Cigarette Lighter Considered Weapon — Fear of Being Burned With Hot Lighter Sufficient to Sustain Assault With Weapon Charge: A minor was convicted of assault with a weapon after burning his younger sister six times with the heated end of an unlit cigarette lighter and threatening his other siblings with the same treatment. On appeal, defendant contended that the charge was erroneous because an unlit lighter could not be considered a weapon and because no serious bodily injury was inflicted. The Supreme Court disagreed with both arguments. By definition, a weapon is an instrument, article, or substance that is readily capable of producing death or serious bodily injury. Thus, even though unlit, the hot lighter was used as a device to inflict pain or injury and satisfied the definition of a weapon. Further, assault with a weapon does not require actual infliction of serious bodily injury, but only a showing that a person knowingly and purposely caused a victim a reasonable apprehension of serious bodily injury with a weapon or with what appeared to be a weapon. The victims in this case were in reasonable apprehension of what they rightfully considered to be serious bodily injury, and the conviction was affirmed. St. v. R.B."J."C., 2004 MT 254, 323 M 62, 97 P3d 1116 (2004).

No Evidence That Corporal Punishment Caused Mental Health Condition of Victim — Violent Felony Offender Designation Reversed: The sentencing court determined that Mason's excessive use of force in punishing a child with a belt constituted a violent offense and caused the child to develop a serious mental health condition, so Mason was designated a violent felony offender. However, the state produced no evidence that Mason caused the child's mental health condition or that the belt was used in a manner capable of producing death. Because the belt was not a deadly weapon, Mason's conduct did not satisfy the definition of crime of violence in 46-18-104. The violent felony offender designation was reversed. St. v. Mason, 2003 MT 371, 319 M 117, 82 P3d 903 (2003).

Unloaded BB Gun Not Considered Weapon for Purposes of Sentence Enhancement for Use of Dangerous Weapon: Clemo pleaded guilty to robbing a casino by threatening an employee with an unloaded BB pistol and was sentenced to 7 years with 5 years suspended for felony robbery pursuant to 45-5-401, plus an additional 2 years for committing the offense with a dangerous weapon pursuant to 46-18-221. Following St. v. Wilson, 282 M 134, 936 P2d 316, 54 St. Rep. 278 (1997), the Supreme Court concluded that Clemo's unloaded BB gun was no more capable of causing harm at the time in question than the inoperable BB gun used in Wilson and thus could not be characterized as a weapon because it was not easily able to produce serious harm when it was used to rob the casino. The case was remanded to vacate the enhanced portion of Clemo's sentence. St. v. Clemo, 1999 MT 323, 297 M 316, 992 P2d 1263, 56 St. Rep. 1292 (1999), distinguishing St. v. Matson, 227 M 36, 736 P2d 971, 44 St. Rep. 874 (1987), and In re R.L.S., 1999 MT 34, 293 M 288, 977 P2d 967, 56 St. Rep. 149 (1999).

Interpretation of Weapon as Device Capable of Producing Death or Serious Bodily Injury — Fake Bomb Not Considered Weapon for Purposes of Charging Felony Assault (now Assault With a Weapon): R.L.S. placed a device that appeared to be a bomb under the sink of a middle school, which R.L.S. contended was a fake bomb intended as a practical joke. Five people saw the device, believed it was a bomb, and were frightened or concerned for their safety. The device was destroyed by a bomb squad before it was ascertained whether the device actually was a bomb. R.L.S. was charged with five counts of felony assault (now assault with a weapon) and convicted of one count, which was appealed on grounds that the petition alleged that the device appeared to be a bomb but never alleged the use of a weapon, which is key to the charge of felony assault (now assault with a weapon). The state contended that a device meets the definition of weapon in this section if it appears and is perceived to be capable of inflicting death or serious bodily injury from the victim's perspective, regardless of whether the device is capable of actually inflicting such injury. The Supreme Court disagreed, holding that the clear and unambiguous language in the definition requires that a weapon must be readily capable of producing death or serious bodily injury and that the definition is not susceptible to any reasonable interpretation that would include a victim's subjective view of the device at issue. The petition failed to allege that R.L.S. used a weapon and thus failed to state facts constituting felony assault (now assault with a weapon). The case was reversed with instructions to dismiss the charges. In re R.L.S., 1999 MT 34, 293 M 288, 977 P2d 967, 56 St. Rep. 149 (1999), distinguishing St. v. Herron, 12 M 230, 29 P 819 (1892), and St. v. Weinberger, 206 M 110, 671 P2d 567, 40 St. Rep. 1539 (1983), and distinguished in St. v. Clemo, 1999 MT 323, 297 M 316, 992 P2d 1263, 56 St. Rep. 1292 (1999).

Clipper Cord a Weapon: Whether an item constitutes a weapon for the purposes of satisfying a statute is a question of fact for the jury. In the present case, the jury could have found beyond a reasonable doubt that an electrical clipper cord, when used as a whip in a felony assault (now assault with a weapon), constituted a weapon within the meaning of this section. St. v. Ahto, 1998 MT 200, 290 M 338, 965 P2d 240, 55 St. Rep. 851 (1998).

Tennis Shoe a Weapon: Mummey alleged that the lower court erred in refusing to overturn his assault conviction on the basis that the state had failed to prove that his footwear was a weapon under the felony assault (now assault with a weapon) statute. The Supreme Court ruled that a tennis shoe could not as a matter of law be found to not be a weapon; rather, it was a question for the jury to determine whether under the circumstances of the assault, the shoe was used in such a manner as to constitute a weapon. St. v. Mummey, 264 M 272, 871 P2d 868, 51 St. Rep. 198 (1994).

Sharpened Eyeglass Armpiece as Dangerous Weapon: Evidence that Birthmark was an inmate at the state prison and that he was found in possession of an eyeglass armpiece that had been altered and sharpened into an object classified as a dangerous weapon by prison authorities was sufficient to support conviction under 45-8-318. St. v. Birthmark, 253 M 526, 833 P2d 1103, 49 St. Rep. 583 (1992).

Stun Gun a Weapon: Consistent with federal case law and with statutes of Montana and other states and supported by the evidence, a stun gun was held to be a weapon capable of producing serious bodily injury. St. v. Evans, 247 M 218, 806 P2d 512, 48 St. Rep. 170 (1991).

Pantyhose a Weapon: A pair of pantyhose may be considered a weapon under this section's definition of "weapon" as it includes any instrument, article, or substance which, regardless of its primary function, is readily capable of being used to produce death or serious bodily injury (defendant was accused of strangling victim with her pantyhose). St. v. Howard, 195 M 400, 637 P2d 15, 38 St. Rep. 1980 (1981).

Metal Pipe: A metal pipe used to beat up a fellow inmate was held to be a "billy" or club, the unauthorized possession of which is prohibited to prison inmates by 45-8-318. The court, therefore, did not decide whether the pipe fit within the category of "other deadly weapon", the unauthorized possession of which is also prohibited to prison inmates. St. v. Perry, 180 M 364, 590 P2d 1129 (1979).

Sufficiency of Evidence: Where no evidence was presented concerning the size, weight, or shape of the projectile which struck the victim or of the velocity at which the slingshot was capable of propelling the projectile and where it only inflicted a bruise on the jaw of the victim and where no hospitalization was required or bones broken, the evidence was insufficient as a matter of law to prove that the assault was committed with a weapon capable of being used to produce death or serious bodily injury. St. v. Deshner, 175 M 175, 573 P2d 172 (1977).

Attorney General's Opinions

Injuries to or Death of Firefighters Covered by Arson Statute: A person who negligently places a firefighter responding to a fire in danger of death or bodily injury by purposely or knowingly starting a fire or causing an explosion commits the offense of negligent arson under 45-6-102. 39 A.G. Op. 10 (1981).

45-2-102. Substitutes for negligence and knowledge.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 2.02(5).

This section is intended to obviate any possible misunderstanding as to what mental state will satisfy the requirements of each statutory provision. Proof of the higher or more specific mental state will satisfy any lesser mental state that may be required by a particular statute.

Case Notes

Sufficient Evidence of Mental State and Reasonable Apprehension to Prove Assault With a Weapon: When attempting to flee from pursuing officers, Martin ducked into the back door of a bakery and then ran out the front door in a further attempt to get away, seeking a hiding place in a small enclosure that was boarded up with plywood. There was a hole in the plywood, and as a pursuing officer stooped to look in the hole, Martin looked out directly at him. Recognizing Martin as the man he had chased out of the bakery, the officer identified himself and ordered Martin to drop his gun and show his hands. Instead, Martin looked out the hole two more times and then pointed the gun through the hole directly at the officer. Thinking he was about to be fired upon, the officer fired a shot. Martin disappeared from view and then threw the gun out of the hole. Martin was convicted of felony assault (now assault with a weapon), but contended on appeal that the state did not establish that he purposely or knowingly intended to create an apprehension of serious bodily injury in the officer. Martin argued that his mental state, not the officer's perception of it, controlled as to the "purposely or knowingly" element of felony assault. The Supreme Court agreed in part with Martin's reasoning, in that that element of the crime is controlled by the perpetrator's mental state, not that of the victim. However, the mental state element goes to the defendant's actions, not to whether those actions caused reasonable apprehension of injury in another. Thus, it was sufficient for the jury to find that Martin saw the officer and deliberately aimed a gun at him. Given the circumstances of the pursuit and the fact that the officer knew that Martin had just shot a fellow officer, coupled with the way Martin pointed the gun, the evidence was sufficient for the jury to find that the officer felt a reasonable apprehension of serious bodily injury, and Martin's conviction for felony assault was affirmed. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Instruction That Person Acts Purposely if Conscious Object Is to Cause Death or "Similar" Type of Harm Not in Error: At Clausell's deliberate homicide trial, the District Court instructed the jury that a person acts purposely with respect to deliberate homicide if it is that person's conscious object to cause death or a "similar" type of harm to another human being. Clausell contended that the instruction was improper because the statutory definitions of purposely and deliberate homicide do not contain the word "similar". The Supreme Court cited St. v. Rothacher, 272 M 303, 901 P2d 82 (1995), in holding that the use of "similar" did not lower the state's burden of proving every element of the crime. The mental state for deliberate homicide can be established if the result involves the same or a similar type of harm or injury as contemplated by defendant, although the actual degree of injury is greater than intended. St. v. Clausell, 2001 MT 62, 305 M 1, 22 P3d 111 (2001), followed in St. v. Dubois, 2006 MT 89, 332 M 44, 134 P3d 82 (2006).

"Knowingly" and "Negligently" Not Mutually Exclusive Mental States: The defendant's involvement in a vehicular accident resulted in his being convicted of knowingly causing serious bodily injury to one of the occupants of a car and negligently causing bodily injury to the remaining occupants. The two mental states are not mutually exclusive, as proof of knowledge necessarily proves the elements of criminal negligence. St. v. Pierce, 199 M 57, 647 P2d 847, 39 St. Rep. 1205 (1982).

Proof of Elements of Crime — Sandstrom-Type Jury Instruction — Retrial Ordered: Defendant appealed his conviction for criminal sale of dangerous drugs (now criminal distribution of dangerous drugs). The only issue he raised which had substantive merit was the challenge to a jury instruction similar to the Sandstrom instruction which had been found defective previously. This case is the first considered in Montana since the Sandstrom decision which has been found to be controlled by Sandstrom. To sustain the charge against the defendant, the State needed to prove beyond a reasonable doubt that the defendant purposely or knowingly manufactured a dangerous drug. The voluntary act here is manufacturing. The ordinary consequence is a dangerous drug. Under this framework, the challenged jury instruction directed the jury to presume intent, purposely or knowingly, upon proof by the state of a voluntary act, manufacturing, and that act's ordinary consequence, a dangerous drug. Given the lack of qualifying instructions, a reasonable jury may have interpreted the instruction in either of two impermissible ways, as a conclusive presumption or as a shifting to the defendant of the burden of proving lack of intent upon proof by the state of the defendant's voluntary act and its ordinary consequences. The court could not agree that the offensive instruction could not have contributed reasonably to the jury's verdict because the State's case was entirely circumstantial and the evidence of intent was not overwhelming. Therefore, they could not find the error harmless. St. v. Wogamon, 188 M 34, 610 P2d 1161 (1980).

Proof of Elements of Crime — Sandstrom-Type Jury Instruction: Defendant, convicted of attempted deliberate homicide and aggravated burglary, appealed claiming error in the jury instruction stating that "you may infer that the attempted homicide was committed knowingly or purposely" under certain circumstances. Because the instruction did not apply to the burglary charge, that conviction stood. As to the homicide charge, the Supreme Court said that the instruction in question must be examined in the context of the other instructions given, as the court had decided previously that an identical instruction was not error in the context of the other instructions given. In finding the instruction in question here not error, the court contrasted the Sandstrom instruction, a presumption mandatory by its very terms which allowed the jury no discretion, with the instruction here in which the jury was told it "may infer" an element of the crime, namely, that the attempted homicide was committed knowingly or purposely. The latter instruction referred to an inference of fact and was, by its express terms, permissive. The language did not involve either a conclusive or burden shifting presumption, nor did the instruction have the effect of allocating to the defendant some part of the burden of proof that properly rested on the state throughout the trial. This was made clear by the other instructions given by the trial court. It was not necessary for the jury to be instructed that they need not make the inference because the terms of the instructions made clear the effect and operation of the inference. Further, the operation and effect of the inference was clearly explained to the jury. St. v. Sheriff, 188 M 26, 610 P2d 1157 (1980).

45-2-103. General requirements of criminal act and mental state.

Criminal Law Commission Comments

Source: Ill. C. C., 1961 Chapter 38, sections 4-3 and 4-8; M.P.C., § 2.04.

The accurate description of the mental states which are elements of the various specific offenses is one of the most difficult problems in the preparation of a criminal code.

In a number of other states, efforts have been made to simplify the description of mental states, by defining a small number of terms and using them uniformly throughout the criminal code, with appropriate qualifying language where necessary to describe accurately a particular offense. Subsection (2) provides a general rule for interpretation of statutory references to mental state in defining specific offenses. Often, a single mental state word, such as "knowingly" is placed in a position where grammatically it may apply to all elements of the offense. To so apply it for the purpose of legal interpretation seems logical, since the purpose that it shall not apply to certain elements of the offense may be expressed readily by a different sentence structure. Subsection (3) states the accepted rule that in the absence of a statutory requirement, knowledge of the law is not an element of the offense. A person's liability for an offense does not depend upon his knowing that his conduct constitutes an offense, or knowing of the existence, meaning, or application of the defining statute. A reasonable reliance upon a statute later determined to be invalid, or upon an authoritative statutory interpretation, later determined to be invalid or erroneous is a defense. Clearly, the state should not punish as criminal, conduct which, according to a formally expressed statement of its duly authorized agents, is not illegal. Proof of the facts upon which such a defense is based should not be difficult, nor should determination of the reasonableness of the defendant's reliance; and since the enactment or interpretation relied upon would be of a public and official nature, collusion to avoid criminal liability seems unlikely. When ignorance or mistake is recognized as a defense the defendant may be convicted of an included offense which does not involve the mental state negatived by the ignorance or mistake.

Compiler's Comments

1995 Amendment: Chapter 354 in (1), at end, substituted "of knowingly, negligently, or purposely" for "described in subsections (33), (37), and (58) of 45-2-101"; and made minor changes in style. Amendment effective April 11, 1995.

1987 Amendment: At beginning of (1) substituted "Except for deliberate homicide as defined in 45-5-102(1)(b) or" for "A person is not guilty of an offense, other than" and after "liability" inserted "a person is not guilty of an offense"; inserted (2) requiring mental state of purposely or knowingly for certain underlying felonies in deliberate homicide; and in (7) changed reference to subsection (4) to reference to subsection (6).

1981 Amendment: In (1) changed internal references to subsections in 45-2-101 to reflect amendment of that section.

Annotator's Note: Except in cases where absolute liability is imposed (MCA, 45-2-104), the new Criminal Code requires, for conviction, that it be established that the act was done voluntarily with one of the three mental states defined in 45-2-101, "purposely", "knowingly", or "negligently". This section, which is substantially similar to the Illinois and Model Penal Code sources, lists in subsections (1) and (2) the requirements for mental states in the new Code and how these requirements for mental states are to be applied to the individual provisions. Subsections (3) and (4) delineate those instances in which mistake of law will be allowed as a defense. Attention is directed to the new "Montana Administrative Procedure Act", MCA, Title 2, chapter 4, for the effectiveness of unpublished administrative rules.

The 1977 amendment changed the reference to subsections of R.C.M. 1947, section 94-2-101 (now MCA, 45-2-101) in subsection 45-2-103(1), MCA, to conform to the change in numbering of the subsections of 45-2-101, MCA. The 1977 amendment also changed the tense of "prescribes" in subsection (2) from past to present tense and made minor changes in phraseology and punctuation. The 1979 amendment added to subsection (1) a last sentence relating to inferring mental state from acts and facts.

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CONSTRUCTION AND APPLICATION

Three Definitions of "Knowingly" — Sexual Abuse of Children: Of the three definitions of "knowingly" in 45-2-101, the conduct/circumstance definition, the result-of-conduct definition, and the fact definition, the same definition does not have to apply to each element of a crime. With the crime of sexual abuse of children under 45-5-625, the correct definition must describe conduct of the defendant, so the conduct/circumstance definition would apply. It was not an abuse of discretion to give the fact definition to help the jury determine whether the defendant knew the pictures he downloaded were of children. St. v. Hovey, 2011 MT 3, 359 Mont. 100, 248 P.3d 303.

Culpability for Criminal Endangerment Created by Appreciation of Probable Risks Posed by One's Conduct — "Knowingly" Misapplied: The mental state element of "knowingly" in criminal endangerment contemplates a defendant's awareness of the high probability that the conduct in which the defendant is engaging, whatever that conduct might be, will cause a substantial risk of death or serious bodily injury to another. Because there is no particularized conduct that gives rise to criminal endangerment, it is incorrect to apply to that offense's mental element the definition of knowingly—that an accused need only be aware of the accused's conduct. It is the appreciation of the probable risks to others posed by one's conduct that creates culpability for criminal endangerment. Pursuant to this section, "knowingly" applies in this case to both conduct and the result of that conduct. Therefore, the District Court's application of the definition of knowingly—that an accused need only be aware of the accused's conduct—as the offense's mental element constituted reversible error. St. v. Lambert, 280 M 231, 929 P2d 846, 53 St. Rep. 1379 (1996). See also St. v. Crisp, 249 M 199, 814 P2d 981 (1991), St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998), and St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Unlawful Entry — Ignorance of Law No Denial of Defense to Element of "Knowingly": Defendant convicted of criminal trespass had no knowledge that the posting of a 12- by 5-inch fluorescent orange sign indicated no trespassing and, therefore, claimed that he could not have knowingly entered unlawfully onto the posted land. However, one need not form the intent to commit a specific crime or intend the result that occurs to be found guilty of knowingly committing a crime. Further, because no argument was made that the sign was not in accordance with the posting statute, defendant was assumed to have had legal notice. Ignorance of the law has never been a defense in Montana. St. v. Blalock, 232 M 223, 756 P2d 454, 45 St. Rep. 1008 (1988).

Criminal Sale of Dangerous Drugs (now Criminal Distribution of Dangerous Drugs) Not Absolute Liability Offense: Defendant contended her sentence was excessive because 45-9-101 is an absolute liability offense, requiring no mental state, and that pursuant to this section and 45-2-104, the maximum penalty is a $500 fine. The Supreme Court held that 45-9-101 is not an absolute liability offense because the state must prove that defendant knowingly or purposely committed the crime. St. v. Brown, 232 M 1, 755 P2d 1364, 45 St. Rep. 818 (1988).

Purpose Inferred From Acts: The general requirements of a mental state, as described in subsection (3) of this section, when read together with the definition of "purposely" in 45-2-101, show that a defendant's purpose or conscious object may be inferred from his acts as well as from the facts and circumstances of the offense. The fact that an additional mental state or purpose must be shown does not bar the trier of fact from inferring such purpose from the defendant's acts. St. v. Smith, 228 M 258, 742 P2d 451, 44 St. Rep. 1503 (1987).

Knowledge of Personal Injury or Death Held Element of Crime: Defendant was convicted of leaving the scene of an accident involving personal injuries in violation of 61-7-103. In instructing the jury on the elements of the crime, the trial judge failed to include as an element that defendant knew that the accident had resulted in personal injuries. On appeal, the state argued that to require that such knowledge is an element of the crime would not be reasonable because it would encourage people to leave the scene of an accident to foreclose the opportunity of acquiring this knowledge. The Supreme Court ruled that knowledge of injury was an element of the crime but that knowledge of personal injury or death may be inferred from the seriousness of the accident. St. v. Stafford, 208 M 324, 678 P2d 644, 41 St. Rep. 377 (1984).

"Knowingly" and "Negligently" Not Mutually Exclusive Mental States: The defendant's involvement in a vehicular accident resulted in his being convicted of knowingly causing serious bodily injury to one of the occupants of a car and negligently causing bodily injury to the remaining occupants. The two mental states are not mutually exclusive, as proof of knowledge necessarily proves the elements of criminal negligence. St. v. Pierce, 199 M 57, 647 P2d 847, 39 St. Rep. 1205 (1982).

Mental State Required to Commit Offense of Practicing Chiropractic Without a License: Although no particular mental state is identified in 37-12-301, 45-2-103 clearly requires the practice of chiropractic without a license be done knowingly or purposely to constitute an offense. St. v. Blinzler, 183 M 300, 599 P2d 349 (1979).

Essential Elements:

The two essential elements in all criminal offenses are a voluntary act and a mental state. People v. Gray, 36 Ill. App.3d 720, 344 N.E.2d 683 (1976), affirmed 69 Ill.2d 44, 370 N.E.2d 797 (1977), certiorari denied 435 US 1013 (1978).

Criminal intent is an essential element of crimes, other than certain nontrue crimes. People v. Arron, 15 Ill. App.3d 645, 305 N.E.2d 1 (1973).

As a general rule criminal liability requires one of three culpable mental states—knowingly, purposely, or negligently. However, the event of driving a motor vehicle while one's operator's license is suspended has been held to involve absolute liability, and mental state is not involved in the offense. People v. Espenscheid, 109 Ill. App.2d 107, 249 N.E.2d 866, 868 (1969).

Criminal Negligence:

Willful or evil intent was not an element of involuntary manslaughter under 94-117, R.C.M. 1947 (since repealed). St. v. Pankow, 134 M 519, 333 P2d 1017 (1958).

In prosecution for involuntary manslaughter under 94-2507, R.C.M. 1947 (since repealed), criminality of the act resulting in death was established if the act was done negligently in such a manner as to evince a disregard for human life or an indifference to consequences irrespective of whether unlawful act was malum in se or merely malum prohibitum. St. v. Strobel, 130 M 442, 304 P2d 606 (1956), overruled on other grounds, St. v. Pankow, 134 M 519, 333 P2d 1017 (1958).

INDICTMENT AND INFORMATION

Attempt to Commit Offense: It was held to be unnecessary that a mental state defined by statute for the choate offense be alleged in specific terminology in an indictment for attempt to commit that offense. People v. Sanders, 7 Ill. App.3d 848, 289 N.E.2d 110 (1972).

When Offense Includes Mental State: If the statutory definition of an offense includes a mental state with which the act is committed as an element of the offense, that knowledge or mental state must be alleged in the indictment charging the offense. People v. Mager, 35 Ill. App.3d 306, 341 N.E.2d 389 (1976). As a general rule, an indictment which fails to allege the required mental state as prescribed by statute or to describe the acts that indicate such mental state is fatally defective. People v. Matthews, 122 Ill. App.2d 264, 258 N.E.2d 378, 382 (1970). Thus, where conduct alleged in the indictment may itself be wholly innocent, it is essential that the unlawfulness of the conduct be stated either by an express allegation or by the use of terms or facts which clearly imply such unlawfulness. People v. Campbell, 3 Ill. App.3d 984, 279 N.E.2d 123, 124 (1972).

Absolute Liability: Where the offense is one for which absolute liability is provided, such as driving a motor vehicle while one's operator's license is suspended, it is not necessary for the mental state to be alleged in the information. People v. Espenscheid, 109 Ill. App.2d 107, 249 N.E.2d 866, 868 (1969).

INTENT ESTABLISHED BY CIRCUMSTANTIAL EVIDENCE

High Probability Providing 18-Year-Old With Half-Gallon of Whiskey Would Create Substantial Risk of Death or Serious Bodily Injury to Another: A defendant bought a half-gallon of whiskey for an 18-year-old, who became so intoxicated he required hospitalization. The defendant appealed his conviction for criminal endangerment, arguing that the state did not prove he was aware of a high probability his action would create a substantial risk of death or serious bodily injury. The Supreme Court ruled that, based on the quantity of alcohol and other facts, a rational jury could have concluded the defendant had actual knowledge there was a substantial risk, but remanded the case on other grounds. St. v. Fleming, 2019 MT 237, 397 Mont. 345, 449 P.3d 1234.

Criminal Endangerment — Sufficient Proof of Mental State and Jurisdiction: Cybulski contended that the state failed to prove criminal endangerment because there was insufficient proof that Cybulski acted knowingly or that the alleged offense occurred in Custer County. The Supreme Court disagreed with both arguments. Under 45-2-103, the existence of a mental state may be inferred from the acts of the accused and the facts and circumstances connected with the offense. Here, Cybulski drove at a high rate of speed for nearly 50 miles on the wrong side of the interstate while intoxicated. A rational trier of fact could conclude beyond a reasonable doubt that Cybulski either was aware of her conduct and the risk it was creating or was unaware solely because of her intoxicated condition, so the element of knowingly was proven. Under 46-3-112, if two or more acts are requisite to the commission of an offense, the charge may be filed in any county in which any of the acts occurred. Cybulski admitted that she drove on the wrong side of the interstate in Custer County and made no objection to charges being filed in Custer County, so venue in Custer County was proper. St. v. Cybulski, 2009 MT 70, 349 M 429, 204 P3d 7 (2009).

No Error in Denying Motion to Dismiss Felony Indecent Exposure Charge for Insufficient Evidence: Defendant's actions coupled with facts and circumstances constituted sufficient evidence for the jury to find the essential elements of the crime beyond a reasonable doubt. St. v. Ommundson, 2008 MT 340, 346 M 263, 194 P3d 672, (2008).

Sufficient Circumstantial Evidence of Deliberate Homicide — Motion for Directed Verdict Properly Denied: At the end of the state's case in chief in Clausell's deliberate homicide trial, Clausell moved for a directed verdict on grounds that the state failed to introduce evidence upon which the jury could conclude that Clausell knowingly or purposely caused his girlfriend's death. The District Court denied the motion, which Clausell contended on appeal was an abuse of discretion because gunshot residue tests failed to establish who was holding the gun when it discharged, there was no other evidence that Clausell was the shooter, there was no well-established motive to prove intent, and there was no evidence of flight. The Supreme Court agreed with the state that there was sufficient circumstantial evidence from which any rational trier of fact could infer that Clausell was holding the gun and that he acted knowingly or purposely. The court also noted that neither motive nor flight is an element of deliberate homicide. Clausell recounted at least eight different versions of the facts that were inconsistent with each other and with the physical evidence. When viewed in the light most favorable to the state, the record showed ample circumstantial evidence that Clausell committed the crime, and denial of the motion for a directed verdict was not an abuse of discretion. St. v. Clausell, 2001 MT 62, 305 M 1, 22 P3d 111 (2001). See also St. v. Lancione, 1998 MT 84, 288 M 228, 956 P2d 1358 (1998).

Criminal Mental State — Jury Question: Whether a defendant acted with the requisite mental state is a question for the jury, and because a state of mind is rarely susceptible of direct or positive proof, it must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence. St. v. Greenwell, 206 M 233, 670 P2d 79, 40 St. Rep. 1616 (1983).

Circumstantial Evidence Insufficient to Sustain Conviction of Attempted Sale of Narcotics — Chemical Tests Inconclusive — Burden of Proof: Where the defendant offered to sell an undercover agent a pound of cocaine and field tests conducted on the substance offered for sale proved the substance could be either cocaine or a prescription drug called lidocaine, the District Court erred in convicting the defendant of felony sale of dangerous drugs (now criminal distribution of dangerous drugs), as there was insufficient evidence to support a conviction. Under St. v. Stoddard, 147 M 402, 412 P2d 827 (1966), circumstantial evidence must not only be entirely consistent with guilt, it must be inconsistent with any other rational theory. Here, the field test failed to prove the drug was a dangerous drug. St. v. Starr, 204 M 210, 664 P2d 893, 40 St. Rep. 796 (1983).

Fleeing After Vehicular Accident: After being involved in a vehicular accident, the defendant fled the scene. Such flight was properly considered as a circumstance tending to prove consciousness of guilt. St. v. Pierce, 199 M 57, 647 P2d 847, 39 St. Rep. 1205 (1982), followed in St. v. Patton, 280 M 278, 930 P2d 635, 53 St. Rep. 1402 (1996). As applied to flight following aggravated assault, see St. v. Charlo, 226 M 213, 735 P2d 278, 44 St. Rep. 597 (1987). As applied to flight following attempted deliberate homicide, see St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999).

"Knowingly" — Vehicular Accident — Circumstantial Evidence: After being involved in a vehicular accident, the defendant admitted consuming 12 beers, being intoxicated, that he shouldn't have been driving, and fleeing from the scene of the accident. Witnesses testified as to the defendant's high rate of speed and illegal passing maneuvers. There was sufficient circumstantial evidence for a jury to conclude that the defendant "knowingly" caused bodily injury. St. v. Pierce, 199 M 57, 647 P2d 847, 39 St. Rep. 1205 (1982).

Theft: While defendant argued there was no direct proof of intent to commit a theft, the rule has long been established in Montana that use of circumstantial evidence is an acceptable and often convincing method of proving criminal intent. There was substantial evidence in the instant case to support such a conclusion of intent. St. v. Pascgo, 173 M 121, 566 P2d 802 (1977).

Involvement: Circumstances of defendant's involvement in crime are relevant in determining his state of mind. People v. Hendrix, 18 Ill. App.3d 838, 310 N.E.2d 798 (1974).

Homicide: Because a defendant's mental state is often difficult to determine, it has been held that in a homicide prosecution the defendant's mental state could be deduced from the facts surrounding the killing when the defendant did not testify as to his thoughts, intuition, or fears. People v. Woods, 131 Ill. App.2d 54, 268 N.E.2d 246 (1971).

Instructions to Jury:

Since under 94-117, R.C.M. 1947 (since repealed), specific intent was not a necessary element of second-degree assault, refusal of instruction thereon was proper even though defendant claimed that high degree of intoxication precluded formation of intent. St. v. Warrick, 152 M 94, 446 P2d 916 (1968).

Under 94-117, R.C.M. 1947 (since repealed), refusal to instruct that in every crime there must exist union or joint operation of act and intent or criminal negligence as provided by statute was not error in prosecution for second-degree assault under which general nonstatutory intent to do harm willfully, wrongfully, and unlawfully is an element but under which specific statutory intent to do any particular kind of degree of injury to victim is not an element. St. v. Fitzpatrick, 149 M 400, 427 P2d 300 (1967).

Under 94-117, R.C.M. 1947 (since repealed), an instruction charging jury that when an unlawful act is shown to have been deliberately committed for the purpose of injuring another it is presumed to have been committed with a malicious and guilty intent and that the law presumes that a person intends the ordinary consequences of any voluntary act committed by him may mislead the jury and should not have been given in prosecution for assault in the first degree, a critical element of which is the intent with which the act is committed. St. v. Schaefer, 35 M 217, 88 P 792 (1907).

An instruction embodying the provisions of 94-117 and 94-118, R.C.M. 1947 (since repealed), regarding the necessity of the presence of joint operation of act and intent to constitute a crime should have been given in every criminal prosecution, especially when requested by defendant. St. v. Allen, 34 M 403, 87 P 117 (1906).

Assault: Under 94-118, R.C.M. 1947 (since repealed), finding of jury that defendant was able to form specific intent to commit first-degree assault as required by statute was properly inferred from evidence that, although intoxicated, defendant turned off lights inside apartment, reached into a nearby drawer and prepared revolver for action, surrendered to police, walked out of apartment under own power with hands in air, and after arrest had no difficulty recounting recent events to police. St. v. Lukus, 149 M 45, 423 P2d 49 (1967).

Fraudulent Intent: Under 94-118, R.C.M. 1947 (since repealed), proof of intent to defraud could consist of reasonable inferences drawn from affirmatively established facts; where defendant was sufficiently conscious at the time of the issuance of check to recognize its fraudulent nature he was of adequate mental ability to form an intent to defraud. St. v. Cooper, 146 M 336, 406 P2d 691 (1965).

Sexual Depravity: Evidence that defendant accosted a 9-year-old girl to whom he was a total stranger on the street, invited her to his room to play with him, on arriving there locked the door, asked her to remove her dress, and then placed his hand upon her shoulder in an attempt to remove her dress was sufficient to warrant a jury finding that the defendant intended to arouse his sexual desires in a depraved manner. St. v. Kocker, 112 M 511, 119 P2d 35 (1941).

Presumption of Intent: Under 94-117, R.C.M. 1947 (since repealed), intent was conclusively presumed from the commission of a statutory offense, as for collecting illegal fees, and where the statutes were not ambiguous, it was no defense that defendant acted on the advice of the Attorney General. State ex rel. Rowe v. District Court, 44 M 318, 119 P 1103 (1911).

Insanity Affecting Intent: Under 94-117, R.C.M. 1947 (since repealed), insanity was defined as any weakness or defect of the mind rendering it incapable of entertaining in the particular instance the criminal intent; criminal responsibility was to be determined solely by defendant's capacity to conceive and entertain the intent to commit the particular crime. St. v. Keerl, 29 M 508, 75 P 362 (1904).

BURDEN OF PROOF

Physician Convicted Over Prescriptions of Dangerous Drugs — Actions Outside Course of Professional Practice — Affirmed in Part, Reversed in Part: The defendant, a general physician who practiced in Montana, was convicted of 2 counts of negligent homicide, 9 counts of criminal endangerment, and 11 counts of criminal distribution of dangerous drugs, all relating to pain medication prescriptions he administered. On appeal, the defendant raised multiple issues relating to his prosecution, including arguing that 45-9-101 did not prohibit "prescribing" of dangerous drugs and that 45-5-207 was unconstitutionally vague. The Supreme Court held that the plain language of 45-9-101 did not prohibit the defendant from being prosecuted, that 45-5-207 was not unconstitutionally vague, and that the District Court properly instructed the jury as to the offense of criminal distribution. However, the Supreme Court reversed and vacated the defendant's conviction for two counts of negligent homicide because the state did not meet its burden that the defendant was the cause-in-fact of the victims' deaths. St. v. Christensen, 2020 MT 237, 401 Mont. 247, 472 P.3d 622.

Sufficient Evidence to Support Attempted Homicide Verdict — State of Mind: Martin was convicted of attempted deliberate homicide after shooting a police officer who was in pursuit following Martin's attempt to cash a forged check. Martin contended that the evidence was insufficient to prove that he acted with the purpose of causing the officer's death. Martin argued that he only intended to scare the officer and that if he had intended to kill the officer, he would not have looked surprised or confused after the shooting, as some witnesses testified. However, other witnesses testified that Martin appeared calm during the chase and even slowed before turning to shoot. Another witness testified that Martin always carried a gun and had boasted that he would shoot anyone who got in his way, "even a cop". In deference to the jury's resolution of the conflicting evidence, the Supreme Court affirmed, concluding that a rational trier of fact could have found the essential elements of attempted deliberate homicide beyond a reasonable doubt. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Mental Disease or Defect: On remand from the U.S. Supreme Court to decide the issue of whether the trial court's instruction on mental disease or defect unconstitutionally shifted the burden of proof of state of mind to defendant, the Supreme Court concluded that not only did the instructions not shift to defendant the burden of disproving any element of the offenses charged but the instructions, when read together, also required defendant to establish his diminished capacity merely by raising a reasonable doubt, rather than proof by a preponderance of the evidence. St. v. McKenzie (II), 177 M 280, 581 P2d 1205 (1978); certiorari granted, vacated and remanded, McKenzie v. Mont., 443 US 903, 99 S Ct 3094 (1979); reaffirmed, St. v. McKenzie (III), 186 M 481, 608 P2d 428 (1980); certiorari denied, McKenzie v. Mont., 449 US 1050, 101 S Ct 626 (1980); petition for habeas corpus denied, McKenzie v. Osborne (IV), 195 M 26, 640 P2d 368 (1981); affirmed, McKenzie v. Risley, 801 F2d 1519 (9th Cir. 1986); rehearing en banc granted, McKenzie v. Risley, 815 F2d 1323 (9th Cir. 1986); denial of habeas corpus affirmed, McKenzie v. Risley, 842 F2d 1525 (9th Cir. 1988).

Necessity or Justification: In a prosecution for escape where defendant claimed necessity or justification as a defense, the Montana court held that under Montana law the defense of justification is an affirmative defense which must be proved by the defendant by a preponderance of the evidence. St. v. Stuit, 176 M 84, 576 P2d 264 (1978).

INSTRUCTIONS TO JURY

Statutory Requirements Followed in Instructing Jury — Plain Error Review Inappropriate. St. v. Ragner, 2022 MT 211, 410 Mont. 361, 521 P.3d 29.

Physician Convicted Over Prescriptions of Dangerous Drugs — Actions Outside Course of Professional Practice — Affirmed in Part, Reversed in Part: The defendant, a general physician who practiced in Montana, was convicted of 2 counts of negligent homicide, 9 counts of criminal endangerment, and 11 counts of criminal distribution of dangerous drugs, all relating to pain medication prescriptions he administered. On appeal, the defendant raised multiple issues relating to his prosecution, including arguing that 45-9-101 did not prohibit "prescribing" of dangerous drugs and that 45-5-207 was unconstitutionally vague. The Supreme Court held that the plain language of 45-9-101 did not prohibit the defendant from being prosecuted, that 45-5-207 was not unconstitutionally vague, and that the District Court properly instructed the jury as to the offense of criminal distribution. However, the Supreme Court reversed and vacated the defendant's conviction for two counts of negligent homicide because the state did not meet its burden that the defendant was the cause-in-fact of the victims' deaths. St. v. Christensen, 2020 MT 237, 401 Mont. 247, 472 P.3d 622.

Adequate Definition of Security for Jury — Willful Conduct Standard Applicable to Securities Act Violations — Omission of Investment Prospectus Not Fraudulent at Time — Securities Restitution Properly Awarded: The defendant, a pastor, was approached by the plaintiff, a member of his congregation, about investing money. The defendant convinced the plaintiff to purchase stock in the defendant's Mexico-domiciled company. Ultimately, the investment promises never materialized and the defendant was convicted of failure to register as a securities salesperson, failure to register a security, and fraudulent practices under the Securities Act of Montana. On appeal, the defendant argued that the term "security" was not adequately or specifically defined for the jury, that the "willful" standard was inappropriate to attach to the charges, that the conviction of fraudulent practices was improper because neither the statute nor administrative rule required an investment prospectus at the time of the violation, and that the award of restitution was improper. The Supreme Court held that the evidence showed that the jury reasonably concluded that the defendant had sold a security because the shares in the company constituted a stock, that the Legislature specifically included a willful standard for Securities Act violations, that the fraudulent practices conviction was improper because failure to provide a prospectus was not part of the statute at the time, and that the award of restitution was proper because the loss stemmed directly from the defendant's conduct. St. v. Himes, 2015 MT 91, 378 Mont. 419, 345 P.3d 297.

Intent Disputed at Trial — "Sandstrom" Instruction Harmful Error: If intent was a disputed issue at trial, a reviewing court could not rationally conclude beyond a reasonable doubt that an unconstitutional Sandstrom instruction was harmless error and could not have tainted a jury verdict, even if the evidence of intent was overwhelming. The appropriate inquiry is whether any reasonable juror could have given the presumption raised by the instruction conclusive or persuasion-shifting effect. (Annotator's note: See McGuinn v. Crist, 657 F2d 1107 (9th Cir. 1981), apparently holding to the contrary.) In re Hamilton, 721 F2d 1189 (9th Cir. 1983).

Jury Instructions on Requirement That Criminal Act Be Voluntary: Defendant was convicted of mitigated deliberate homicide after having shot the owner of a bar. Prior to the shooting, the victim had hit defendant on the head, causing him to fall against a juke box. At the trial, a psychologist testified that due to the physical injuries defendant had suffered and the humiliation, anger, and fear he was experiencing, the defendant did not know what he was doing and was not able to control himself. The defense requested that the court instruct the jury that the burden is on the State to prove beyond a reasonable doubt that the defendant acted purposely, knowingly, and voluntarily. The court did not include the word "voluntarily" in instructing the jury on the State's burden of proof. The Supreme Court ruled that since the court did give one instruction that stated: "A material element of every offense is a voluntary act" and included in two other instructions the statement that the State has the burden to prove each element of the crime beyond a reasonable doubt, the jury had been properly instructed. St. v. Zampich, 205 M 231, 667 P2d 955, 40 St. Rep. 1235 (1983), followed in St. v. Patton, 280 M 278, 930 P2d 635, 53 St. Rep. 1402 (1996).

Instruction on Acting "Knowingly" — Inference Permitted: In deliberate homicide case, the court instructed the jury that one acts knowingly with respect to conduct or a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists and that he acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. The court also gave an instruction that if the jury found that defendant committed a homicide and that no circumstances of mitigation, excuse, or justification appeared, the jury could infer that the homicide was committed knowingly or purposely. Neither instruction had the effect of allocating to defendant some part of the State's burden of proof through use of a presumption or contained a conclusive presumption. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

"May Infer" Rather Than "Must Presume" Not a Sandstrom Instruction: A jury instruction that uses "may infer" rather than the Sandstrom-like language of "must presume" is not mandatory and does not shift the burden of proof to the defendant. St. v. Goltz, 197 M 361, 642 P2d 1079, 39 St. Rep. 613 (1982), followed in St. v. Charlo, 226 M 213, 735 P2d 278, 44 St. Rep. 597 (1987).

"Sandstrom" Instruction on Intent and Voluntary Act — Upheld: In defendant's trial on the charge of robbery, the jury was instructed substantially as follows, that "in order to constitute the offense charged, it is necessary to prove the alleged intent. Intent need not be proved by direct and positive testimony but may be inferred from the evidence if there are any facts proved that satisfy the jury of its existence. The law also presumes that a person intends the ordinary consequences of any voluntary act committed by him. This latter presumption is a disputable presumption and may be controverted by other evidence." The court found that this instruction could not be interpreted by any juror to be mandatory in nature and did not shift the burden of going forward with the evidence or the burden of persuasion. Spurlock v. Risley, 520 F. Supp. 135, 38 St. Rep. 1339 (D.C. Mont. 1981).

Improper Jury Instructions — Elements of Crime — Failure to Pursue Civil Remedy Implying Theft — "Plain Error": The jury was not instructed on the statutory elements of the crime. The jury's instructions on the defendant's civil remedy, an agister's lien, permitted the inference from his failure to pursue the civil remedy that he was guilty of theft. In granting a new trial, the Supreme Court noted that the issue of jury instructions not offered or objected to at trial, usually a nonappealable issue, was reviewed here to determine if the jury was properly instructed. The failure to instruct on the elements of the crime constituted "plain error". Instructing the jury that each element of the crime had to be proved was insufficient if the elements were not given to the jury as well. St. v. Lundblade, 191 M 526, 625 P2d 545, 38 St. Rep. 441 (1981), distinguished in St. v. Williams, 2015 MT 247, 380 Mont. 445, 358 P.3d 127.

Jury Instruction on "Aggressor" — Self-Defense: An instruction defining "aggressor" and stating the unavailability of the defense of self-defense to an aggressor was appealed because there allegedly was no evidence presented in support of the instruction and, as given, allegedly was an incorrect statement of the law. The Supreme Court said that the trial judge must instruct the jury on every essential question presented by the evidence. Testimony that the defendant and a friend had made efforts to attract the victim's attention as he came out of the bar just before the shooting, coupled with the testimony of the defendant's prior acts of hostility towards the victim and his girlfriend, was sufficient to justify the aggressor instruction. Defendant's allegation that the jury instruction incorrectly stated the law was also rejected on appeal. The exceptions to the lack of availability of the defense of self-defense to an aggressor were inapplicable to the facts. Furthermore, the State had offered an instruction incorporating statutory language of 45-3-105, but the defendant rejected that proposed jury instruction. The reviewing court held that having objected to the very instruction he now asserts should have been included, defendant may not then predicate error on the absence of the qualifying instruction. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Jury Instructions on Self-Defense Requirements: Three jury instructions allegedly gave incorrect statements of the law because they did not clearly express the self-defense requirements. Although the precise statutory phrase "reasonably believes" was not used, the Montana Supreme Court found that two of the instructions made it absolutely clear to the jury that the danger need not be actual, it need only be what a reasonable person would perceive as being a threat to the person's life or a threat of serious bodily harm. In the third instruction appealed from, the words "necessary self-defense" conceivably could be an incorrect statement of the law. However, the instruction contained the proviso "as explained and defined in these instructions". Therefore, no error occurred by giving the three instructions. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Giving of "Sandstrom Instruction" as Error — Failure to Render Tax Return: The giving of the "Sandstrom Instruction", which states that a person intends the ordinary consequences of his voluntary acts, was prejudicial and harmful in this case concerning failure to file proper state tax returns. The instruction when read with the body of instructions could be interpreted as allowing the jury no discretion and directing them to find the element of intent. St. v. Poncelet, 187 M 528, 610 P2d 698 (1980).

Sandstrom Instructions — Harmless Constitutional Error — "Overwhelming Weight of the Evidence" Test Adopted: In the Sandstrom case, the jury was instructed, "The law presumes that a person intends the ordinary consequences of his voluntary acts." This instruction was held unconstitutional because the jury might have interpreted it in one of two ways: (1) as a conclusive presumption, or (2) as shifting the burden of persuasion to the defendant to disprove an element of the crime, viz., that defendant "knowingly or purposely" killed the victim. Either interpretation would have rendered the instruction unconstitutional. Here, the instructions included various clarification statements, including one that, unless otherwise instructed, all presumptions are rebuttable. The first Sandstrom objection was thus met. The second objection raises the question of whether the federal constitutional error was harmless beyond a reasonable doubt. The Montana Supreme Court adopted the test that measures the evidence as a whole and excludes the constitutional infirmity where overwhelming evidence supports the conviction. Here the evidence was undisputed, overwhelming, and uncontradicted and permitted only one rational conclusion, that the defendant had the requisite intent when he kidnapped and killed the victim. A reasonable juror could not have found otherwise. Therefore, the unconstitutional jury instructions were harmless beyond a reasonable doubt in the context of the undisputed evidence in the case, and the assigned error could not have contributed to the verdict. St. v. McKenzie, 186 M 481, 608 P2d 428 (1980). For full appellate history of McKenzie, see case note at 45-5-102, INFORMATION and INDICTMENT, *Felony Murder Alleged.*

Sandstrom Jury Instruction — Presumptions of Intent of Consequences of Acts — Harmless Error: Defendant, charged with mitigated deliberate homicide, alleged as error the giving of the jury instruction, "The law presumes that a person intends the ordinary consequences of his voluntary acts." Under Montana law, causing the death of another becomes deliberate homicide only when it is committed purposely or knowingly. These elements are necessary to the proof of this particular crime and must be proved beyond a reasonable doubt by the prosecution. Intent is a difficult element to prove. The evidence normally must be in the nature of outward manifestations of the defendant's state of mind, but when a telephone line to the police station from the scene of the murder happened to be open and the defendant was overheard at length, the court knew what he was thinking from his own words. It is difficult to conceive of a better indication as to defendant's intent. Also, the officer heard the fight at the time these words were spoken, and another officer found the defendant and the victim's body minutes later. The only contested element here was intent, and the evidence on it was overwhelming. Basing its holding on the probable impact of the instructions upon the minds of the average jury, in the light of the evidence, the impact of the instruction upon the jury could not reasonably have contributed to the verdict. The error in giving the contested instruction was harmless. St. v. Hamilton, 185 M 522, 605 P2d 1121 (1980).

Sandstrom Instruction — Harmless Error Doctrine Correct Test — Plain Error Rule Not Applicable — Federal Habeas Corpus: In rejecting the State's contention that the giving of the Sandstrom instruction (Sandstrom v. Mont., 442 US 510 (1979)) constituted harmless error, the court stated that in applying the "harmless constitutional error" doctrine, as set out in Chapman v. California, 386 US 18 (1967), it must be shown that the constitutional right affected is not a right basic to a fair trial and it must be found harmless beyond a reasonable doubt. For conviction the Due Process Clause requires that each element of a crime be proven beyond a reasonable doubt, this being basic to a fair trial. The Sandstrom instruction by shifting the burden of proof of intent, an element of the crime of homicide, to the defendant denies him due process, and thus the court cannot consider the instruction as harmless error. The "plain error" doctrine is not applicable because it only sets a standard of "highly probable" that the instruction error "materially affected the verdict", the wrong standard by which to measure the effect of constitutional error. McGuinn v. Crist, 492 F. Supp. 478 (D.C. Mont. 1980).

Jury Instructions — Intention of Consequences of Acts — Sandstrom Distinguished: Distinguishing Sandstrom, the court noted that the jury was not given a mandatory presumption, but it was told it could reasonably infer the defendant's intent for all the consequences which one acting in a like position would reasonably have expected. Nothing in the instruction lessened the duty of the State to prove every element of the crime charged beyond a reasonable doubt, nor did it affect the presumption of defendant's innocence. St. v. Bad Horse, 185 M 507, 605 P2d 1113 (1980), distinguishing Sandstrom v. Mont., 442 US 510, 99 S Ct 2450, 61 L Ed 2d 39 (1979).

Sandstrom Instruction — Presumption of Intent — Constitutionality — Harmless Error: The jury in a deliberate homicide case was instructed that "the law presumes that a person intends the ordinary consequences of his voluntary acts". The U.S. Supreme Court determined that the instruction denied a defendant the constitutional right to a jury determination of proof beyond a reasonable doubt of all elements of the offense. The case was remanded to the Montana Supreme Court to determine if the instruction constituted harmless error. To find harmless error, the court must be able to assert that the offensive instruction could not reasonably have contributed to the jury verdict. The court could not make this assertion. The case was remanded to the District Court for retrial. St. v. Sandstrom, 184 M 391, 603 P2d 244 (1979).

Justification: A jury instruction was approved on the defense of justification in a prosecution for escape, which required that the defendant be faced with a specific threat of death or substantial bodily injury in the immediate future in order to be justified in his escape. The standard to be imposed is objective rather than subjective in accordance with decisions of the California court of appeals. St. v. Stuit, 176 M 84, 576 P2d 264 (1978).

Mental State Erroneously Omitted: The giving of an instruction that it is unlawful for a person to sell any narcotic drug except if authorized by the Uniform Narcotics Drug Act inadequately instructed jurors regarding the elements of the crime of unlawful sale of a narcotic drug, because it omitted the element of the crime relating to the defendant's mental state. People v. Lewis, 112 Ill. App.2d 1, 250 N.E.2d 812, 817 (1969).

Absolute Liability — Mental State Not Required: Where the defendant was being tried for an offense for which absolute liability was imposed, instructions relating to mental state and the condition of the defendant who was being tried for driving a motor vehicle while his operator's license was suspended were properly refused. People v. Espenscheid, 109 Ill. App.2d 107, 249 N.E.2d 866, 869 (1969).

PARTICULAR OFFENSES

Instructions for Self-Destructive Activity Given From Afar — Elements of Aggravated Assault Satisfied Given Foreseeability of Injury: Posing as a doctor, Sherer made numerous telephone calls from Florida to Montana women, asking the women to do destructive things to their bodies under the guise of performing self-tests to diagnose possible infection. Three women harmed themselves at Sherer's suggestion, for which Sherer was convicted of two counts of criminal endangerment and one count of aggravated assault and ordered to register as a violent offender. Sherer appealed the aggravated assault charge, arguing that encouraging "someone to injure themselves does not constitute aggravated assault" and that the causation element was too remote to form the basis of an aggravated assault charge. The Supreme Court disagreed. Sherer's instructions to the victims were intended to produce the precise injuries suffered, and by admitting to the facts in the information, Sherer could not credibly claim that he did not intend the injuries because the injuries flowed directly from Sherer's instructions. Statutes defining aggravated assault, cause, act, and conduct gave fair warning that the nature of Sherer's conduct constituted the offense of aggravated assault if that conduct resulted in the intended injuries. The definition of aggravated assault does not require a defined parameter of proximity between defendant and victim or require that a defendant personally direct force toward the victim, but specifically contemplates that any form of communication may itself be sufficient conduct. Sherer was successful in causing the intended injury, and his attempts to blame the victim for falling for the deceptive, illegal activity were meritless. The aggravated assault conviction was affirmed. St. v. Sherer, 2002 MT 337, 313 M 299, 60 P3d 1010 (2002).

Finding of Mental State Not Necessary in Revocation of Suspended Sentence Proceedings: Averill's suspended sentence was revoked after he admitted that he had violated numerous conditions of his probation agreement and after the District Court found that he had also violated several other conditions for which no charges were brought. Averill argued that the District Court erred in finding that he had committed the unadmitted violations because under this section, he was lacking the requisite mental state to establish guilt and that without having committed the acts either knowingly, purposefully, or negligently, he did not violate parole. However, 46-18-203 sets forth the requirements applicable to revocation of suspended sentences and makes no reference to intent, mental state, or this section, so it was not necessary for the court to find that Averill acted knowingly, purposefully, or negligently in order to revoke the suspended sentence. A revocation proceeding is not equivalent to a trial. The burden of proof in a revocation hearing is only a preponderance of the evidence, and the issue is not one of guilt or innocence, but rather whether a condition of a suspended sentence has been violated. Here, the court was reasonably satisfied that Averill's conduct was not what was agreed it would be if Averill was given his liberty, so revocation of the sentence was not an abuse of discretion. St. v. Averill, 2001 MT 161, 306 M 106, 30 P3d 1059 (2001), followed in St. v. Boulton, 2006 MT 170, 332 M 538, 140 P3d 482 (2006).

Driving Under the Influence as Absolute Liability Offense: Driving under the influence is an absolute liability offense not requiring the proof of a mental state or a jury instruction on the mental state element of the charge. St. v. McDole, 226 M 169, 734 P2d 683, 44 St. Rep. 561 (1987).

Arson — Mental State — Inadmissible Evidence — Handwriting Analysis: At issue was the state of mind of arson defendant on the night he allegedly set the fire. Handwriting analyst did not testify as to his mental state that night or to an analysis of a writing he made that night. Her testimony as to analysis of writings made before and after that night was not relevant and was properly excluded. St. v. Gray, 202 M 445, 659 P2d 255, 40 St. Rep. 199 (1983).

Arson — Note Indicating Mental State Not Overly Inflammatory: Admission in trial for arson of defendant's note to his estranged wife, written the night he allegedly set a fire in her garage while staying the night at her house, stating "Please get ready for bed and come to the basement where I am at and be with me tonight. Tonight I need you with me for the last time ever", was not so inflammatory as to prejudice the jury and deprive defendant of a fair trial. The note could not have reasonably contributed to the verdict. St. v. Gray, 202 M 445, 659 P2d 255, 40 St. Rep. 199 (1983).

Law Review Articles

After Abolition: The Present State of the Insanity Defense in Montana, Bender, 45 Mont. L. Rev. 133 (1984).

45-2-104. Absolute liability.

Criminal Law Commission Comments

Source: Ill. C. C. 1961, Chapter 38, §§ 4-9.

This section is intended to establish strict limitations upon the elimination of a mental state as an element of an offense. Most states have numerous statutes which impose upon the courts the responsibility of determining, as to each such provision, either that mental state is or is not an element, or (particularly in the more serious offenses) that the legislature intended that a particular mental state be implied. (See the careful study of the Wisconsin statutes by Remington, "Liability Without Fault Criminal Statutes," 1956 Wis. L. Rev. 625.) Many such provisions are found in legislation of a regulatory nature, involving the sale of specified kinds of property to designated classes of persons or to the public, the commission of nuisances, the violation of laws concerning motor vehicles, health and safety, and fish and game laws.

In the old code numerous statutes failed to specify the mental state required and no adequate rule existed for determining whether a particular provision, not interpreted by the court, was to be regarded as implying a particular mental state or as imposing absolute liability. (The usual methods of interpretation are summarized in Remington, "Liability Without Fault Criminal Statutes," 1956 Wis. L. Rev. 625 at 629 to 632.)

Section 94-2-104 [R.C.M. 1947, now 45-2-104, MCA] represents only a partial solution of the problem—a restrictive rule of interpretation. Another part of the solution is in the rephrasing of code provisions which define specific offenses, to indicate clearly the intended mental state and the offenses in which mental state, for some cogent policy reason, is not an element.

Absolute liability is authorized for those offenses in which incarceration is not part of the penalty, and the fine is less than five hundred dollars ($500.00). Many of the old Montana code provisions which do not require proof of specified mental state are in this category, as are many of the penal provisions appearing outside of the Criminal Code. The difficulty of enforcing such provisions if a mental state must be proved may justify the conclusion that the omission of a mental state requirement is intended to create absolute liability. (See Model Penal Code, Draft No. 4, comment on § 2.05 at page 145; Sayre, "Public Welfare Offenses," 33 Colum. L. Rev. 55 at 68 to 72, 78 and 79 (1933)).

In addition to restricting absolute liability to offenses not punishable by incarceration or by a fine of more than five hundred dollars ($500.00), this section provides that only a clearly indicated legislative purpose to create absolute liability should be recognized, and in all other instances, a mental state requirement should be implied as an application of the general rule that an offense consists of an act accompanied by a culpable mental state, as provided in section 94-2-103(1), (2) and (3) [R.C.M. 1947, now 45-2-103(1), (2) and (3), MCA]. (See Model Penal Code, Draft No. 4, comment on § 2.05 at pages 145 and 146; Sayre, supra, at pages 68 to 72 and 79 to 83).

Compiler's Comments

1995 Amendment: Chapter 354 near middle, after "mental states", substituted "of knowingly, negligently, or purposely" for "described in subsections (33), (37), and (58) of 45-2-101"; and made minor changes in style. Amendment effective April 11, 1995.

1987 Amendment: After "$500" substituted "or" for "and".

1981 Amendment: Changed internal references to subsections in 45-2-101 to reflect amendment of that section.

Annotator's Note: Under the new Criminal Code, most offenses require some degree of culpability, either "purposely", "knowingly", or "negligently" (MCA, 45-2-101), for criminal liability to be imposed. This section provides that when all that is required by a statute is the commission of a specified act without any mental state, such a "strict liability" offense can be no more than a misdemeanor. The wording for this section is quite similar to the Illinois source.

The 1977 amendment changed the references to subsections of R.C.M., 1947, § 94-2-101 (now MCA, 45-2-101) in subsection (1) to conform to the change in the numbering of the subsections of § 94-2-101 (now MCA, 45-2-101).

Case Notes

Adequate Definition of Security for Jury — Willful Conduct Standard Applicable to Securities Act Violations — Omission of Investment Prospectus Not Fraudulent at Time — Securities Restitution Properly Awarded: The defendant, a pastor, was approached by the plaintiff, a member of his congregation, about investing money. The defendant convinced the plaintiff to purchase stock in the defendant's Mexico-domiciled company. Ultimately, the investment promises never materialized and the defendant was convicted of failure to register as a securities salesperson, failure to register a security, and fraudulent practices under the Securities Act of Montana. On appeal, the defendant argued that the term "security" was not adequately or specifically defined for the jury, that the "willful" standard was inappropriate to attach to the charges, that the conviction of fraudulent practices was improper because neither the statute nor administrative rule required an investment prospectus at the time of the violation, and that the award of restitution was improper. The Supreme Court held that the evidence showed that the jury reasonably concluded that the defendant had sold a security because the shares in the company constituted a stock, that the Legislature specifically included a willful standard for Securities Act violations, that the fraudulent practices conviction was improper because failure to provide a prospectus was not part of the statute at the time, and that the award of restitution was proper because the loss stemmed directly from the defendant's conduct. St. v. Himes, 2015 MT 91, 378 Mont. 419, 345 P.3d 297.

DUI Absolute Liability Offense — Proof of Mental State and Consideration of Involuntary Intoxication Not Required: During Weller's DUI trial, Weller proffered a jury instruction concerning a defense of involuntary intoxication, but the instruction was refused. Weller appealed, but the Supreme Court affirmed. The statute on involuntary intoxication, 45-2-203, provides that even though involuntary intoxication is not a defense to any offense, it may be taken into consideration in determining the existence of a mental state in cases where a mental state is an element of an offense. However, DUI is an absolute liability offense that does not require proof of a mental state, so consideration of involuntary intoxication was not necessary. Thus, the District Court did not abuse its discretion in refusing an involuntary intoxication instruction. St. v. Weller, 2009 MT 168, 350 M 485, 208 P3d 834 (2009).

Failure of Felony DUI Punishment Provision to Include Mental State or Impose Absolute Liability: Failure of the statutory provision stating the punishment for a fourth or subsequent DUI offense to either include a mental state as an element of the offense or to clearly indicate a legislative purpose to impose absolute liability for the conduct was not a flaw because that statute was merely the statute under which defendant was sentenced. A separate statute defining the offense clearly stated that absolute liability is imposed. The court rejected the argument that the absolute liability provision of the statute defining the offense applied only to the offenses that existed at the time that the absolute liability provision was inserted in the law and did not apply to the felony offense that defendant was charged with and that was inserted in the law at a later date. St. v. Ellenburg, 283 M 136, 938 P2d 1376, 54 St. Rep. 532 (1997).

Crime of Waste of Game as Absolute Liability Offense: Defendant contended that because the offense of wasting game meat is punishable by a fine in excess of $500, the offense may not be classed as an absolute liability offense. However, the second element of this section, wherein a clear legislative purpose validates the imposition of absolute liability, was indicated by the obvious statutory intent to preserve game resources for the benefit of the public and by the recognition of the state's duty to protect public wildlife resources. The trial court did not err in failing to instruct the jury on criminal intent. St. v. Huebner, 252 M 184, 827 P2d 1260, 49 St. Rep. 210 (1992).

Criminal Sale of Dangerous Drugs (now Criminal Distribution of Dangerous Drugs) Not Absolute Liability Offense: Defendant contended her sentence was excessive because 45-9-101 is an absolute liability offense, requiring no mental state, and that pursuant to 45-2-103 and this section, the maximum penalty is a $500 fine. The Supreme Court held that 45-9-101 is not an absolute liability offense because the state must prove that defendant knowingly or purposely committed the crime. St. v. Brown, 232 M 1, 755 P2d 1364, 45 St. Rep. 818 (1988).

Driving Under the Influence as Absolute Liability Offense: Driving under the influence is an absolute liability offense not requiring the proof of a mental state or a jury instruction on the mental state element of the charge. St. v. McDole, 226 M 169, 734 P2d 683, 44 St. Rep. 561 (1987), followed in St. v. West, 252 M 83, 826 P2d 940, 49 St. Rep. 170 (1992).

Leaving Scene of Accident — Not Absolute Liability Offense: The crime of leaving the scene of an accident involving death or personal injuries, in violation of 61-7-103, is not an offense of absolute liability within the meaning of this section. To convict a person of the crime, it must be proved that he acted "knowingly" with respect to each element of the offense. St. v. Stafford, 208 M 324, 678 P2d 644, 41 St. Rep. 377 (1984).

Parking Ordinance — Vicarious Criminal Responsibility: A city may, in the exercise of its police power, enact a parking ordinance that provides that the registered owner of a motor vehicle is vicariously criminally responsible for illegal parking of it by another unless it is shown that the vehicle was being used without the owner's consent. Such an ordinance does not violate due process restrictions (overruling a contrary holding in St. v. Jetty, 176 M 519, 579 P2d 1228 (1978)), but the ordinance must conform to the absolute liability requirements of this section. Missoula v. Shea, 202 M 286, 661 P2d 410, 40 St. Rep. 91 (1983).

Proof of Mens Rea Required — Exceptions: To support a conviction under most sections of this code proof of a mens rea is required. For example, the section on deceptive practices (45-6-317), requires an intent to defraud. People v. Billingsley, 67 Ill. App.2d 292, 213 N.E.2d 765, 768 (1966). However, certain offenses, such as the violation of some vehicle code provisions, involve absolute liability without requiring any mental state. People v. Espenscheid, 109 Ill. App.2d 107, 249 N.E.2d 866, 868 (1969). Statutes creating offenses involving strict criminal liability are neither unusual nor improper. People v. Lawrence, 17 Ill. App.3d 300, 308 N.E.2d 52 (1974).

Part 2

Other Factors Affecting Individual Liability

Part Case Notes

Refusal to Issue Jury Instructions Instructing Jury to Consider Youth Characteristics in Determining Youth's Culpability — No Abuse of Discretion: The Youth Court did not abuse its discretion by refusing to instruct the jury to consider youth characteristics in determining the defendant's guilt. The Supreme Court declined to extend jurisprudence regarding consideration of youth characteristics during sentencing to a Youth Court jury's determination of guilt or innocence. In re J.W., 2021 MT 291, 406 Mont. 224, 498 P.3d 211.

Identification of Defendant as Perpetrator — Necessity of In-Court Identification: It was not reversible error to refuse to dismiss on the ground that there was no in-court identification of defendant as the perpetrator. The method of identifying a defendant as the perpetrator is largely within the discretion of the trial judge. It was sufficient in this case that several police officers referred in their testimony to defendant as being the perpetrator. St. v. Stringer, 263 M 295, 868 P2d 588, 51 St. Rep. 63 (1994).

45-2-201. Causal relationship between conduct and result.

Criminal Law Commission Comments

Source: M.P.C., 1962, § 2.03.

This section is concerned with offenses that are so defined that causing a particular result is a material element of the offense. Subsection (1)(a) treats cause-in-fact as the causal relationship normally regarded as sufficient to create culpability. When concepts of "proximate cause" disassociate the offender's conduct and the result which was cause-in-fact, the reason for limiting culpability is the conclusion that the actor's culpability with reference to the result, i.e., his purpose, knowledge, or negligence, was such that it would be unjust to permit the result to influence his liability or the gravity of the offense. Problems of this kind should be faced as problems of the culpability required for conviction and not as problems of causation.

Subsection (1)(b) contemplates that the general rule of (1)(a) may be unacceptable when dealing with particular offenses. In this event additional causal requirements may be imposed explicitly. Subsections (2) and (3) are drafted on the theory that there is a need to systematize rules that have developed when there is a variance between the actual result and the result sought, contemplated or probable under the circumstances. These subsections assume that liability requires purpose, knowledge or negligence with respect to the result which is an element of the offense. Subsections (2)(b) and (3)(b) make no attempt to catalogue possibilities like intervening or concurrent causes, etc. They set out an ultimate criterion, whether the result was too accidental to have a bearing on the actor's liability or the gravity of the offense. Since the actor has sought a criminal result or has been negligent with respect to that result, he will be guilty of some offense even if he is not held for the actual result. There is an advantage to permit the jury to face the issue squarely with their own sense of justice, e.g., where the defendant shoots his wife and in the hospital she contracts a disease and dies. Her death may be thought to have been rendered substantially more probable by the defendant's conduct yet a jury could regard it as too remote to convict the defendant of murder. It should be noted that the maximum potential punishment for attempt is the same as for the underlying offense, thus placing greater emphasis on purpose than result. See section 94-4-103 [R.C.M. 1947, now 45-4-103, MCA].

Compiler's Comments

Annotator's Note: This section is substantially the same as the Model Penal Code source. While the principle set forth in this section on causal relationships is generally thought to be common knowledge, there was in fact no statutory provision concerning the subject in the old code. The mental state terms used in this section, "conduct", "knowingly", "negligently", and "purposely", are defined in 45-2-101.

Case Notes

Inapplicable Jury Instructions — Self-Defense Issue Clearly Argued to Jury — No Review Under Plain Error or Ineffective Assistance: The District Court's specific purpose jury instruction instead of a more appropriate self-defense instruction did not warrant review under either the doctrine of plain error or ineffective assistance of counsel. Given the trial record, the Supreme Court was not firmly convinced that failure to review the inapplicable instruction would have resulted in a manifest miscarriage of justice, left unsettled the question of fundamental fairness of the trial, or compromised the integrity of the judicial process. The Supreme Court also determined that the instruction did not derail what was a clearly directed trial about the defendant's intentions and his assertion that his actions of stabbing the victim with a knife multiple times were justified by self-defense. St. v. St. Marks, 2020 MT 170, 400 Mont. 334, 467 P.3d 550.

Assault on Minor Sufficient as Felony-Murder Predicate Offense: The defendant was charged with felony murder under 45-5-102 for pushing a 3-year-old into a wall, an injury from which she was later declared brain dead. Assault on a minor, the predicate offense prosecutors alleged when charging the defendant with felony murder, incorporates misdemeanor assault elements. Because the incorporated elements could not support a felony-murder charge, the defendant argued that, likewise, assault on a minor could not support a felony-murder charge and the charges should be dismissed. However, assault on a minor includes additional provisions concerning the age of the individuals involved and a penalty of up to 5 years in a state prison. The Supreme Court held that since the Legislature enhanced the penalty for assault on a minor, the offense is a felony. In addition, the defendant's assault on the child used physical force or violence, qualifying it as a forcible felony. St. v. Hicks, 2013 MT 50, 369 Mont. 165, 296 P.3d 1149.

Deliberate Homicide by Accountability — Instruction on Criminal Endangerment and Negligent Homicide Not Required: At Doyle's trial for deliberate homicide by accountability, Doyle contended that the trial court should have offered instruction on the lesser included offenses of criminal endangerment and negligent homicide. The Supreme Court disagreed. Criminal endangerment is not a lesser included offense of deliberate homicide by accountability based on the defendant's failure to act under 45-5-201(2)(b). St. v. Doyle, 2007 MT 125, 337 M 308, 160 P3d 516 (2007).

Instructions for Self-Destructive Activity Given From Afar — Elements of Aggravated Assault Satisfied Given Foreseeability of Injury: Posing as a doctor, Sherer made numerous telephone calls from Florida to Montana women, asking the women to do destructive things to their bodies under the guise of performing self-tests to diagnose possible infection. Three women harmed themselves at Sherer's suggestion, for which Sherer was convicted of two counts of criminal endangerment and one count of aggravated assault and ordered to register as a violent offender. Sherer appealed the aggravated assault charge, arguing that encouraging "someone to injure themselves does not constitute aggravated assault" and that the causation element was too remote to form the basis of an aggravated assault charge. The Supreme Court disagreed. Sherer's instructions to the victims were intended to produce the precise injuries suffered, and by admitting to the facts in the information, Sherer could not credibly claim that he did not intend the injuries because the injuries flowed directly from Sherer's instructions. Statutes defining aggravated assault, cause, act, and conduct gave fair warning that the nature of Sherer's conduct constituted the offense of aggravated assault if that conduct resulted in the intended injuries. The definition of aggravated assault does not require a defined parameter of proximity between defendant and victim or require that a defendant personally direct force toward the victim, but specifically contemplates that any form of communication may itself be sufficient conduct. Sherer was successful in causing the intended injury, and his attempts to blame the victim for falling for the deceptive, illegal activity were meritless. The aggravated assault conviction was affirmed. St. v. Sherer, 2002 MT 337, 313 M 299, 60 P3d 1010 (2002).

Instruction That Person Acts Purposely if Conscious Object Is to Cause Death or "Similar" Type of Harm Not in Error: At Clausell's deliberate homicide trial, the District Court instructed the jury that a person acts purposely with respect to deliberate homicide if it is that person's conscious object to cause death or a "similar" type of harm to another human being. Clausell contended that the instruction was improper because the statutory definitions of purposely and deliberate homicide do not contain the word "similar". The Supreme Court cited St. v. Rothacher, 272 M 303, 901 P2d 82 (1995), in holding that the use of "similar" did not lower the state's burden of proving every element of the crime. The mental state for deliberate homicide can be established if the result involves the same or a similar type of harm or injury as contemplated by defendant, although the actual degree of injury is greater than intended. St. v. Clausell, 2001 MT 62, 305 M 1, 22 P3d 111 (2001), followed in St. v. Dubois, 2006 MT 89, 332 M 44, 134 P3d 82 (2006).

Verbatim Recitation of Statutory Definition as Sufficient Instruction: Houle contended that he was denied a fair trial when the District Court instructed the jury regarding the method by which Houle's state of mind could be proved, asserting that the effect of the instruction was to permit the jury to believe that there was no legal difference between an intent to cause bodily injury and an intent to cause serious bodily injury. On appeal, the Supreme Court noted that the instruction at issue was a verbatim recitation of subsection (2) of this section, which provides a method of proving the elements of purposely and knowingly when the result is not within the contemplation or purpose of the offender. The charges against Houle involved those elements, and the verbatim recitation of the statutory language served to adequately inform the jury regarding the law applicable to the case. St. v. Houle, 1998 MT 235, 291 M 95, 966 P2d 147, 55 St. Rep. 989 (1998).

Erroneous Instruction — Harmless Error: The defendant was charged with deliberate homicide and convicted of mitigated deliberate homicide. At trial, the District Court erroneously instructed the jury that the state merely needed to prove that the defendant acted purposely, without regard to the result that was intended. The giving of the instruction, when potential prejudice could occur if the defendant had acted purposely but without intent to cause harm, was harmless error when there were no facts presented from which an argument could be made that when the defendant struck the victim in the face and kicked the victim in the head while the victim was lying on the ground, the defendant intended no harm to the victim. The instruction was, at worst, superfluous. The jury was correctly instructed on the meaning of deliberate homicide, the lesser included offense of mitigated deliberate homicide, and on the statutory provision that purposeful and knowing causation can occur without intending a specific result, so long as the same type of harm or injury was contemplated. Because the challenged instruction did not apply to any facts offered as proof in the case, the error in giving the instruction was harmless beyond a reasonable doubt. St. v. Rothacher, 272 M 303, 901 P2d 82, 52 St. Rep. 772 (1995), followed in St. v. Patton, 280 M 278, 930 P2d 635, 53 St. Rep. 1402 (1996), and St. v. Schaff, 1998 MT 104, 288 M 421, 958

P2d 682, 55 St. Rep. 396 (1998). Patton was followed in St. v. Nick, 2009 MT 174, 350 M 533, 208 P3d 864 (2009).

Instruction — Prior Decisions Overruled: The defendant was charged with deliberate homicide and convicted of mitigated deliberate homicide. At trial, the District Court instructed the jury that it was not necessary for the state to prove that the defendant intended to cause the death of the victim. The Supreme Court held that the District Court erred when it instructed the jury that the state needed to prove that the defendant acted purposely, without regard to the result that was intended. To the extent that prior decisions in Sigler, McKimmie, and Byers are inconsistent with this opinion, they are overruled. St. v. Rothacher, 272 M 303, 901 P2d 82, 52 St. Rep. 772 (1995), followed in St. v. Patton, 280 M 278, 930 P2d 635, 53 St. Rep. 1402 (1996), and distinguished in St. v. Lantis, 1998 MT 172, 289 M 480, 962 P2d 1169, 55 St. Rep. 694 (1998). See also St. v. Doyle, 2007 MT 125, 337 M 308, 160 P3d 516 (2007).

Completed Underlying Felony Not Required for Felony-Murder Rule to Apply — Accountability: A conviction under the felony-murder rule requires that the evidence support a finding as to each element of deliberate homicide, including the underlying offense, not that there be a conviction for a completed felony. A completed attempt or completed felony is not required in order for the felony-murder rule to apply. As set out in St. v. Fish, 190 M 461, 621 P2d 1072 (1980), accountability for the deliberate homicide means that the defendant played an active part in facilitating the commission of the underlying offense. St. v. Turner, 265 M 337, 877 P2d 978, 51 St. Rep. 467 (1994). See also St. v. Lantis, 1998 MT 172, 289 M 480, 962 P2d 1169, 55 St. Rep. 694 (1998).

Felony-Murder Statute as Supplying Causal Connection Element: Turner facilitated a burglary during a riot at the state prison by feloniously propping open an entrance gate, which conduct subsequently contributed to the deaths of several inmates. Turner contended that the state failed to establish a causal connection between the felonious act and the deaths. However, the felony-murder rule itself supplies the causal connection element by requiring that the death occur "in the course of the forcible felony or flight thereafter". St. v. Turner, 265 M 337, 877 P2d 978, 51 St. Rep. 467 (1994).

Jury Instructions on Proximate Cause Not Appropriate in Criminal Case: Defendant in a homicide case argued that refusal to give his offered instructions on proximate causation deprived him of the opportunity for the jury to consider his theory that the victim's death was a result of the victim's own negligence. Proximate cause is not a term that is generally used in criminal jury instructions. Problems created by concepts of proximate cause should be faced as problems of the culpability required for conviction and not as problems of causation. St. v. Magruder, 234 M 492, 765 P2d 716, 45 St. Rep. 2075 (1988).

Admissibility of Evidence Inseparable From Crime Charged: Evidence of acts that are inextricably or inseparably linked with the crime charged is admissible without regard to the rules governing "other crimes" evidence. St. v. Romero, 224 M 431, 730 P2d 1157, 43 St. Rep. 2309 (1986), citing St. v. Riley, 199 M 413, 649 P2d 1273, 39 St. Rep. 1491 (1982). Romero was followed in St. v. Hayworth, 1998 MT 158, 289 M 433, 964 P2d 1, 55 St. Rep. 631 (1998).

Mitigated Deliberate Homicide — Intent Causally Related — No Error to Deny Withdrawal of Plea: The trial court did not abuse its discretion in denying defendant's motion to withdraw plea of guilty to charge of mitigated deliberate homicide since his acts meet the statutory requirements of the crime. Defendant by his own admissions intended to slap the victim numerous times about the head. The result, death by brain damage, may not have been intended. However, the result that did occur is a more severe form of the same kind of injury that was intended, i.e., injury to the head area of the victim. In these instances the deliberate homicide statutes and case laws state that the actor may be held accountable for the unintended death, if a causal relationship is established pursuant to 45-2-201. St. v. Koepplin, 213 M 55, 689 P2d 921, 41 St. Rep. 1942 (1984).

Proof of Specific Intent to Cause Death Not Required: Defendant was convicted of the deliberate homicide of the 19-month-old child of the woman with whom he was living. On appeal, he contended that the District Court improperly instructed the jury concerning the mental state "purposely". He contended the statutory definition of "purposely", coupled with the statutory definition of "deliberate homicide", confused the jury, in that if they found he purposely struck the child they need not find that he intended to cause the death or purposely cause the death. In a criminal homicide prosecution, the state must prove and the jury must find beyond a reasonable doubt that the voluntary and unjustified act of the defendant purposely, knowingly, or negligently caused the death of the victim. Proof of cause is a primary duty of the state and a necessary element to be found by the jury for a proper conviction in a criminal homicide case. It is true that under the instructions given and under the statutes defining crimes, the state was not required to prove the specific intent of the defendant to cause the death of the child. Our criminal law proscribes purposely doing an act which causes the death of another. Death may not be the intended result, but if the act which causes the death is done purposely, deliberate homicide is committed. The jury instructions were proper, and the evidence presented was strong enough to sustain the jury's finding that the defendant purposely engaged in conduct which resulted in the death of the child. St. v. Sigler, 210 M 248, 688 P2d 749, 41 St. Rep. 1039 (1984), followed in St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993). Sigler and Byers were overruled in part in St. v. Rothacher, 272 M 303, 901 P2d 82, 52 St. Rep. 772 (1995). See also St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995), overruled in Mont. v. Egelhoff, 518 US 37, 135 L Ed 2d 361, 116 S Ct 2013 (1996).

Negligent Homicide and Causation Proven — Shooting Victim in Third Party's House: Proof of causation of death and of negligent homicide was shown beyond a reasonable doubt where defendant left his apartment in a depressed state at about 12:20 a.m., left his lawyer's telephone number with his live-in girlfriend in case he got into trouble, took a loaded .357 magnum handgun with him, indicated he wanted to photograph his recently divorced ex-wife's boyfriend's auto, which he had earlier seen at her home, went to her home, did not photograph the auto, was not permitted to be at her home, opened a locked door with a key, took pictures of his ex-wife and boyfriend in an intimate position, ordered them to sit down, threatened them with the gun, and struggled with the boyfriend, who was shot and killed. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

Felony Murder — Guidelines of Applicability — Defendant Not Killer: Defendant was charged with felony murder in that the murder of Floyd Azure, by defendant's father, was caused while defendant attempted the crime of aggravated assault. The guidelines as to the applicability of the felony-murder rule are stated in 1 Wharton's Criminal Law and Procedure (Anderson) § 252, p. 543: "For the felony-murder rule to apply, it is necessary that the homicide be a natural and probable consequence of the commission or attempt to commit the felony; that the homicide be so closely connected with such other crime as to be within the res gestae thereof; or the natural or necessary result of the unlawful act; or that it be one of the causes . . . . Something more than a mere coincidence of time and place between the wrongful act and the death is necessary. It must appear that there was such actual legal relation between the killing and the crime committed or attempted that the killing can be said to have occurred as a part of the perpetration of the crime, or in furtherance of an attempt or purpose to commit it . . . . Thus for the felony-murder rule to apply, a causal connection between the felonious act and the death must be present." The evidence at the trial concerning the attempted aggravated assault concerned whether defendant attempted to hit Azure with a chain prior to defendant's father shooting Azure. The evidence failed to show beyond a reasonable doubt that defendant swung the chain toward Azure. There was no evidence of bodily injury or reasonable apprehension of bodily injury by Azure as a result of the swinging of the chain. The defendant's conviction was reversed. St. v. Weinberger, 206 M 110, 671 P2d 567, 40 St. Rep. 1539 (1983), rehearing denied, 206 M 110, 671 P2d 567, 40 St. Rep. 1758 (1983).

Systematic Series of Acts as Cause of Death: Defendant was convicted of deliberate homicide in the death of victim under 45-2-301 and 45-2-302. On appeal, the court found that the State did not attempt to prove that defendant struck the blow which killed victim. The State's case was that defendant was a major participant in a systematic series of acts which led to the death of victim. The State proved that defendant's conduct was a cause of death. St. v. Riley, 199 M 413, 649 P2d 1273, 39 St. Rep. 1491 (1982).

Omission to Take Action — Jury Instruction: The theory upon which this case was tried was that defendant or another coconspirator had done overt acts in furtherance of the crime. As the jury was instructed that the definition of "act" included omission only "where relevant", there was no error in an instruction which allowed the jury to find a conspiracy by proof of an omission as well as an overt act. St. v. Williams, 185 M 140, 604 P2d 1224 (1979).

Instructions to Jury: An instruction charging the jury that when an unlawful act is shown to have been deliberately committed for the purpose of injuring another, it is presumed to have been committed with a malicious and guilty intent, and that the law presumes that a person intends the ordinary consequences of any voluntary act committed by him may mislead the jury and should not be given in a prosecution for assault in the first degree, a critical element of which was intent with which the act was committed. St. v. Schaefer, 35 M 217, 88 P 792 (1907).

45-2-202. Voluntary act.

Criminal Law Commission Comments

Source: Ill. C. C., 1961, Chapter 38, §§ 4-1, 4-2.

The minimum elements of any offense (other than one in which absolute liability for an act alone is imposed) are described as a voluntary act and a specified state of mind. See R.C.M. 1947, section 94-117 [repealed by Ch. 513, L. 1973].

The word "act" is sometimes used loosely to describe not only the person's physical movement, but also certain attendant circumstances and the consequence of the movement. However, in the interest of accurate expression these three components should be separately designated, and "act" should be limited to the relevant physical movements. A further narrowing of the use of the term in a criminal code arises from the fact that a muscular movement may be voluntary ("willed") or involuntary—a physical reflex or compelled motion which is not accompanied by the volition of the person making the motion. Only the voluntary act gives rise to criminal liability. In this code, "act" is used in the narrow sense and with the accompanying mental state, is referred to as "conduct." An "omission" to take some action required by law is distinguished sometimes from an "act," since it denotes lack of physical movement. However, an omission necessarily is defined by describing the act of commission which is omitted; and if the distinction is made, then the phrase "act or omission" must be used each time reference is made to a person's physical behavior, unless the reference is only to a positive movement, or only to the lack of required movement. Consequently, the use of "act" to include "omission" seems reasonable, and clearly is more convenient. Perkins, "Negative Acts in Criminal Law," 22 Iowa L. Rev. 95 at 107 (1934). This usage, of course, does not preclude the specific reference to an omission when the failure to perform a duty imposed by law is the substance of a particular offense. The criminal law is concerned only with the voluntary phase—the purposeful or negligent omission to perform a duty which the person is capable of performing.

Possession is another aspect of behavior which, while it does not necessarily involve a physical movement is conveniently brought within the definition of "act" when it refers to maintaining control of a physical object. Again, only the voluntary aspect is significant—a consciousness of purpose, derived from knowingly procuring or receiving the thing possessed, or awareness of control thereof for a sufficient time to enable the person to terminate his control. An examination of the former Montana statutory provisions prohibiting possession indicates the suitability of this usage. Some of the provisions in the present law flatly prohibit possession of specified objects, without reference to any accompanying mental state. (E.g., section 94-8-211, [R.C.M. 1947, now MCA, 45-8-316], carrying firearm; section 54-133 [R.C.M. 1947, now MCA, 45-9-102], narcotics; section 94-8-202 [R.C.M. 1947, now MCA, 45-8-303], machine gun.) Others denounce possession with intention to accomplish a specified purpose, such as sale or the commission of another offense. (E.g., section 94-6-205 [R.C.M. 1947, now MCA, 45-6-205], possession of burglary tools; section 94-8-110 [R.C.M. 1947, now MCA, 45-8-201], obscenity.) A few analogous situations involve the ownership or possession of real property used for prohibited purposes.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1987 Amendment: At end of first sentence inserted exception clause.

Annotator's Note: This section on "voluntary act" has been taken directly from the Illinois source. The provision recodifies former Montana law, R.C.M. 1947, § 94-117. Because criminal liability requires a voluntary act, except in certain statutes where absolute liability is imposed, that an act was done "involuntarily" (45-2-101), such as during a seizure, constitutes a defense. A thorough discussion of this section is included in the commission comments to this section.

Case Notes

Calculation of Restitution Reversed and Remanded — No Joint and Several Liability for Restitution for 11-Day Vandalism Spree When Youth Participated Only 2 Days: A youth pleaded guilty to participating in 2 nights of an 11-day vandalism spree. The judge ordered that he was jointly and severally liable for the amount of damage caused throughout the entire spree, which exceeded $70,000. The youth argued he should be ordered to pay restitution for only the damages caused during the 2 days instead because the state did not establish his accountability for the vandalism that occurred during the other 9 days of the spree. The state argued it did not have to establish his accountability under the criminal mischief statutes for each day of the spree. The youth appealed to the Supreme Court, which agreed with the youth that the state was required to prove his accountability for the acts of others. The Court reversed the District Court's order of restitution and remanded for a recalculation of restitution for the 2 days on which the youth participated in the acts of vandalism. In re B.W., 2014 MT 27, 373 Mont. 409, 318 P.3d 682.

Improper Exclusion of Evidence That Defendant Ingested "Date Rape" Pill Prior to DUI — Automatism Defense Available as Affirmative Defense Upon Written Notice — Burden on Defendant: The defendant was charged with a misdemeanor DUI. She alleged that she had unknowingly ingested a "date rape" drug prior to the incident and therefore she did not commit a voluntary act by driving the car. The District Court disallowed her from asserting the "automatism" defense, ruling that because DUI is an absolute liability offense, the defendant's mental state is irrelevant. The defendant appealed. The Supreme Court reversed and remanded, holding that under 45-2-202, a voluntary act is a material element of every offense, and thus the plaintiff was entitled to raise the defense. Missoula v. Paffhausen, 2012 MT 265, 367 Mont. 80, 289 P.3d 141.

Criminal Endangerment and Failure to Act — Parent-Child Duty Applicable to Children in Cohabiting Households: A jury convicted the defendant of criminal endangerment for swinging her boyfriend's 6-month-old child headfirst against the child's crib, causing serious bodily injury to the child. On appeal, the defendant argued that the District Court erred in instructing the jury on criminal endangerment predicated on the defendant's failure or omission to act because the defendant had no legal duty to aid the child. Following the rationale of St. ex rel. Kuntz v. District Court, 2000 MT 22, 298 Mont. 146, 995 P.2d 951, which recognized a mutual reliance duty owed between two people who were not closely related but lived together, the Supreme Court held that the parent-child duty applies to children present in households of cohabiting adults. Because the defendant established a personal relationship similar to that of a parent with the victim, a common-law duty to protect the victim from harm existed, and the defendant's breach of that duty constituted an appropriate basis for her conviction of criminal endangerment. St. v. Hocter, 2011 MT 251, 362 Mont. 215, 262 P.3d 1089.

Conclusion That Defendant Caused Injuries Based on Quality and Quantity of Circumstantial Evidence — Conviction Affirmed: An infant suffered serious injuries while Allum was babysitting, and Allum was charged with aggravated assault. Evidence offered at trial consisted of the extent of the child's injuries, Allum's inconsistent statements to police, and testimony from relatives concerning Allum's prior abusive conduct with the child. Allum was convicted by a jury based on this circumstantial evidence. On appeal, Allum contended that the state failed to make a connection between the child's injuries and any voluntary act by Allum. The state argued that the totality of the circumstances coupled with the severity of the injuries established that Allum had the requisite mental state of purposely or knowingly and that this mental state led to voluntary actions that caused the serious bodily injury. The Supreme Court affirmed the conviction. The circumstantial evidence was of such a quality and quantity that a jury could decline to accept Allum's assertion that the child's injuries were self-inflicted or accidental and could conclude instead that Allum purposely and knowingly caused the injuries. St. v. Allum, 2009 MT 15, 349 M 49, 201 P3d 776 (2009). See also St. v. Lancione, 1998 MT 84, 288 M 228, 956 P2d 1358 (1998), and St. v. Clausell, 2001 MT 62, 305 M 1, 22 P3d 1111 (2001).

Ingestion of Dangerous Drugs Considered Constructive Possession When Accompanied by Evidence of Knowing and Voluntary Possession: The state sought to revoke a juvenile youth's probation on grounds that the youth's urinalysis tested positive for methamphetamines, opiates, and marijuana. The youth argued that once the drugs were ingested, the youth no longer had dominion or control over them and thus could not be considered to be in possession of drugs. In a case of first impression, the Supreme Court considered whether constructive possession can be proved by a positive urinalysis. The court agreed with the youth that once a substance is ingested and then assimilated into a person's bloodstream, the person who ingested it ceases to exercise dominion and control over the substance, but the court also concluded that the presence of an illegal substance in the body constitutes circumstantial evidence of prior possession of that substance, if even for a short time. However, based on statutory definitions, the presence of a dangerous drug in one's body, standing alone, is insufficient to sustain a conviction for possession of dangerous drugs because possession also requires proof that the drug was knowingly or voluntarily ingested. Thus, the presence of a controlled substance in a person's blood or urine constitutes sufficient circumstantial evidence to prove prior possession beyond a reasonable doubt only when accompanied by other corroborating evidence of knowing and voluntary possession, such as admission of drug use. Here, the youth admitted using methamphetamine, which provided direct evidence that the youth knowingly and voluntarily possessed methamphetamine as charged. However, the youth made no admission of using opiates or marijuana, so there was no corroborating evidence to support the positive urinalysis for those substances. Thus, the determination that the youth illegally possessed opiates and marijuana was reversed. In re R.L.H., 2005 MT 177, 327 M 520, 116 P3d 791 (2005).

Criminal Liability Based on Failure to Act When Self-Preservation at Issue — No Legal Duty to Perform Legal Duty at Personal Risk: For criminal liability to be based on a failure to act, there must be a legally imposed duty to act and the person must be physically capable of performing the act. When self-preservation is at stake, the law does not require a person to save another's life by sacrificing one's own. No crime is committed by a person who in saving one's own life in the struggle for the only means of safety causes the death of another. Accountability may still exist for the results of the peril into which one person places another, but the law does not require a person to risk serious bodily injury to perform a legal duty. (See 40 Am. Jur. Homicide § 116 (1999).) State ex rel. Kuntz v. District Court, 2000 MT 22, 298 M 146, 995 P2d 951, 57 St. Rep. 111 (2000), following St. v. Mally, 139 M 599, 366 P2d 868 (1961), and distinguishing People v. Beardsley, 113 NW 1128 (1907). See also Burns v. Fisher, 132 M 26, 313 P2d 1044 (1957).

Justifiable Use of Force — No Duty to Assist Aggressor in Zone of Risk — Revival of Duty to Summon Aid: Kuntz was charged with negligent homicide for stabbing Becker and then failing to immediately call for medical assistance. Kuntz pleaded justifiable use of force. The state contended that even if the use of force was justified, a proved subsequent failure by Kuntz to summon aid could constitute a gross deviation from ordinary care. The Supreme Court held that when a person justifiably uses force to fend off an aggressor, that person has no duty to assist the aggressor in any manner that could conceivably create the risk of bodily injury to that person or to other persons. This absence of a duty necessarily includes any conduct that would require the person to remain in or return to the zone of risk created by the original aggressor. The victim has but one duty after fending off an attack, and that is the duty owed to one's self, as a matter of self-preservation, to seek and secure safety away from the place where the attack occurs. Thus, a person who justifiably acts in self-defense is temporarily afforded the same status as an innocent bystander (see Pope v. St., 396 A2d 1054 (Md. 1979)). However, the duty to summon aid may in fact be revived but only after the victim has fully exercised the right to secure safety from personal harm. Only then may a legal duty be imposed to summon aid for the person placed in peril by an act of self-defense, and before that duty is imposed, there must be a showing that: (1) the person had knowledge of the facts indicating a duty to act; and (2) the person was physically capable of performing the act. Even so, a proved breach of the legal duty may still fall short of negligent homicide, which requires a gross deviation from an ordinary or reasonable standard of care. To find a person who justifiably acts in self-defense criminally culpable for causing the death of the aggressor, the failure to summon aid must be the cause in fact of the aggressor's death, not the justified use of force itself. State ex rel. Kuntz v. District Court, 2000 MT 22, 298 M 146, 995 P2d 951, 57 St. Rep. 111 (2000), following St. v. Bier, 181 M 27, 591 P2d 1115, 36 St. Rep. 466 (1979), and followed in St. v. Bowen, 2015 MT 246, 380 Mont. 433, 356 P.3d 449.

Verbatim Recitation of Statutory Definition as Sufficient Instruction: Houle contended that he was denied a fair trial when the District Court instructed the jury regarding the method by which Houle's state of mind could be proved, asserting that the effect of the instruction was to permit the jury to believe that there was no legal difference between an intent to cause bodily injury and an intent to cause serious bodily injury. On appeal, the Supreme Court noted that the instruction at issue was a verbatim recitation of 45-2-201(2), which provides a method of proving the elements of purposely and knowingly when the result is not within the contemplation or purpose of the offender. The charges against Houle involved those elements, and the verbatim recitation of the statutory language served to adequately inform the jury regarding the law applicable to the case. St. v. Houle, 1998 MT 235, 291 M 95, 966 P2d 147, 55 St. Rep. 989 (1998).

Purpose or Knowledge — Substantial Evidence to Support: Defendant appeared at the home of the victim and rang the doorbell. When the victim answered, defendant entered, chased her through the house, cornered her, and strangled her for 10 to 20 seconds with a rope. Defendant fled, and the victim asked two construction workers for help. The workers chased and caught defendant. Defendant notified the prosecution of his intention to rely on mental disease or defect as a defense. Defendant contended that he did not possess the requisite mental elements of purposely or knowingly. Defendant was convicted of aggravated assault. On appeal, the defendant contended the evidence was insufficient to prove purpose or knowledge. The Supreme Court found that defendant remembered the entire incident. He was aware of his conduct. He tried to conceal his reason for fleeing, which tended to prove he had done something wrong. This evidence supported a finding that he acted knowingly. Defendant also acted purposely. His conduct was not the result of reflex. He possessed the rope prior to entering the home and harmed the woman because he thought she owed him money. This tended to prove his conscious object to engage in strangling the victim. The evidence was sufficient to support the finding that defendant acted purposely or knowingly. St. v. Raty, 214 M 114, 692 P2d 17, 41 St. Rep. 2354 (1984).

Volitionally Impaired Defendant — Due Process Met: Defendant was charged with attempted deliberate homicide and aggravated assault. He gave notice of his intent to rely on a mental disease or defect to prove he did not have the particular state of mind that is an essential element of the offense charged. After conviction, defendant appealed, contending that Montana's statutory insanity defense scheme did not recognize those who lack the ability to conform their conduct to the law. He contended that this elimination of the involuntariness defense violated due process. The Supreme Court held that the volitional aspect of mental disease or defect has not been eliminated from Montana law. Consideration of that factor has been transferred from the jury to the sentencing judge under 46-14-311. Section 45-2-202 provides that a voluntary act is a material element of every offense. That section and the definition of involuntary act in 45-2-101 adequately provide for an involuntariness defense. St. v. Korell, 213 M 316, 690 P2d 992, 41 St. Rep. 2141 (1984).

Jury Instructions:

Defendant was convicted of mitigated deliberate homicide after having shot the owner of a bar. Prior to the shooting, the victim had hit defendant on the head, causing him to fall against a juke box. At the trial, a psychologist testified that due to the physical injuries defendant had suffered and the humiliation, anger, and fear he was experiencing, the defendant did not know what he was doing and was not able to control himself. The defense requested that the court instruct the jury that the burden is on the State to prove beyond a reasonable doubt that the defendant acted purposely, knowingly, and voluntarily. The court did not include the word "voluntarily" in instructing the jury on the State's burden of proof. The Supreme Court ruled that since the court did give one instruction that stated: "A material element of every offense is a voluntary act" and included in two other instructions the statement that the State has the burden to prove each element of the crime beyond a reasonable doubt, the jury had been properly instructed. St. v. Zampich, 205 M 231, 667 P2d 955, 40 St. Rep. 1235 (1983), followed in St. v. Patton, 280 M 278, 930 P2d 635, 53 St. Rep. 1402 (1996).

Where there is not evidence to indicate that the defendant's drugged condition was involuntarily produced, his requested instruction to the effect that a person in a drugged condition is not responsible for his conduct was properly refused. People v. Espenscheid, 109 Ill. App.2d 107, 249 N.E.2d 866, 869 (1969).

Sandstrom Instruction With Statement Presumption Disputable: Reversal of mitigated deliberate homicide conviction was required where the court gave the following Sandstrom instruction: "The law also presumes that a person intends the ordinary consequences of any voluntary act committed by him. This presumption, however, is termed a disputable presumption and may be controverted by other evidence." The error was not harmless. The instruction obviously permitted the jury to presume intent without proof beyond a reasonable doubt. Intent was hotly contested and an important element of the crime charged, and because of the instruction the jury could disregard the defendant's claim that he intended only to fire a warning shot. Then, with the presumption of intent, the jury could have concluded that defendant used deadly force to intentionally kill the victim. St. v. Musgrove, 202 M 59, 655 P2d 982, 39 St. Rep. 2327 (1982).

In General: A cornerstone of the defense of involuntary conduct is that a person, in a state of automatism, who lacks the volition to control or prevent his conduct cannot be criminally responsible for the involuntary act. People v. Spani, 46 Ill. App.3d 777, 361 N.E.2d 377 (1977). Automatism, manifested by performance of involuntary acts that can be of a simple or complex nature, is not insanity. People v. Grant, 46 Ill. App.3d 125, 360 N.E.2d 809 (1977), reversed on other grounds 71 Ill.2d 551, 377 N.E.2d 4 (1978). Generally, if a person voluntarily commits an unlawful act, and while so doing inflicts personal injury, he is held to be criminally liable. People v. Allen, 117 Ill. App.2d 20, 254 N.E.2d 103, 107 (1969). It is a material element of virtually every criminal offense that the act be done voluntarily. People v. Ball, 126 Ill. App.2d 9, 261 N.E.2d 417, 418 (1970). Because this section defining a voluntary act includes the omission of the performance of a duty imposed by law, it has been held that the contention of a tax collector that he could not be found guilty of official misconduct because he was not shown to have done any act was ineffectual. People v. Haycraft, 3 Ill. App.3d 974, 278 N.E.2d 877, 883 (1972). While there has been no ruling to date defining in broad terminology when conduct becomes involuntary, it has been held that evidence that a defendant was a homosexual who used homosexuality as a way of dealing with his problems and that therefore he had limited control over his impulses did not support the defendant's contention that his admitted deviate sexual assault was involuntary. People v. Jones, 43 Ill.2d 113, 251 N.E.2d 195, 197 (1969).

Possession as Voluntary Act:
This section provides that physical possession which gives the defendant immediate and exclusive control of contraband is sufficient to show possession; however, the Illinois courts have ruled that possession need not always be actual possession. Constructive possession is sufficient where it can be shown that the defendant had the property under his dominion and control. People v. Archibald, 3 Ill. App.3d 591, 279 N.E.2d 84, 87 (1972); People v. Cogwell, 8 Ill. App.3d 15, 288 N.E.2d 729, 730 (1972). See also, People v. Szymezak, 116 Ill. App.2d 384, 253 N.E.2d 894 (1969).

Illinois courts have held that to apply doctrine of constructive possession, it must be shown that defendant had immediate exclusive control of area or premises where items allegedly possessed were situated. People v. Day, 51 Ill. App.3d 916, 366 N.E.2d 895 (1977). See also People v. Collier, 17 Ill. App.3d 21, 307 N.E.2d 678 (1974).

However, the Montana court has held that exclusive, immediate personal possession is not essential to establish constructive possession. St. v. Trowbridge, 157 M 527, 487 P2d 530 (1971).

There is constructive possession when the person charged with possession has dominion and control over the goods although they were not in his actual physical possession. Id. It is not necessary to show that defendant was in actual physical possession or had exclusive control over the goods. It is sufficient that it be shown either by direct or circumstantial evidence that defendant did have the right to exercise control over the contraband. Id. at 531. Testimony that defendant presented a passenger copy of a flight ticket, together with a baggage claim tag, is in and of itself sufficient to establish constructive possession of contraband in suitcase. Id. at 529, 530. Possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control or to the joint dominion and control of the accused and another. St. v. Meader, 184 M 32, 601 P2d 386 (1979), followed in St. v. Van Voast, 247 M 194, 805 P2d 1380, 48 St. Rep. 160 (1991), and St. v. Caekaert, 1999 MT 147, 295 M 42, 983 P2d 332, 56 St. Rep. 583 (1999).

Evidence showing that defendant was present in the same room where drugs were found and evidence that connected defendant with the premises (i.e., mail addressed to defendant at the premises, personalized license plates bearing defendant's nickname, men's clothing which would fit defendant, and belief of landlady that defendant resided at the premises) were held sufficient to show defendant's control over the premises and constructive possession of the drugs. Id. An Illinois court has pointed out that while the presence of others does not necessarily negate constructive possession of contraband, equal access of others to the contraband can act to defeat constructive possession. People v. Cogwell, 8 Ill. App.3d 15, 288 N.E.2d 729 (1972).

Due Process: The Illinois Supreme Court has held that a defendant was not denied due process by failure of the court to raise sua sponte the issue of the voluntariness of deviant sexual assault by the defendant, when it later became known to the court that defendant was a homosexual, where there was no evidence of the defendant's insanity or his lack of competence to stand trial. People v. Jones, 43 Ill.2d 113, 251 N.E.2d 195, 198 (1969).

Law Review Articles

After Abolition: The Present State of the Insanity Defense in Montana, Bender, 45 Mont. L. Rev. 133 (1984).

45-2-203. Responsibility — intoxicated condition.

Criminal Law Commission Comments

Source: Ill. C.C. 1961, Chapter 38, § 6-3; §§ 94-01(1), 94-119.

Chapter 5 of Title 95 [now chapter 14 of Title 46], Competency of the Accused, completes the coverage of this section.

Subsection (2) [now the section in its entirety] is taken from Illinois Criminal Code, Ch. 38, section 6-3. This imposes a stricter limitation than the old code section 94-119(1). Instead of involuntary intoxication being a defense it is necessary for the accused to also prove that he was thereby made mentally incompetent. The second sentence of paragraph (2) [now the section in its entirety] makes it clear that intoxication is no defense but is merely a fact which the jury can consider in determining the existence of a particular mental state. When intoxication has proceeded so far as to render the accused incapable of forming the particular mens rea required for the offense, the defendant is entitled to be acquitted on that charge.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1987 Amendment: Substituted language concerning criminal responsibility for intoxicated condition for former language that read: "A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. An intoxicated or drugged condition may be taken into consideration in determining the existence of a mental state which is an element of the offense."

Annotator's Note: Section 45-2-203 contains two principles of law concerning intoxication as a defense. The first sentence states the general rule that voluntary intoxication is not a defense and limits the defense of involuntary intoxication only to those situations in which the intoxication has rendered the accused mentally incompetent. Sentence two states the exception to the general rule to intoxication as a defense, by providing that where an offense requires a specific mental state, the intoxicated state of the offender may be considered as a factor in determining whether that required mental state has been established. For example, voluntary intoxication would not be a defense for Negligent Homicide (MCA, 45-5-104) caused by drunk driving because the crime does not require a specific mental state but instead provides that responsibility stems from the negligent act itself—driving while intoxicated. Voluntary intoxication could be a factor in Deliberate Homicide to determine whether the required mental state of "knowingly" or "purposely" has been established. This subsection is somewhat narrower than prior law concerning involuntary intoxication by requiring proof of mental incompetency before a complete defense is raised. Since intoxication may be taken into consideration in determining the existence of a mental state which is an element of the offense, proof of intoxication might reduce the grade of some offenses. However, because the concept of specific intent is deleted from the law, the defendant's intoxication would have to be so debilitating that he was 1) "deprived of the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" [see MCA, Title 46, chapter 14], or 2) unaware of his conduct or existing circumstances [see definition of "knowingly" in 45-2-101]. In the offense of deliberate homicide, premeditation, deliberation and malice aforethought have been deleted. Nevertheless, recent Montana decisions indicate that the doctrine of St. v. Palen, 119 M 600, 178 P2d 862 (1947), decided under former law, that voluntary intoxication may be a defense in a murder case where specific intent is an essential element of the crime charged, is alive and well to some extent. In both St. v. Gone, 179 M 271, 587 P2d 1291 (1978), and St. v. Hardy, 185 M 130, 604 P2d 792 (1980), the defense of intoxication was raised as precluding the existence of the mental state which was an element of the offense charged. In Hardy the contested element was "purpose to commit an offense . . ." in an occupied structure (burglary) while in Gone the element was "purposely or knowingly causing apprehension". In each case the court pointed to evidence that showed activity by the defendant near the time of the offense which indicated that he was acting consciously and with apparent knowledge of his objectives. Certain mental states, such as "purpose", are viewed by the court as specific enough to be the equivalent of the mental state in Palen. The new cases are open to the construction that even "knowledge" might be defeated by this defense, but the court's emphasis on the conscious nature of the defendants' behaviors in Gone and Hardy, indicates at least that it would be very hard to negative "knowledge" without being unconscious or otherwise reduced to purely automatic behavior.

The 1974 amendment deleted former subsection (1) which read: "No person is capable of committing any offense unless he has attained his sixteenth birthday at the time the act in question was committed. Any person who has not yet attained his eighteenth birthday shall be subject to the law as provided in Title 10, chapter 6, R.C.M. 1947"; and deleted subsection designation (2).

Case Notes

Intoxication by Prescription Medication No Defense When Defendant Took Four Times Prescribed Amount: At his trial for incest, the defendant testified that he had been prescribed one hydrocodone pill per day and two naproxen twice a day. He also testified that on the night of the incident, he took four hydrocodone pills, three naproxen, and cold medication. On appeal, the defendant argued that the jury instruction that provided that intoxication from having ingested intoxicating substances is not a defense to the mental state element of a crime prevented the jury from fully considering his mental state. The defendant also argued that his case was distinguishable from other cases involving voluntary intoxication because he was following physician orders by taking medication that made him drowsy. The Supreme Court disagreed, noting that the defendant was not following physician orders by taking four times the prescribed amount of the hydrocodone in combination with other medications. The Supreme Court held that this case was not different from any other case in which a defendant chooses to become intoxicated, commits a crime, and then is held accountable for his conduct under 45-2-203. St. v. Ring, 2014 MT 49, 374 Mont. 109, 321 P.3d 800, following Mont. v. Egelhoff, 518 US 37 (1996).

Right to Present Defense — No Enhanced Right Under Montana Constitution — Jury Instruction on Intoxication Proper: The defendant was convicted of deliberate homicide despite his testimony that he was intoxicated at the time of the shooting and that an accidental jerk of his arm caused the gun to fire. Over the defense's objection, the District Court permitted a jury instruction, based on 45-2-203, that intoxication is not a defense to any offense except in limited circumstances. The defendant claimed that both the instruction and the statute violated his right to present a defense and improperly reduced or shifted the state's burden of proof. He further argued that the Montana Constitution provides broader protections to the right to present a defense than does the U.S. Constitution. The Supreme Court disagreed, ruling that the defendant had been allowed to present his defense, that 45-2-203 is constitutional, and thus that the instruction based on the statute was proper. St. v. Myran, 2012 MT 252, 366 Mont. 532, 289 P.3d 118. See also St. v. Ring, 2014 MT 49, 374 Mont. 109, 321 P.3d 800.

Defendant May Not Claim Constitutional Rights Violation When Evidence of Intoxication Allowed: The defendant argued that 45-2-203 is unconstitutional since it states that a jury may not consider voluntary intoxication with respect to a required mental state and therefore the statute violates Article II, sections 3 and 24, of the Montana constitution. The Supreme Court held that the defendant was allowed to present evidence of his intoxication and the jury was not instructed to not consider that evidence; therefore, the defendant's rights under the Montana constitution were not violated. St. v. Belanus, 2010 MT 204, 357 Mont. 463, 240 P.3d 1021. See also St. v. Myran, 2012 MT 252, 366 Mont. 532, 289 P.3d 118.

DUI Absolute Liability Offense — Proof of Mental State and Consideration of Involuntary Intoxication Not Required: During Weller's DUI trial, Weller proffered a jury instruction concerning a defense of involuntary intoxication, but the instruction was refused. Weller appealed, but the Supreme Court affirmed. The statute on involuntary intoxication, 45-2-203, provides that even though involuntary intoxication is not a defense to any offense, it may be taken into consideration in determining the existence of a mental state in cases where a mental state is an element of an offense. However, DUI is an absolute liability offense that does not require proof of a mental state, so consideration of involuntary intoxication was not necessary. Thus, the District Court did not abuse its discretion in refusing an involuntary intoxication instruction. St. v. Weller, 2009 MT 168, 350 M 485, 208 P3d 834 (2009).

Defendant May Not Claim Intoxication as Inability to Consent as Defense in Aggravated Assault Case: Mackrill argued that the jury verdict against him finding him guilty of aggravated assault should be dismissed because he was intoxicated at the time he had a fight with the victim and therefore could not have consented to enter into the fight. Since his argument that the victim consented to engage in the fight had been disregarded, Mackrill argued that the Supreme Court should also find that his own intoxication made it impossible for him to consent to the fight. The Supreme Court held that 45-2-203 specifically disallowed intoxication as a defense and that the defendant had not raised the due process issue at trial or properly argued the issue before the Supreme Court. St. v. Mackrill, 2008 MT 297, 345 M 469, 191 P3d 451 (2008).

Evidence of Defendant's Intoxication Following Arrest Admissible Under Transaction Rule: At McCaslin's trial for aggravated assault, assault, and assault with a weapon, the state introduced evidence of McCaslin's intoxication after arrest. McCaslin contended that the evidence was irrelevant and prejudicial. The Supreme Court disagreed. Under the transaction rule, McCaslin's behavior following arrest was relevant as part of the transaction, and the jury had a right to hear evidence regarding McCaslin's behavior subsequent to arrest in order to provide context to the criminal act. St. v. McCaslin, 2004 MT 212, 322 M 350, 96 P3d 722 (2004). See also St. v. Detonancour, 2001 MT 213, 306 M 389, 34 P3d 487 (2001), and St. v. McLaughlin, 2009 MT 211, 351 M 282, 210 P3d 694 (2009).

Jury Instruction Denying Intoxication Defense When Defendant Claims Justifiable Use of Force — No Error: Contesting a jury instruction based on this section that intoxication was not a defense, McCaslin contended that it was fundamentally unfair for the state to introduce evidence of McCaslin's intoxicated condition to illustrate that McCaslin was too intoxicated to act reasonably in self-defense, rebutting McCaslin's justifiable use of force defense, while on the other hand prohibiting McCaslin from using the inebriated condition as a defense or for determining intent. However, the jury was instructed on: (1) the elements of each offense and the state's burden of proving each element beyond a reasonable doubt; (2) the definitions of purposely and knowingly; (3) the ability to infer the existence of a mental state from the acts of an accused and from the facts and circumstances connected with an offense; (4) the difference between direct and circumstantial evidence; (5) witness credibility; and (6) the need for a unanimous verdict. As a whole, the jury instructions did not prejudicially affect McCaslin's substantial rights, and the District Court did not abuse its discretion in giving the contested jury instruction. St. v. McCaslin, 2004 MT 212, 322 M 350, 96 P3d 722 (2004).

Voluntary Intoxication Instruction Not Prejudicial: Following Strauss's negligent homicide trial, the trial court instructed the jury about the scope of an intoxicated person's responsibilities, noting that voluntary intoxication is not a defense to a crime. Strauss asserted that the instruction was given in error and was confusing and prejudicial because Strauss had not claimed intoxication as a defense. The Supreme Court disagreed. Strauss did not raise a valid state constitutional challenge to the instruction, and the argument that the instruction was confusing was mere conjecture. A District Court has broad discretion when instructing a jury, and reversible error occurs only if the instructions prejudicially affect a defendant's substantial rights. Strauss established no prejudice, and the trial court did not err in giving the voluntary intoxication instruction. St. v. Strauss, 2003 MT 195, 317 M 1, 74 P3d 1052 (2003). See also St. v. McLaughlin, 2009 MT 211, 351 M 282, 210 P3d 694 (2009), citing Strauss for the holding that a defendant does not necessarily have to raise intoxication as a defense in order for the intoxication instruction to be appropriate.

Jury Instruction Disallowing Evidence of Intoxication in Determining State of Mind Not Error — Full and Fair Instructions on Law: Following Raugust's criminal trial, the court instructed the jury that it could not consider evidence of intoxication for any purpose, pursuant to this section. Raugust maintained on appeal that the instruction was in error because depriving him of the ability to admit intoxication evidence lessened the state's burden of proof and confused the jury, in violation of his due process rights. However, the error urged on appeal was not contained in the objection made to the instruction during the final settling of jury instructions, constituting waiver of the argument on appeal. Moreover, the plain error doctrine did not apply because review under that doctrine was requested for the first time on appeal. Here, the jury was instructed regarding: (1) the elements of each offense charged and the state's burden of proving each element beyond a reasonable doubt; (2) the definition of the applicable mental states—purposely and knowingly; (3) the fact that the existence of a mental state may be inferred from the acts of the accused and from the facts and circumstances connected with the offense; (4) the difference between direct and circumstantial evidence; (5) witness credibility; and (6) the need for a unanimous verdict. Read as a whole, these instructions fairly and fully instructed the jury on the law applicable to the case, and giving the instruction disallowing the defense of intoxication was not erroneous. St. v. Raugust, 2000 MT 146, 300 M 54, 3 P3d 115, 57 St. Rep. 570 (2000). See also St. v. Hagen, 283 M 156, 939 P2d 994 (1997).

Deliberate Homicide by Intoxicated Defendant — Evidence of Intoxication Properly Excluded on Issue of Intent: Egelhoff was found heavily intoxicated in an automobile in which his two companions lay, shot in their heads by a revolver similar to Egelhoff's. Egelhoff's revolver had been fired twice, and he had gunpowder residue on his hands. The Montana Supreme Court held that a jury instruction and part of this section providing that "an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense" violated Egelhoff's right to due process of law. The Montana Supreme Court overruled any portion of St. v. Byers, 261 M 17, 861 P2d 860 (1993), holding to the contrary and, citing Teague v. Lane, 489 US 288 (1989), applied its decision to cases pending upon direct review but not to cases pending upon collateral review. St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995). On the state's writ of certiorari to the United States Supreme Court, the court reversed, holding that the due process of law clause of the United States Constitution was not violated by the instruction and this section. Mont. v. Egelhoff, 518 US 37, 135 L Ed 2d 361, 116 S Ct 2013 (1996), followed in St. v. McCaslin, 2004 MT 212, 322 M 350, 96 P3d 722 (2004). See also St. v. Myran, 2012 MT 252, 366 Mont. 532, 289 P.3d 118.

Instructions:

Defendant's argument that giving of the intoxication instruction relieved the state of the burden of proving all elements of an offense beyond a reasonable doubt was unpersuasive when other instructions specifically directed that the state had the burden of proof and that defendant was presumed to be innocent at every stage of trial and jury deliberation. St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993). See also St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995), overruled in Mont. v. Egelhoff, 518 US 37, 135 L Ed 2d 361, 116 S Ct 2013 (1996). See also St. v. Myran, 2012 MT 252, 366 Mont. 532, 289 P.3d 118.

Instruction as to involuntary intoxication was properly refused in negligent homicide case where no evidence of involuntary intoxication was presented. St. v. Kirkaldie, 179 M 283, 587 P2d 1298 (1978). Where the jury has been properly instructed and there is sufficient credible evidence to support its findings, the question of the relationship of voluntary intoxication to specific intent will not be reconsidered on appeal. St. v. McKimmie, 232 M 227, 756 P2d 1135, 45 St. Rep. 1011 (1988); St. v. Hardy, 185 M 130, 604 P2d 792 (1980); St. v. Gone, 179 M 271, 587 P2d 1291 (1978).

Defense of Intoxication — Establishment by Lay Testimony: The defense of intoxication may be established solely by lay testimony. St. v. Bingman, 229 M 101, 745 P2d 342, 44 St. Rep. 1813 (1987).

Voluntary Intoxication — Mitigated Deliberate Homicide: On appeal of his conviction of mitigated deliberate homicide, defendant claimed that he was too intoxicated at the time of the crime to entertain the required mental state. Testimony of witnesses indicated that defendant was aware of his surroundings and of what he had done. The Supreme Court refused to overturn the conviction, pointing out that apparently the jury did take defendant's intoxication into consideration since it convicted him of mitigated deliberate homicide rather than the more serious offense of deliberate homicide. St. v. Sage, 221 M 192, 717 P2d 1096, 43 St. Rep. 738 (1986).

No Evidence in Record to Warrant Jury Instruction on Mitigating Circumstances: Defendant contended District Court erred in refusing to give jury instructions on the lesser offense of mitigated deliberate homicide. On appeal, the Supreme Court found no error in refusing to instruct for two reasons: (1) the only potentially mitigating circumstance presented at trial concerned defendant's use of alcohol on the night in question; however, in St. v. White, 194 M 421, 632 P2d 1118, 38 St. Rep. 1417 (1981), the court held that voluntary intoxication alone was insufficient to show the extreme mental or emotional stress which would mitigate deliberate homicide charges; and (2) since defendant's main defense at trial was alibi, he was entitled either to an acquittal or to be found guilty, and if the jury believed his testimony, it would have been inconsistent with finding defendant guilty of mitigated deliberate homicide. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986).

Contention That Instruction Confusing and That Intoxication Not an Issue — No Error: Defendant, who had been drinking on the day of the crime, claimed prejudice in giving a jury instruction based on this section because intoxication was not an issue and thus confused the jury. The Supreme Court held that giving the instruction was not error because evidence of intoxication supported giving the instruction and that the defendant failed to show prejudice resulting from the instruction which affected his substantial rights. St. v. Harris, 209 M 511, 682 P2d 159, 41 St. Rep. 866 (1984).

Leaving Accident Scene — Intoxication and Mental State: In a trial on the charge of leaving the scene of an accident involving personal injuries, in violation of 61-7-103, it was error for the District Court, in instructing the jury on criminal responsibility, to fail to tell the jury that an intoxicated or drugged condition may be taken into account in determining the existence of a mental state which is an element of the offense. St. v. Stafford, 208 M 324, 678 P2d 644, 41 St. Rep. 377 (1984).

Failure to Rebut Defendant's Witnesses — Other Evidence Considered: The failure of the State to rebut the defendant's witnesses regarding his drugged condition did not make the evidence submitted by the defendant "uncontroverted evidence" requiring a directed verdict for acquittal because the State introduced evidence in its case in chief regarding the defendant's condition sufficient to meet its burden for submitting the case to the jury. St. v. Doney, 194 M 22, 636 P2d 1377, 38 St. Rep. 1707 (1981).

Involuntary Intoxication — Limits on Expert Testimony: Defendant was convicted of burglary after being found in a store in a shopping mall after hours. Defendant was admittedly a chronic alcoholic who could not control his drinking; he contended he was therefore involuntarily intoxicated at the time of the crime. As part of his defense he intended to have a psychiatrist and a psychologist testify that his intoxicated condition deprived him of the capacity to appreciate the criminality of his conduct. The expert testimony was excluded through a motion in limine. The Supreme Court, relying on St. v. Ostwald, 180 M 530, 591 P2d 646 (1979), held that the proffer of expert testimony comes within 46-14-213, which specifically limits the testimony an expert may give. It does not include opinions on the ability to appreciate the criminality of conduct or to conform conduct to the requirements of the law. St. v. Peavler, 195 M 379, 636 P2d 270, 38 St. Rep. 1937 (1981).

In General: As developed by the cases cited below, voluntary intoxication in Montana is generally no defense to a criminal charge. See St. v. Warrick, 152 M 94, 446 P2d 916 (1968); Alden

v. St., 234 F. Supp. 661 (D.C. Mont. 1964); St. v. Brooks, 150 M 399, 436 P2d 91 (1967); St. v. Palen, 119 M 600, 178 P2d 862 (1947); St. v. Kirkaldie, 179 M 283, 587 P2d 1298 (1978). Whether or not a defendant's intoxicated state prevented him from forming the necessary criminal intent to commit an offense is a factual issue to be determined by the jury. St. v. Austad, 166 M 425, 533 P2d 1069 (1975); St. v. Hardy, 185 M 130, 604 P2d 792 (1980). Where the jury has been properly instructed and there is sufficient credible evidence to support its findings, the question of the relationship of voluntary intoxication to specific intent will not be reconsidered on appeal. St. v. McKimmie, 232 M 227, 756 P2d 1135, 45 St. Rep. 1011 (1988); St. v. Gone, 179 M 271, 587 P2d 1291 (1978). Unlike deliberate homicide, which requires that the offense be committed purposely or knowingly, negligent homicide only requires a gross deviation from a reasonable standard of care, i.e., criminal negligence, which can arise as a result of intoxication. St. v. Kirkaldie, 179 M 283, 587 P2d 1298 (1978). For a discussion of the distinction between alcoholism-caused insanity and the defense allowed by this section, see St. v. Ostwald, 180 M 530, 591 P2d 646 (1979).

Objection to Jury Instruction on Voluntary Intoxication Without Merit: Where the defendant was convicted of felony murder, aggravated kidnapping, and robbery, his contention that a certain instruction precluded the jury from considering his voluntary intoxication as a cause of his diminished capacity was without merit. The instruction stated that "an intoxicated or drugged condition may be taken into consideration in determining the existence of a mental state which is an element of the offense". That language was included in the instruction at the insistence of the defendant and does not preclude the jury from considering voluntary intoxication. St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981).

Intoxication Affecting Capacity — Question for the Jury: When defendant had introduced evidence concerning his actions and physical condition and expert testimony as to the effect of drugs and alcohol and was able to get all his evidence before the jury except unsupported conclusions solicited from lay witnesses, the factual issue of intoxication was to be determined by the jury. There was sufficient credible evidence to support the jury's finding on the question of the defendant's state of intoxication. St. v. Hardy, 185 M 130, 604 P2d 792 (1980).

Opinion Testimony as to State of Intoxication — Harmless Error: Failure to allow witnesses to answer defense attorney's question of whether they thought defendant was drunk or on drugs, when witnesses had testified as to defendant's erratic actions, responses, appearance, and condition and defendant's expert witness had testified concerning the effect of alcohol and drugs, was at most harmless error not affecting the substantive rights of the defendant. St. v. Hardy, 185 M 130, 604 P2d 792 (1980).

Sufficiency of Evidence: Evidence that shows activity by defendant near the time of the offense which indicated that he was acting consciously and with apparent knowledge of his objectives held sufficient to allow jury to find defendant acted with the requisite mental state, despite defendant's contention that his intoxicated state precluded such a mental state and despite evidence of intoxication. St. v. Hardy, 185 M 130, 604 P2d 792 (1980); St. v. Gone, 179 M 271, 587 P2d 1291 (1978).

Guilty Pleas: Where the District Court had before it evidence of mitigating circumstances (i.e., evidence that defendant was under the influence of a combination of drugs and alcohol and was possibly suffering from mental distress or instability) which may have prevented defendant from being able to commit an aggravated assault as defined by statute, it should have permitted defendant to withdraw his previously entered plea of guilty to the offense charged. St. v. Nelson, 184 M 491, 603 P2d 1050 (1979).

Notice of Defense: When the defense of intoxication shifts to a defense based on expert testimony as to the long-term effects of alcoholism, it becomes a defense of mental disease or defect within the purview of the statutes requiring notice. St. v. Ostwald, 180 M 530, 591 P2d 646 (1979).

Specific Intent:

Testimony of two witnesses that defendant was under the influence of alcohol was not sufficient to refute finding by jury that defendant was not so intoxicated as to be unable to form the requisite intent to commit larceny. St. v. Austad, 166 M 425, 533 P2d 1069 (1975).

Since specific intent was not element of second-degree assault, the court was correct in refusing defendant's offered instruction that jury could take degree of intoxication into account in arriving at verdict insofar as it affected defendant's capacity for willfulness and intent under prior law (section 94-119, R.C.M. 1947). St. v. Warrick, 152 M 94, 446 P2d 916 (1968).

Malice and Intoxication:

Under prior law (section 94-119, R.C.M. 1947), in murder prosecution, jury was properly instructed that if killing was done by defendant with malice aforethought but defendant was incapable of premeditation and deliberation because of intoxication, the crime was second-degree murder, and that if defendant was so intoxicated at the time of killing that he was incapable of harboring malice aforethought, crime was manslaughter. St. v. Brooks, 150 M 399, 436 P2d 91 (1967).

Where defendant was intoxicated to such an extent as to render him incapable of entertaining the purpose, intent, or malice requisite for first-degree murder, the crime was properly reduced to murder in second degree. St. v. Palen, 119 M 600, 178 P2d 862 (1947), explained in St. v. Brooks, 150 M 399, 436 P2d 91 (1967).

Under prior law (section 94-119, R.C.M. 1947), intoxication was not an absolute defense; if, however, defendant could show that the state of his intoxication was such that he was incapable of forming a malicious intent, the charge would be mitigated to a lesser offense which did not include intent as an element. Where defendant, on the day previous to an assault, told the prosecuting witness that he was going to get a gun and kill him relative to a matter occurring a year previously, and on the day of the assault, referring to it again, viciously assaulted the victim, thus showing his capacity to harbor malice, his alleged intoxication was no defense. St. v. Laughlin, 105 M 490, 73 P2d 718 (1937).

Under prior law (section 94-119, R.C.M. 1947), in prosecution for felony murder, ample evidence presented to jury to justify conclusion that defendant, although intoxicated, was able to entertain intent to commit the robbery during which homicide occurred precluded review on appeal of the question of defendant's state of intoxication and his ability to entertain intent to commit the robbery. St. v. Reagin, 64 M 481, 210 P 86 (1922).

Confession While Intoxicated: Under prior law (section 94-119, R.C.M. 1947), confession of intoxicated defendant was voluntary and admissible in light of evidence that he was able to recite in great detail events occurring prior to and during act charged. St. v. Chappel, 149 M 114, 423 P2d 47 (1967).

Voluntary Intoxication:

While voluntary intoxication was generally no defense to a criminal charge under 94-119, R.C.M. 1947 (the former intoxication defense law), it was available as a defense where a specific intent was an essential element of the crime charged. Alden v. St., 234 F. Supp. 661 (D.C. Mont. 1964), affirmed in Ellsworth v. Alden, 345 F2d 530 (9th Cir. 1965).

Although as a general rule courts do not approve the giving of abstract propositions of law as instructions to juries, where the sole defense of one charged with an attempt to commit rape was intoxication, the trial court did not err in giving an instruction on voluntary intoxication in the words of subsection (1) of 94-119, R.C.M. 1947 (the former intoxication defense law). St. v. Stevens, 104 M 189, 65 P2d 612 (1937), overruled on other grounds in St. v. Bosch, 125 M 566, 242 P2d 477 (1952).

Insanity: Evidence that defendant's reason had been clouded by intoxication during the earlier hours of the day on which the homicide was committed and that he suffered from periodic heart attacks did not warrant an instruction upon the question of his sanity. St. v. Kuum, 55 M 436, 178 P 288 (1919).

Law Review Articles

After Abolition: The Present State of the Insanity Defense in Montana, Bender, 45 Mont. L. Rev. 133 (1984).

45-2-204. Liability of firefighters.

Compiler's Comments

Effective Date: Section 5, Ch. 464, L. 2007, provided that this section is effective on passage and approval. Approved May 8, 2007.

45-2-211. Consent as defense.

Criminal Law Commission Comments

Source: New.

Victim consent may eliminate criminal responsibility. However, not every consent is legally valid. The state has an obligation to protect the young and the helpless from their own incapacities. For reasons of public policy, the state may prohibit some conduct absolutely irrespective of anyone's consent.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 8, Ch. 167, L. 2023. Amendment effective April 19, 2023.

Severability: Section 38, Ch. 167, L. 2023, was a severability clause.

2019 Amendment: Chapter 308 inserted (2)(e) providing a list and types of offenses for which consent is ineffective; and made minor changes in style. Amendment effective May 7, 2019.

Applicability: Section 16, Ch. 308, L. 2019, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective May 7, 2019.

2015 Amendment: Chapter 161 in (2)(b) substituted "mental disease or disorder" for "mental disease or defect". Amendment effective April 1, 2015.

Annotator's Note: It is an element of the sexual offenses of Sexual Assault and Sexual Intercourse Without Consent (MCA, 45-5-502, 45-5-503) that the sexual act was committed without the consent of the victim. Thus, consent is a defense which may eliminate criminal responsibility. Subsection (2)(a) provides that certain persons are deemed to be legally incapable of giving consent regardless of actual acquiescence. Subsection (2)(b) protects the young and the helpless from their own incapacities. Subsection (2)(c) provides that consent which is forcibly compelled is ineffective. Subsection (2)(d) covers those situations when, for reasons of public policy, such as in "statutory rape" (now covered by MCA, 45-5-503), certain conduct is prohibited irrespective of consent. The 1977 amendment inserted "it is given by a person who" at the beginning of subsection (2)(b) and made minor changes in punctuation and phraseology.

Case Notes

Case Rendered Moot by Board's Removal of Position Statement — Specific Relief Achieved: The plaintiff, a nonprofit that opposes assisted suicide and euthanasia, filed a petition seeking to have the board of medical examiners remove a position statement related to Baxter v. State, 2009 MT 449, 354 Mont. 234, 224 P.3d 1211, concerning aid in dying. During the proceeding, the board rescinded its position statements and moved for dismissal. The District Court granted summary judgment because the issue was rendered moot. On appeal, the Supreme Court agreed, holding that the issue was not a justiciable controversy, the specific remedy sought by the plaintiff had been achieved, and there was no evidence to suspect that the same wrong would occur. Montanans Against Assisted Suicide v. Bd. of Medical Examiners, 2015 MT 112, 379 Mont. 11, 347 P.3d 1244.

Physician Aid in Dying Not Against Public Policy — Protection of Participating Physician From Prosecution: The District Court held that a competent terminally ill patient has a right to die with dignity pursuant to the rights to individual dignity and privacy in the Montana Constitution, which includes protection of the patient's physician from prosecution for homicide. The Supreme Court held that the issue could be resolved at the statutory level and therefore declined to rule on the constitutional issue. Because suicide is not a crime under Montana law, the only person who might be subject to criminal prosecution is a physician who prescribes a lethal dose of medication to a terminally ill patient. Thus, the court addressed the possible culpability of a physician who extends aid in dying, whether the patient's consent could constitute a statutory defense against a homicide charge against the assisting physician, and whether patient consent is rendered ineffective by 45-2-211(2)(d) because permitting the conduct or resulting harm is against public policy. The court noted that the consent defense is effective only if none of the exceptions in 45-2-211(2) apply. By law, consent is ineffective if it is (1) given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; (2) given by a person who by reason of youth, mental disease or defect, or intoxication is unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; (3) induced by force, duress, or deception; or (4) against public policy to permit the conduct or the resulting harm, even though consented to. The first three exceptions require case-by-case factual determinations, so the court confined its analysis to whether consent to physician aid in dying is against public policy and concluded that physician aid in dying provided to terminally ill, mentally competent adult patients is not against public policy. The exception to consent applies only to conduct that disrupts public peace and physically endangers others, to which the act of a physician handing medicine to a terminally ill patient and the patient's subsequent peaceful and private act of taking the medicine is not comparable. The physician is not directly involved in the final decision or the final act, and the patient's private decision whether to take the medicine does not breach public peace or endanger others, so the patient's consent to physician aid in dying constitutes a statutory defense to a homicide charge against the physician when no other exceptions apply. Baxter v. St., 2009 MT 449, 354 M 234, 224 P3d 1211 (2009).

Consent May Not Be Used as Defense to Aggravated Assault Charge: Mackrill argued that the jury verdict against him finding him guilty of aggravated assault should be dismissed because the victim consented to fight him. The Supreme Court ruled that 45-2-211(2)(d) provided that consent could not be used in a criminal case if it would be against public policy to permit the conduct or the resulting harm even if the victim had consented to the conduct or harm. The Supreme Court cited numerous cases from other jurisdictions with similar or related fact patterns in which the other courts had also held that consent in those cases could not be used as a defense because to allow the defense would violate public policy. St. v. Mackrill, 2008 MT 297, 345 M 469, 191 P3d 451 (2008).

Elements of Issuing Bad Checks Supportive of Information: The County Attorney filed an information against McWilliams for issuing bad checks in connection with a construction business. McWilliams asserted that the information should be dismissed because the series of transactions involving the checks were an illegal series of deferred deposit loans, so McWilliams could not be criminally prosecuted. However, 31-1-723, which prohibits deferred deposit loans, applies only to licensees under Title 31, ch. 1, part 7. None of the parties involved were licensees, so the statute did not apply. McWilliams also contended that the checks did not meet the definition of negotiable instruments in 30-3-104 because they were not payable on demand, but rather were in the nature of a future promise. However, the checks contained no restrictive endorsement, and although the parties to whom the checks were written agreed to refrain from cashing them immediately, the checks were in fact payable on demand and met the statutory definition. McWilliams also cited this section in arguing a consent defense because the parties consented to take the checks and hold them, but that argument also failed because even though the parties agreed to hold the checks, they did not consent to nonpayment or to having McWilliams stop payment altogether. McWilliams next asserted that under St. v. Patterson, 75 M 315, 243 P 355 (1926), the information was defective because it contained no assertion of an intent to defraud. The statutory language under which Patterson was charged in 1926 required a showing of intent to defraud, but the current statute, 45-6-316, contains no intent to defraud element, so the information was not defective in that regard. There was sufficient evidence to charge McWilliams with issuing bad checks, and the District Court did not err in denying McWilliams' pretrial motion to dismiss the information. St. v. McWilliams, 2008 MT 59, 341 M 517, 178 P3d 121 (2008).

Theft of Benefits by Deception — Induced Consent Ineffective Defense: After conviction of conspiracy to commit theft for obtaining workers' compensation benefits by deception, the defendant appealed, alleging that the State Fund consented to the defendant's actions by failing to diligently investigate false claims and by entering into a settlement for claims. The Supreme Court affirmed the District Court decision, ruling that consent induced by deception constitutes an ineffective defense. St. v. Young, 259 M 371, 856 P2d 961, 50 St. Rep. 839 (1993).

Failure to Instruct Jury on Defense of Consent Not Reversible Error: Defendant convicted of theft contended that the District Court had a duty to instruct the jury on every theory having support in the evidence. While his counsel did not offer an instruction on the defense of consent, defendant contends that had the court given an instruction on consent as it related to theft, the jury could have concluded that he did not act beyond the scope of his authority by selling his girlfriend's automobile and television. The Supreme Court held that the District Court was under no obligation to instruct on a theory that had not been established by evidence and did not err by failing to instruct the jury on the defense of consent as it related to theft. St. v. Tumbleson, 249 M 153, 815 P2d 592, 48 St. Rep. 690 (1991).

Instructions and Special Interrogatories Relating to Consent Properly Excluded: Defendant contended that the trial court improperly excluded several proposed instructions and special interrogatories relating to consent by the complainant to acts of sexual intercourse. Defendant's proposed instructions addressed the necessity that the force or lack of consent precede the acts of sexual intercourse for rape to occur, that consent may not be withdrawn during the acts, and that consent is a defense. The Supreme Court held that the trial court properly excluded the instructions as being adequately covered in other instructions or as misstatements of the law. St. v. Brodniak, 221 M 212, 718 P2d 322, 43 St. Rep. 755 (1986).

45-2-212. Compulsion.

Criminal Law Commission Comments

Source: Ill. C.C. 1961, Chapter 38, § 7-11.

Compulsion, coercion, or duress is another long-recognized basis for finding a person not guilty of an offense charged, although his conduct appears to be within the definition of the offense. The justification does not extend to action under threat of damage to property, or of injury less than serious bodily harm or even of death or serious bodily harm which is not imminent; but the person's reasonable fear of imminent death or serious bodily harm if mistaken, is within the principle. (See 1 Bishop on Criminal Law (9th ed.) §§ 346 to 348.)

This established type of formulation has been criticized. However, to broaden the defense to accord completely with the "free will" theory would be to invite routine contentions of some kind of pressure, such as "threats of harm to property, reputation, health, general safety, and to acts done under the orders," with accompanying assertion of individual personality weakness. (Newman and Weitzer, supra, at 334.) Prof. Wharton, after stating the established restrictions upon the defense, comments: "It would be a most dangerous rule if a defendant could shield himself from prosecution for crime by merely setting up a fear from or because of threat of a third person." (1 Wharton's Criminal Law (19th ed.), § 384.)

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: The wording for this section is substantially similar to the first paragraph of the Illinois source. The meaning of the section is explained fully [in the commission comments].

Case Notes

Elements of Affirmative Compulsion Defense — Compulsion Possible Acceptable Defense to DUI Charge: The affirmative defense of compulsion is a well-recognized basis for finding a person not guilty of a charged offense even though the person's conduct appears to fall within the definition of the offense. As set out in St. v. Owens, 182 M 338, 597 P2d 72 (1979), the elements of a compulsion defense require a defendant to show that the defendant was compelled to perform the offensive conduct by the threat or menace of the imminent infliction of death or serious bodily harm, that the defendant believed that death or serious bodily harm would be inflicted on the defendant if the conduct was not performed, and that this belief was reasonable. A defendant need not show that there were no options other than the allegedly compelled action, only that the elements of the defense were satisfied. In this case, the District Court held that the compulsion defense did not apply to a DUI charge, so Leprowse was precluded from presenting evidence in support of the defense. The Supreme Court reversed. Leprowse alleged that the required elements of the defense were present because she was compelled to drive away from a bar due to an imminent threat of serious bodily injury, and that the belief was reasonable. Whether Leprowse was compelled to drive 14 miles and ostensibly commit a DUI was a question of fact based on the circumstances, but Leprowse should have been allowed to present the evidence, so the case was remanded for a new trial. St. v. Leprowse, 2009 MT 387, 353 M 312, 221 P3d 648 (2009).

Testimony of Expert on Prison Conditions Irrelevant to Compulsion Defense: It was not an error for the District Court, in considering a compulsion defense, to deny a motion for a prison conditions expert to testify about whether an inmate's subjective state of mind at the time of a prison riot caused the inmate to commit certain acts in an attempt to save the inmate's life because such testimony is irrelevant to a compulsion defense. St. v. Cox, 266 M 110, 879 P2d 662, 51 St. Rep. 680 (1994), following Amin v. St., 811 P2d 255 (Wyo. 1991).

Common-Law Defense — Choice of Evils Not Included in Compulsion: The trial court granted the prosecution's motion to exclude Lewis's and Brisendine's argument that they were not guilty of trespass under the compulsion statute. The Supreme Court ruled that the compulsion statute does include the common-law defense of "choice of evils" and that the common-law elements of the defense are not recognized in Montana. Helena v. Lewis, 260 M 421, 860 P2d 698, 50 St. Rep. 1103 (1993), followed in St. v. Close, 267 M 44, 881 P2d 1312, 51 St. Rep. 876 (1994), and St. v. Higgins, 2020 MT 52, 399 Mont. 148, 458 P.3d 1036.

Defense of Compulsion Properly Excluded in Abortion Clinic Trespass Case: The trial court granted the prosecution's motion to exclude Lewis's and Brisendine's argument that they were not guilty of trespass under the compulsion statute. The Supreme Court ruled that the compulsion statute does include imminent threats of harm to third persons. The defendants' argument concerning compulsion was properly excluded as inapplicable as a matter of law. Helena v. Lewis, 260 M 421, 860 P2d 698, 50 St. Rep. 1103 (1993), followed in St. v. Close, 267 M 44, 881 P2d 1312, 51 St. Rep. 876 (1994).

Compulsion Defense Not Inclusive of Threats to Third Person: The language of this section is a proper guide for instructing the jury and does not provide that the compulsion defense includes imminent threats of harm to a third person. St. v. Spalding, 247 M 317, 806 P2d 1029, 48 St. Rep. 215 (1991).

Compulsion Statute and Necessity Doctrine Complementary, Not Mutually Exclusive: The defendant left the state in violation of her parole and argued that the action was justified because she fled to avoid a forced sexual relationship with her foster parent. The Supreme Court ruled that in addition to meeting the requirements of the compulsion statute, the defendant also had to meet the requirements of the complementary doctrine of necessity, which included the duty to turn herself over to the proper authorities upon reaching a place of safety. Since the defendant failed to report to anyone after arriving in California, the lower court was justified in revoking her suspended sentence. St. v. Ottwell, 240 M 376, 784 P2d 402, 46 St. Rep. 2207 (1989), followed in St. v. Close, 267 M 44, 881 P2d 1312, 51 St. Rep. 876 (1994).

Compulsion Requirements Not Satisfied — Duress and Necessity Not Included Defenses: Defendant claimed he and the crime victim were emotionally distraught and were compelled to see each other—an action directly violating defendant's parole agreement. These circumstances did not satisfy the requirements for a compulsion defense, and duress and necessity are not, per se, included as defenses under Montana law. Whether the defendant or victim acted under duress or necessity is a question of fact adequately resolved by the District Court. St. v. Pease, 233 M 65, 758 P2d 764, 45 St. Rep. 1296 (1988).

Jury Instruction on Compulsion Defense: Where there is evidence in support of any defense offered by an accused that raises an issue of fact favorable to him, the trial court should present the issue by an affirmative instruction which explains the pertinent law. However, where there is no evidence in the record supporting each element of the compulsion defense, the court may properly refuse to instruct the jury on the defense. St. v. Owens, 182 M 338, 597 P2d 72 (1979), following St. v. Gallaher, 177 M 150, 580 P2d 930 (1978).

Defense to Charge of Escape: In order to establish a defense of compulsion to charge of escape, defendant must establish that: (1) the defendant was faced with a threat of death or serious bodily injury; (2) there was insufficient time to complain to prison authorities; (3) there was insufficient time to resort to the courts; (4) the prisoner immediately reported to the police when he obtained a position of safety. The defendant has the burden of proving each element by a preponderance of the evidence. St. v. Stuit, 176 M 84, 576 P2d 264 (1978), followed in St. v. Strandberg, 223 M 132, 724 P2d 710, 43 St. Rep. 1591 (1986).

Restricting Voir Dire — Right to Impartial Jury: The court did not err in sustaining the state's objections to defense counsel's voir dire questioning of prospective jurors on their attitude toward defense of justification in the prosecution of felony charge of escape from prison. St. v. Stuit, 176 M 84, 576 P2d 264 (1978).

In General: An alleged threat to a public official by his superiors that he would lose his position if he did not cooperate with state attorney's office was ruled not to constitute compulsion sufficient to provide a defense for official's false testimony. People v. Ricker, 45 Ill.2d 562, 262 N.E.2d 456, 460 (1970). See also, People v. Lightning, 83 Ill. App.2d 430, 228 N.E.2d 104 (1967).

45-2-213. Entrapment.

Criminal Law Commission Comments

Source: Ill. C.C. 1961, Chapter 38, § 7-12.

The defense of entrapment generally follows the rule stated by the majority in the Sorrells case. (See "The Doctrine of Entrapment and Its Application in Texas," 9 Sw. L. J. 456 (1955); Note, 28 N.Y.U. L. Rev. 1180 (1953) recognizing three principal elements: (1) The idea of committing an offense originates, not with the suspect, but with the enforcement authorities, who (2) actively encourage the suspect to commit the offense, (3) for the purpose of obtaining evidence for his prosecution.)

Most of the cases in which entrapment has been alleged involved a course of conduct, resulting apparently in repeated offenses of the same type or in a continuing offense, such as violation of the Medical Practice Act, illegal sale of liquor or narcotics or explosives, larceny, and ticket scalping.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This section has been taken directly from the Illinois source. It should be noted that if the officer only affords the opportunity to commit the offense after the offender himself originated the criminal purpose, entrapment has not occurred.

Case Notes

Conflicting Facts — Entrapment Question Properly Submitted to Jury: The District Court did not err in denying the defendant's motion to dismiss for entrapment as a matter of law on the charge of felony attempted prostitution with a minor, in violation of 45-4-103 and 45-5-601. The defendant argued that the task force entrapped him into attempted prostitution with a minor by inducing him into replying to an ad on Backpage.com with a seductive photo, luring him to a motel room, and cajoling him into retrieving money from an ATM to pay for sex. However, there were several affirmative decisions from which a reasonable jury could conclude that the idea to engage in the criminal behavior originated in the defendant's mind. After reading the advertisement, the defendant dialed the contact information, learned that the prospective sex workers were minors, and arranged a meeting at a motel. In the motel room, the defendant proceeded to negotiate for sex with a 15-year-old girl. After indicating that he did not bring cash with him, the defendant retrieved cash from an ATM, returned to the room, and paid the undercover officer so he could have sex with a minor. Given these facts, the defendant's entrapment defense would have been a tough sell to a jury, much less warranting dismissal as a matter of law. Because conflicting facts existed as to whether the defendant had the requisite intent to commit the criminal act, the District Court correctly denied the motion and concluded the issue of entrapment must be submitted to a jury. St. v. Lindquist, 2018 MT 38, 390 Mont. 329, 413 P.3d 455. See also St. v. Vallie, 2022 MT 213, 410 Mont. 384, 519 P.3d 470.

Determination That Jury Might Find That Defendant Induced Into Criminal Transaction Not Proof of Entrapment as Matter of Law: Smith moved for a directed verdict on grounds that she was induced into selling a dangerous drug and entrapped as a matter of law. The trial court held that the evidence could support a verdict that Smith was predisposed to make the sale but also found that cross-examination of the state's witnesses presented evidence that Smith was induced to make the sale, so the court denied the motion and sent the case to the jury, concluding that the state would be required to prove beyond a reasonable doubt that Smith was not induced to make the sale. Following conviction, Smith appealed on grounds of entrapment, but the Supreme Court affirmed. After setting out the elements of entrapment enumerated in St. v. Karathanos, 158 M 461, 493 P2d 326 (1972), the court concluded that the trial court's determination that the circumstances of the sale could be interpreted to mean that Smith was induced, therefore imposing an additional burden of proof on the prosecution, did not mean that Smith was entrapped as a matter of law. Thus, the trial court did not err in denying the motion for a directed verdict and sending the case to the jury. St. v. Smith, 2006 MT 145, 332 M 386, 138 P3d 799 (2006). See also St. v. Harney, 160 M 55, 499 P2d 802 (1972), and St. v. Sweet, 1998 MT 30, 287 M 336, 954 P2d 1133 (1998).

Locating Authority With Control Over Property to Resolve Dispute — No Entrapment: Allum attempted to cash a check at a bank branch located in a grocery store but became angry when told by a teller that, according to bank policy, he would have to stamp his thumbprint on the check in order to cash it. The bank manager affirmed the policy, and when Allum continued to object, the manager asked Allum to leave the bank. The conversation moved to the grocery store, and officers arrived. One officer summoned the store manager, who asked Allum to leave. After repeatedly refusing to leave the store, Allum was arrested for trespass. At trial, Allum requested an entrapment instruction, contending that the officers incited or induced him into committing trespass by summoning the store manager. The instruction was refused, and on appeal, the Supreme Court affirmed. Locating a person with authority over property in order to peacefully resolve a dispute does not constitute action inciting or inducing a crime. St. v. Allum, 2005 MT 150, 327 M 363, 114 P3d 233 (2005).

Defendant Advised Not to Drive — No Entrapment Upon Subsequent Arrest for DUI: The bartender at a Carter bar called officers to report that Reynolds was drunk and causing a disturbance. When they arrived, the officers inquired about Reynolds' health and concluded that he was not ill but intoxicated. A background check revealed that Reynolds driver's license had been revoked, so the officers advised Reynolds not to drive. Reynolds gave his car keys to the bartender and indicated that he had arranged for a ride. The bartender told Reynolds that he could stay until he was sober or his ride arrived, providing that he did not bother the other customers. About 2 hours later, officers received another call indicating that Reynolds was again belligerent and demanding return of the keys and that the bartender feared for her safety if she refused to return them. The officers told the bartender to return the keys and proceeded back to the bar, waiting outside to see if Reynolds drove away. When Reynolds drove off, he was arrested for felony DUI, fourth or subsequent offense, driving while his license was suspended or revoked, ninth offense, and driving without liability insurance. Reynolds contended that the officers' conduct constituted entrapment and moved to dismiss the charges, but the motion was denied. On appeal, the Supreme Court affirmed. In St. v. Canon, 212 M 157, 687 P2d 705 (1984), the court set out elements of the defense of entrapment: (1) criminal intent or design originating in the mind of the police officer or informer; (2) absence of criminal intent or design originating in the mind of the accused; and (3) luring or inducing the accused into committing a crime that the accused had no intention of committing, noting that there is a difference between inducing a person to commit a crime and setting a trap to catch a person in the execution of a criminal design of the person's own conception. Reynolds failed to prove any of the elements of entrapment. The officers warned Reynolds about driving, and yet he did so anyway. Merely affording Reynolds the opportunity or facility to commit the offenses was not entrapment. St. v. Reynolds, 2004 MT 364, 324 M 495, 104 P3d 1056 (2004). See also St. v. Kim, 239 M 189, 779 P2d 512 (1989), and St. v. Sweet, 1998 MT 30, 287 M 336, 954 P2d 1133 (1998).

Burden of Proof — General Jury Instructions on Entrapment: Citing U.S. v. Mkhsian, 5 F3d 1306 (9th Cir. 1993), the Supreme Court emphasized that once evidence of inducement is shown by the defendant, it is the government's burden to prove that the defendant was predisposed to violate the law before the government intervened. The court cautioned against an entrapment instruction containing the phrase "where a person already has the readiness and willingness to engage in a crime, the mere fact that law enforcement officers or their agents provided what appears to be a favorable opportunity is not entrapment". St. v. Brandon, 264 M 231, 870 P2d 734, 51 St. Rep. 244 (1994).

Drug Sales — Proper Entrapment Instruction:

Although not a model, the following entrapment instruction is an adequate expression of the law and is not unnecessarily complex or misleading: "The elements of the defense of entrapment: (1) criminal intent or design originating in the mind of the police officer or informer; (2) absence of criminal intent or design originating in the mind of the accused; and (3) luring or inducing the accused into committing a crime he had no intention of committing." St. v. Farnsworth, 240 M 328, 783 P2d 1365, 46 St. Rep. 2165 (1989), followed in St. v. Brandon, 264 M 231, 870 P2d 734, 51 St. Rep. 244 (1994).

A jury instruction stated that where a person has no previous intent or purpose to commit a crime by selling dangerous drugs and is induced or persuaded to do so by police or their agents, he is a victim of entrapment. It also stated that: (1) if a person already has the readiness and willingness to engage in the crime, the mere fact that police or their agents provide a favorable opportunity is not entrapment; (2) it is not entrapment for police to pretend to be someone else and offer to purchase drugs from a suspected seller; and (3) what the law forbids is for police to originate a criminal design or implant it in the suspect's mind. Giving this instruction was not error. St. v. Walker, 225 M 415, 733 P2d 352, 44 St. Rep. 363 (1987).

Trap Set by Police Officers — No Entrapment: Entrapment did not exist as a matter of law when the criminal investigation was initiated because of citizen complaints and law officers then set a trap to catch defendant, who was subsequently convicted of prostitution and promoting prostitution. Defendant did not have to be induced to participate in discussions of sexual intercourse; substantial credible evidence supported a finding that criminal intent originated with defendant. St. v. Kim, 239 M 189, 779 P2d 512, 46 St. Rep. 1610 (1989).

Entrapment Elements:

Evidence replete in the record that a defendant engaged in the business of selling dangerous drugs refuted the defendant's contention that he had no criminal intent or that he would not have made a sale without inducement from an agent. St. v. Bartnes, 234 M 522, 764 P2d 1271, 45 St. Rep. 2101 (1988).

Defendant, who volunteered to infiltrate a drug ring to arrange a buy for police, was convicted of felony sale of dangerous drugs (now criminal distribution of dangerous drugs) after an acquaintance contacted a buyer, who unknown to them was an undercover officer, and defendant accompanied by two others made the sale to the undercover officer. The defendant was not entrapped into committing the offense because: (1) the criminal intent originating the crime began with the acquaintance and not with the police; (2) there was no absence of criminal intent or design originating with the accused; and (3) he was not lured or induced into committing the crime because the undercover officer was the person contacted for the sale. St. v. Hanley, 186 M 410, 608 P2d 104 (1980).

Defendants charged with escape failed to prove the elements of an entrapment defense: (1) that criminal intent or design to commit the crime originated in the mind of the law enforcement officer; (2) that no criminal intent or design originated in the minds of the accused; and (3) that the law enforcement officer lured or induced the defendants into committing a crime they had no intention of committing. St. v. Gallaher, 177 M 150, 580 P2d 930 (1978).

In order to establish entrapment the defendant must show: (1) that the criminal intent originated in the mind of the informant; (2) absence of a criminal intent originating in the mind of the defendant; and (3) that the defendant was lured into committing a crime he had no intention of committing. The defendant as a matter of law established these elements by showing: (1) that a police informant developed a close friendship with the defendant; (2) that the informant used this friendship to induce the defendant to get him small amounts of drugs; (3) that the informant planned the "big buy"—the involvement in which the defendant was convicted; (4) that the defendant was lured into this scheme by the informant's promise to use the proceeds to finance a trip to Utah where the defendant would be provided a job; and (5) that there was no evidence that this defendant had ever been involved with drugs other than at the initiative of the informant. St. v. Grenfell, 172 M 345, 564 P2d 171 (1977), distinguished in St. v. Kim, 239 M 189, 779 P2d 512, 46 St. Rep. 1610 (1989).

No Entrapment in Delivery of Postal Package — Search Warrant and Conviction Upheld: Where the warrant used to search the defendant's home was supported by an affidavit attesting to a "controlled delivery" to the defendant of a UPS package containing a dangerous drug, the Supreme Court held that the affidavit did not disclose an entrapment by the police and that the search warrant was properly issued. The delivery of the package to the defendant and his subsequent possession of the drugs in the package were not a plan of the police department's making; the police only caught the defendant in the execution of criminal design. The defendant's "crime" was not the acceptance of the package; it only provided probable cause to believe the defendant knowingly possessed a dangerous drug with intent to sell. St. v. Kelly, 205 M 417, 668 P2d 1032, 40 St. Rep. 1400 (1983).

Conflicting Evidence — Fact Question: Evidence as to whether defendant was entrapped was conflicting, and therefore Supreme Court would not find it existed as a matter of law. It was a factual question for the jury. St. v. McClure, 202 M 500, 659 P2d 278, 40 St. Rep. 242 (1983), followed in St. v. Brandon, 264 M 231, 870 P2d 734, 51 St. Rep. 244 (1994).

In General:

"Entrapment" exists where officers of the law have conceived and planned the commission of a criminal activity and thus have incited, induced, instigated, or lured the accused in the commission of an offense that he had no prior intention of committing except for the persuasion of the entrapper. People v. Wright, 27 Ill.2d 557, 190 N.E.2d 318 (1963); People v. Lewis, 26 Ill.2d 542, 187 N.E.2d 700 (1963); People v. McSmith, 23 Ill.2d 87, 178 N.E.2d 641 (1962); People v. Strong, 21 Ill.2d 320, 172 N.E.2d 765 (1961); People v. Cazaux, 119 Ill. App.2d 11, 254 N.E.2d 797, 799 (1969); People v. Gassaway, 65 Ill. App.2d 244, 212 N.E.2d 689, 692 (1965); People v. Cash, 26 Ill.2d 595, 188 N.E.2d 20, certiorari denied 374 US 813 (1968); People v. Hall, 25 Ill.2d 297, 185 N.E.2d 143, 145 (1962); U.S. v. Millpax, Inc., 313 F2d 152, 156 (7th Cir. 1963). Thus, entrapment exists only when criminal intent originates in the mind of the entrapping officer and the accused otherwise had no criminal intent. People v. Dollen, 2 Ill. App.3d 567, 275 N.E.2d 446, 449 (1971); People v. Clay, 32 Ill.2d 608, 210 N.E.2d 221, 222 (1965). But there is no entrapment where law enforcement officers merely provide an opportunity for the commission of a crime by one who is already so predisposed, and in such cases it is proper for the police to use artifices to catch criminals. People v. McCloskey, 2 Ill. App.3d 892, 270 N.E.2d 126, supp. 274 N.E.2d 358 (1971); People v. Johnson, 66 Ill. App.2d 465, 214 N.E.2d 354 (1966); People v. Morgan, 98 Ill. App.2d 435, 240 N.E.2d 286 (1968); People v. Clay, 32 Ill.2d 608, 210 N.E.2d 221 (1965); People v. McSmith, 23 Ill.2d 87, 178 N.E.2d 641 (1962). An appeal to sympathy and friendship, without the necessary elements of culpability, does not constitute entrapment. People v. Washington, 81 Ill. App.2d 162, 225 N.E.2d 673 (1967), certiorari denied, 390 US 991 (1968); People v. Hatch, 49 Ill. App.2d 177, 199 N.E.2d 81, 85 (1964); People v. Luna, 69 Ill. App.2d 291, 216 N.E.2d 473 (1966), reversed on other grounds 37 Ill.2d 299, 226 N.E.2d 586 (1967).

For application of the general principles stated above, attention is directed to the following additional cases: narcotics—People v. Hall, 25 Ill.2d 297, 185 N.E.2d 143, 145 (1962); People v. Brown, 95 Ill. App.2d 66, 238 N.E.2d 102, 104 (1968); People v. Toler, 26 Ill.2d 100, 185 N.E.2d 874, 875 (1962); People v. Wells, 25 Ill.2d 146, 182 N.E.2d 689 (1962); unlicensed professional practice—People ex rel. Ill. State Dental Soc. v. Taylor, 131 Ill. App.2d 492, 268 N.E.2d 463 (1971); gambling—People v. Hornstein, 64 Ill. App.2d 319, 211 N.E.2d 756 (1965); unauthorized sale of liquor—Roberts v. Illinois Liquor Control Commission, 58 Ill. App.2d 171, 206 N.E.2d 799, 803 (1965).

Entrapment is a valid defense for those instances in which police officers inspire, incite, persuade, or lure a defendant to commit a crime which he otherwise had no intention of perpetrating. People v. Toler, 24 Ill.2d 100, 185 N.E.2d 874, 875 (1962); People v. Gassaway, 65 Ill. App.2d 244, 212 N.E.2d 689 (1965); People v. McSmith, 178 N.E.2d 641, 23 Ill.2d 87 (1962); People v. Lewis, 26 Ill.2d 542, 187 N.E.2d 700 (1963). But the law of entrapment distinguishes between trap for the unwary criminal and a trap set to ensnare the innocent and law-abiding into committing a crime. People v. Gonzales, 125 Ill. App.2d 225, 260 N.E.2d 234, 237 (1970); People v. Jackson, 116 Ill. App.2d 304, 253 N.E.2d 527, 531 (1969).

Entrapment Found as a Matter of Law: The facts of the present case fall within the scope of earlier cases in which the Supreme Court held entrapment as a matter of law. The criminal intent or design to sell marijuana did not originate with the defendant but with the undercover officers who induced defendant to give them a minute quantity of marijuana. The officers did more than merely afford Kamrud the opportunity to commit the offense by making a casual offer to buy. They befriended him on more than one occasion for the purpose of soliciting drugs. St. v. Kamrud, 188 M 100, 611 P2d 188 (1980), following St. v. Grenfell, 172 M 345, 564 P2d 171 (1977), and distinguished in St. v. Kim, 239 M 189, 779 P2d 512, 46 St. Rep. 1610 (1989). See also St. v. Canon, 212 M 157, 687 P2d 705, 41 St. Rep. 1659 (1984), and St. v. Sweet, 1998 MT 30, 287 M 336, 954 P2d 1133, 55 St. Rep. 110 (1998).

Intent as Negating Entrapment: The defense of entrapment is not available to one who has the intention and design to commit a criminal offense and who does commit the offense merely because a law officer, for the purpose of securing evidence, has afforded such a person the opportunity to commit the act. People v. Gassaway, 65 Ill. App.2d 244, 212 N.E.2d 689 (1965); People v. Gonzales, 125 Ill. App.2d 225, 260 N.E.2d 234 (1970); People v. Johnson, 56 Ill. App.2d 465, 214 N.E.2d 354 (1966); People v. Outten, 13 Ill.2d 21, 147 N.E.2d 284 (1958); People v. Wells, 25 Ill.2d 146, 182 N.E.2d 689 (1962); People v. McSmith, 23 Ill.2d 87, 178 N.E.2d 641, 642 (1962).

Sufficiency and Admissibility of Evidence: In determining whether there has been entrapment of defendant, the court should consider both the conduct of law enforcement officials and evidence regarding the defendant's predisposition and criminal design to commit the crime involved. People v. Lewis, 26 Ill.2d 542, 187 N.E.2d 700, 701 (1963); People v. Gonzales, 125 Ill. App.2d 225, 260 N.E.2d 234, 237 (1970). Thus, in a prosecution for unlawful sale of narcotics, evidence that defendants were ready to make quick sale negated defense of entrapment. People v. Gonzales, supra. Similarly, evidence that the defendant was able to supply illegal drugs within a matter of hours defeated the defense of entrapment. People v. McSmith, 23 Ill.2d 87, 178 N.E.2d 641, 645 (1962). See also St. v. Grenfell, 172 M 345, 564 P2d 171 (1977), in which the Montana court held that the defendant had, as a matter of law, established the defense of entrapment.

Denial of Offense: The defense of entrapment is incompatible with a claim that the defendant did not commit the acts with which he is charged. People v. Banks, 103 Ill. App.2d 180, 243 N.E.2d 669, 673 (1968); People v. Morgan, 98 Ill. App.2d 435, 240 N.E.2d 286 (1968); People v. Washington, 81 Ill. App.2d 162, 225 N.E.2d 673 (1967), certiorari denied, 390 US 991 (1968); People v. Lewis, 80 Ill. App.2d 101, 224 N.E.2d 647 (1967).

Review: Entrapment is an affirmative defense which may not be raised for the first time on appeal. People v. Lewis, 80 Ill. App.2d 101, 224 N.E.2d 647 (1967); People v. Morgan, 98 Ill. App.2d 435, 240 N.E.2d 286 (1968); People v. Johnson, 66 Ill. App.2d 465, 214 N.E.2d 354 (1966); People v. Redding, 28 Ill.2d 305, 192 N.E.2d 341 (1963). See also United States ex rel. Hall v. People of State of Illinois, 329 F2d 354 (7th Cir.), certiorari denied 379 US 891 (1964).

Instructions: If any evidence exists in support of entrapment theory, defendant is entitled to instruction thereon. People v. Luna, 69 Ill. App.2d 291, 216 N.E.2d 273 (1966), reversed on other grounds 37 Ill.2d 299, 226 N.E.2d 586 (1967). See also People v. Cash, 26 Ill.2d 595, 188 N.E.2d 20, 21 (1963); People v. Jackson, 116 Ill. App.2d 304, 253 N.E.2d 527, 532 (1969).

Part 3

Liability for Acts Committed by or for Another

45-2-301. Accountability for conduct of another.

Criminal Law Commission Comments

Source: Ill. C. C., 1961, Chapter 38, § 5-1.

This section states the general principles that criminal liability is based on conduct and that the conduct may be that of another person.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This section and the companion section 45-2-302, MCA, describe those circumstances when liability may be based upon conduct of another. Both sections are taken with minor changes from the Illinois code.

Case Notes

Calculation of Restitution Reversed and Remanded — No Joint and Several Liability for Restitution for 11-Day Vandalism Spree When Youth Participated Only 2 Days: A youth pleaded guilty to participating in 2 nights of an 11-day vandalism spree. The judge ordered that he was jointly and severally liable for the amount of damage caused throughout the entire spree, which exceeded $70,000. The youth argued he should be ordered to pay restitution for only the damages caused during the 2 days instead because the state did not establish his accountability for the vandalism that occurred during the other 9 days of the spree. The state argued it did not have to establish his accountability under the criminal mischief statutes for each day of the spree. The youth appealed to the Supreme Court, which agreed with the youth that the state was required to prove his accountability for the acts of others. The Court reversed the District Court's order of restitution and remanded for a recalculation of restitution for the 2 days on which the youth participated in the acts of vandalism. In re B.W., 2014 MT 27, 373 Mont. 409, 318 P.3d 682.

Sufficient Evidence for Conviction for Deliberate Homicide by Accountability — Evidence of Underlying Crime Required: Doyle asserted that there was insufficient evidence to convict him of deliberate homicide by accountability and that the accountability statute violated due process by relieving the state of proving that an offense had been committed. The Supreme Court affirmed the conviction based on sufficient, corroborated, independent evidence that Doyle played an active role in the homicide. The court also noted that under the accountability statute, a person may be convicted although the other person claimed to have committed the offense has not been prosecuted or convicted, has been convicted of a different offense, is not amenable to justice, or has been acquitted, but the statute in no way violates due process by lessening the state's burden of proving that the underlying offense of deliberate homicide was committed. St. v. Doyle, 2007 MT 125, 337 M 308, 160 P3d 516 (2007).

Failure to Give Unsupported Accountability Jury Instruction Proper: Hall contended that the District Court erred in refusing to give an accountability instruction in Hall's trial for theft because certain evidence at the crime scene implicated that a witness was an accomplice in the crime, so the jury should have been instructed that the witness's testimony should be viewed with distrust. The Supreme Court disagreed. In this case, the accomplice instruction was inconsistent with Hall's theory of complete innocence, and the witness's testimony established no element of accountability. It is not proper to give an accountability instruction when it is not supported by the evidence and is inconsistent with a defendant's claim of innocence. St. v. Hall, 2003 MT 253, 317 M 356, 77 P3d 239 (2003).

Theory of Accountability Not Required to Be Set Forth in Information: Tower was arrested for sale of a dangerous drug. Over Tower's objection at trial, the jury was instructed on the issue of accountability under 45-2-302 and this section. Tower contended that in order to fulfill the purpose of the criminal laws of Montana, notice must be given in the information that the theory of accountability will be relied upon. The Supreme Court noted that 45-1-102 and the accountability statutes had been borrowed from the State of Illinois and that Illinois had not interpreted the accountability statutes to require that notice of the theory of accountability be included in the charging documents. Citing St. v. Zadick, 148 M 296, 419 P2d 749 (1966), the Supreme Court also noted that this interpretation was consistent with the previous law of accountability in Montana. St. v. Tower, 267 M 63, 881 P2d 1317, 51 St. Rep. 946 (1994), followed in St. v. Abe, 1998 MT 206, 290 M 393, 965 P2d 882, 55 St. Rep. 876 (1998), and St. v. Tellegen, 2013 MT 337, 372 Mont. 454, 314 P.3d 902.

Use of Jury Forms for Principal in Case of Accomplice: Defendant contended that he was denied due process because he was charged as an accomplice in aiding and abetting the crimes of robbery and theft, while he was tried as a principal and the jury verdict forms were those for a principal. The court found 45-2-301 to be dispositive. Under the instructions of the case, defendant was charged, tried, and convicted of being responsible or accountable for robbery and theft. The fact that the word "accountable" was not used on the verdict forms had no bearing on the case. St. v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983).

Sale of Marijuana — Purchaser Not Accomplice to Acts of Seller: Where the arresting officer found a bag of marijuana on the front seat of the defendant's car and the defendant was later convicted of possession of the drug and sale to a juvenile, the Supreme Court found that the juvenile to whom some of the marijuana was given by the defendant was not an accomplice of the defendant and that the juvenile's testimony therefore did not need corroboration. The defendant had failed to demonstrate that the juvenile was legally accountable for the defendant's possession. St. v. Godsey, 202 M 100, 656 P2d 811, 39 St. Rep. 2354 (1982), followed in St. v. Haskins, 269 M 202, 887 P2d 1189, 51 St. Rep. 1474 (1994), and overruled in part in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Systematic Series of Acts as Cause of Death: Defendant was convicted of deliberate homicide in the death of victim under 45-2-301 and 45-2-302. On appeal, the court found that the State did not attempt to prove that defendant struck the blow which killed victim. The State's case was that defendant was a major participant in a systematic series of acts which led to the death of victim. The State proved that defendant's conduct was a cause of death. St. v. Riley, 199 M 413, 649 P2d 1273, 39 St. Rep. 1491 (1982).

Proper Refusal of Proposed Instruction on Accountability: Defendant's proposed instruction on accountability that stated: "You are instructed that some evidence has been introduced tending to show that a person other than the defendant, Alfred Owens, is responsible for the crimes here charged. If, after a consideration of all the evidence, there remains in your minds a reasonable doubt as to who is responsible for the crimes, then it is your duty to acquit." was an incorrect statement of the law. It created the distinct impression that defendant could not be held responsible for the crimes charged if somebody else actually performed the offensive conduct and was therefore properly refused. The instruction given by the court in the language of 45-2-301 and 45-2-302 was a correct presentation of the law on accountability and a proper jury instruction. St. v. Owens, 182 M 338, 597 P2d 72 (1979).

Legal Accountability Omitted From Information: The court did not err in allowing the State to introduce the theory of legal accountability at trial even though the theory was not listed in the information. St. v. Oppelt, 176 M 499, 580 P2d 110 (1978).

Indictment and Information:

When a person is charged with aiding and abetting in the commission of a crime, proper practice is to charge the defendant under 45-2-301 through 45-2-303. St. v. Murphy, 174 M 307, 570 P2d 1103 (1977).

Where the facts of the case indicated that the defendant was not surprised or precluded from knowing the specific charges against him, failure to charge under those sections, although defendant was tried and convicted on "aiding and abetting" theory, was not reversible error. St. v. Murphy, 174 M 307, 570 P2d 1103 (1977).

This section, 45-2-302, and 45-2-303 were intended basically to continue existing Montana law as declared in 94-6423, R.C.M. 1947 (since repealed), and St. v. Zadick, 148 M 296, 419 P2d 749 (1966). St. v. Murphy, 174 M 307, 570 P2d 1103 (1977).

Testimony of Witness — Requirement of Corroboration: Where a witness, even though not charged, is legally accountable for the conduct of the defendant, the witness' testimony must be corroborated according to 46-16-213. Such corroboration can be circumstantial but must tend to connect the defendant with the commission of the crime. St. v. Fitzpatrick, 174 M 174, 569 P2d 383 (1977); St. v. Orsborn, 170 M 480, 555 P2d 509 (1976).

In General: It is the general rule that in order to impose accountability on a defendant for the conduct of another, the State must prove beyond a reasonable doubt that the defendant facilitated commission of the offense by another with the intent that such an offense be committed. People v. Brumbeloe, 97 Ill. App.2d 370, 240 N.E.2d 150 (1968); People v. Washington, 121 Ill. App.2d 174, 257 N.E.2d 190, 194 (1970). Whether a person is accountable for the conduct of another and guilty of an offense charged may be proved by circumstantial evidence. People v. Manley, 104 Ill. App.2d 271, 244 N.E.2d 373 (1971).

45-2-302. When accountability exists.

Criminal Law Commission Comments

Source: Ill. C.C. 1961, Chapter 38, § 5-2.

This section is a statement of principles of accessoryship although that term is not employed in the code. It provides a much fuller statement of applicable law in this important field and, in some respects, alters and modifies the old law.

The former statutory provisions R.C.M. 1947, sections 94-6423 and 94-6425 had as their primary purpose the elimination of the elaborate common law distinctions between principals in the first degree, principals in the second degree, and the accessories before the fact. Section 94-2-107 [R.C.M. 1947, now 45-2-302, MCA] accepts the approach of the existing law and endeavors to develop it in full and systematic fashion.

Subsection (2) makes clear a person may be held legally accountable in circumstances not otherwise included in section 94-2-107 [R.C.M. 1947, now 45-2-302, MCA], where the particular statute so provides. In such case the particular provision prevails. An example of such a statute might be one imposing vicarious criminal liability on a tavern owner for the act of an employee resulting in sale of liquor to a minor.

Subsection (3) is a comprehensive statement of liability based on counseling, aiding and abetting which includes those situations that, at common law, involve the liability of principals in the second degree and accessories before the fact. Liability under this subsection requires proof of a "purpose to promote or facilitate . . . commission of the substantive offense." Moreover, "conspiracy" between the actor and defendant is not of itself made the basis of accountability for the actor's conduct, although the acts of conspiring may in many cases satisfy the particular requirements of this subsection. (See, e.g., Pinkerton v. United States, 328 US 640, 90 L Ed 1489, 66 S Ct 1180 (1946), Commentary, A.L.I., Model Penal Code Tent, Draft No. 1, 1953, 20-26.)

Subsection (3)(a) states that the person who is a "victim" of the criminal act does not, unless the particular statute so states, share the guilt of the actor. This is true even though the person is a "willing" victim and counseled commission of the crime. Thus, the victim of a blackmail plot who pays over money, even though he "aids" the commission of the crime, or the girl under age of consent in statutory rape, even though she solicited the criminal act, is not deemed guilty of the substantive offense. Subsection (3)(a) does not prevent the extension of criminal liability to the victim if the particular statute so provides. Thus, if it be decided that a bribe-taker should be treated as guilty of bribery, this can be provided in the bribery section. All that is done in these provisions is to state the rule that persons falling under subsection (3)(a) are not guilty if there is no specific provision to the contrary.

Subsection (3)(b) poses the question: What can a person do who has aided and abetted in a criminal plot, to relieve himself of liability for the substantive crime? It appears desirable to provide some escape route, if for no other reason than to provide an inducement for disclosure of crimes before they occur. The problem here should be distinguished from the question in the law of conspiracy as to what actions are required for a person to dissociate himself from a conspiratorial agreement.

To obtain release from criminal liability the person must terminate his affirmative efforts to facilitate commission of the crime. In addition, he may be relieved if he is able wholly to deprive his contributions to the commission of an offense of their effectiveness. If a timely warning is given the police, the person should be relieved even if through negligence or act of God the police fail to prevent the crime. Finally, a general clause "otherwise makes proper effort to prevent the commission of the offense" is included. This will require interpretation according to the facts of the individual case.

This section should not conflict with the substance of Montana case law that the knowledge that a crime is about to be committed does not make the accused an accomplice (State v. Mercer, 114 M 142, 133 P2d 358 (1943)) and that one who knows a felony has been committed, but does nothing to conceal it or harbor or protect the offender, is not an accessory to the commission of that felony (State v. McComas, 85 M 428, 278 P 993 (1929)).

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: While former sections 94-6424 and 94-6425, R.C.M. 1947, allowed an indictment to be brought against an accessory as though he were a principal, older provisions of the Code retained common-law distinctions between persons who aided and abetted in the commission of crimes. This section replaces all prior law regarding accessories. Under this section, any person who assists in the commission of a crime, either before or during the occurrence, other than the victim, is liable as a principal offender. One who aids an offender after a crime has been committed would be punished under the Compounding a Felony law (MCA, 45-7-305). It should be noted that a person who aids in the preparation or perpetration of an offense also may be prosecuted for one of the Inchoate Offenses (MCA, 45-4-101 through 45-4-103), but the new section on Multiple Prosecution (MCA, 46-11-501) [now repealed, but see 46-11-410] prohibits a conviction for both a principal and an associated inchoate offense. The wording for this section is taken without substantial change from the Illinois source.

Case Notes

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GENERAL

Getaway Driver Accountable for Robbery — Specificity of Charging Documents — Jury Instructions: The defendant was convicted of accountability for robbery after serving as the getaway driver. On appeal, the defendant argued that he was never specifically charged with and convicted of a subelement of accountability for robbery, that the jury instruction was improper because it did not require the jury to reach unanimity with regard to a specific element of robbery, and that the jury instruction regarding a getaway driver was inaccurate. The Supreme Court disagreed, holding that the charging documents and jury instruction provided accountability for any of the subelements of the crime and there was ample evidence that each subelement was satisfied, that the defendant failed to object to the robbery instruction's lack of a unanimity requirement and a plain error review was not warranted, and that the getaway driver jury instruction gave a full and fair explanation of the law. St. v. Hanna, 2014 MT 346, 377 Mont. 418, 341 P.3d 629.

Ex-Girlfriend's Testimony Not Subject to Accomplice Testimony Corroboration Rule: Grace argued that the testimony of his ex-girlfriend that he had confessed to her that he robbed a bank was inadmissible under the accomplice testimony corroboration rule. The Supreme Court held that the ex-girlfriend's testimony was admissible because Grace's ex-girlfriend had not met him until sometime after he committed the robbery and therefore she could not have helped him in the planning or commission of the crime as required by this section for criminal accountability. St. v. Grace, 2001 MT 22, 304 M 144, 18 P3d 1008 (2001).

Requirements for Application of Accomplice Testimony Corroboration Rule: Blackcrow was charged with robbery and aggravated burglary. At the close of the state's case, Blackcrow moved for directed verdict on grounds that the only evidence presented at trial that connected Blackcrow to the charged offenses was uncorroborated accomplice testimony, which was insufficient to support a conviction. There are two requirements that must be met in order for the application of 46-16-213 to justify a directed verdict for acquittal: (1) the witness whose testimony is being offered must be an accomplice and legally accountable for the defendant's conduct; and (2) the accomplice's testimony must be uncorroborated by additional evidence. Whether a person may be held legally accountable for the conduct of another and so qualify as an accomplice for purposes of the accomplice testimony rule is, unless undisputed by the parties, a matter of fact to be determined by the jury. In this case, the fact that there was conflicting testimony on the issue of a witness's legal accountability further bolstered the conclusion that the issue was properly within the province of the jury. Denial of the motion for a directed verdict was therefore proper. St. v. Blackcrow, 1999 MT 44, 293 M 374, 975 P2d 1253, 56 St. Rep. 194 (1999).

Petition for Postconviction Relief Denied — No Due Process Violation — No Abuse of Discretion in Refusing New Trial Because All Factors Not Fulfilled — No New Trial: Sullivan, the director of the Parks and Recreation Department for the city of Great Falls, was convicted of three counts of felony theft of various city recreational fees and one count of tampering with public records. Later, the employee who replaced him found in a budget file an envelope containing $1,300 of city recreation funds. Sullivan brought a petition for postconviction relief, arguing that his constitutional rights under Brady v. Md., 373 US 83 (1963) (granting postconviction relief on the basis of evidence suppressed by the prosecution), had been violated and that the newly discovered evidence entitled him to a new trial. The Supreme Court held Brady inapplicable because the new evidence was not known to the prosecution at the time of the trial and therefore could not have been wrongfully withheld. In connection with the Brady claim, the Supreme Court also noted that Sullivan had not attached an affidavit or other evidence in support of his allegations, as required by 46-21-104, and concluded that Sullivan's assertions were not sufficient under 46-21-201 to allow him to conduct discovery or to entitle him to an evidentiary hearing. Because theft is not an element of tampering under 45-7-208 and this section, the Supreme Court concluded that Sullivan's conviction for tampering by making another employee alter official city records would not have been changed had the newly discovered evidence been available at trial. The Supreme Court also concluded that Sullivan had not fulfilled all of the six factors discussed in St. v. Cline, 275 M 46, 909 P2d 1171 (1996), required for grant of a new trial based upon newly discovered evidence because he had not shown that the new evidence would probably produce a different result at trial and that the new evidence was not merely cumulative evidence. Concerning Sullivan's final claim, the Supreme Court noted that in St. v. Perry, 232 M 455, 758 P2d 268 (1988), the defendant obtained newly discovered evidence but that neither a motion for a new trial nor postconviction relief was available to the defendant, so the Supreme Court created a "window" for review of the claim that otherwise would have been procedurally barred. The Supreme Court contrasted Perry and pointed out that in Sullivan's case, he was not barred from bringing a petition for postconviction relief. For all of these reasons, the Supreme Court affirmed the District Court's denial for postconviction relief and denial of Sullivan's motion for a new trial. St. v. Sullivan, 285 M 235, 948 P2d 215, 54 St. Rep. 1128 (1997).

Drug Sale — Completion of Transaction by Unanticipated Seller: The defendant was approached by undercover officers and agreed to set up a sale of drugs to them. At the time of the transaction, another individual showed up with the drugs rather than the person the defendant had told the officers was going to sell them the drugs. The defendant argued that he could not have had the requisite intent to abet the individual who had sold the drugs because he did not even know that person was going to appear. The Supreme Court ruled that the defendant could be convicted of the crime because the necessary intent was his intent to help the undercover officers purchase illegal drugs, not the intent to assist a particular individual in selling the drugs. St. v. Downing, 240 M 215, 783 P2d 412, 46 St. Rep. 2065 (1989), distinguished in St. v. Flatley, 2000 MT 295, 302 M 314, 14 P3d 1195, 57 St. Rep. 1249 (2000).

Notification of Authorities — No Accountability: A person who was solicited for participation in a crime and, upon learning of the specifics of the intended criminal act, notified authorities and prevented the crime from occurring was not accountable for any crime and was not an accomplice to the crime of solicitation. St. v. Morse, 229 M 222, 746 P2d 108, 44 St. Rep. 1919 (1987).

Witness Found Not to Be Accomplice for Purposes of Corroboration Requirement:

There was sufficient evidence in the record to show that neither of two state witnesses was an accomplice to make the question one for the jury. As the jury determined that neither witness had the requisite criminal intent, their corroborative testimony was admissible. St. v. Gonyea, 225 M 56, 730 P2d 424, 44 St. Rep. 39 (1987), followed in St. v. Blackcrow, 1999 MT 44, 293 M 374, 975 P2d 1253, 56 St. Rep. 194 (1999).

Defendant claimed a witness had been his accomplice and as such his testimony could not convict him or support his conviction unless corroborated by independent evidence. The Montana Supreme Court found the alleged accomplice did not solicit, advise, or encourage anyone in the planning or commission of the robbery in question. He did not ever agree to aid or attempt to aid anyone in such planning or commission. His statements about robbing the store were made at a remote time, and there is no concrete connection between those statements and the robbery. Since the witness was not an accomplice, his testimony stands on the same basis as any other witness'. He need not be corroborated, and his credibility is for the jury to decide. St. v. Bad Horse, 185 M 507, 605 P2d 1113 (1980).

Purchaser of Illegal Drugs Not Accomplice of Seller: On the issue of whether a purchaser is an accomplice to a seller of dangerous drugs thereby requiring independent corroboration of the purchaser's testimony to sustain the seller's conviction, the Supreme Court noted a definite distinction between a seller and buyer. Because the parties do not share the same criminal purpose as required for accountability under this section, the purchaser may not be considered an accomplice of the seller even though their separate acts may result in a single transaction. St. v. Stokoe, 224 M 461, 730 P2d 415, 43 St. Rep. 2336 (1986), followed in St. v. Lyons, 254 M 360, 838 P2d 397, 49 St. Rep. 730 (1992).

No Separate Offense of Accountability: The youth was charged with criminal homicide under the accountability statute. The Supreme Court rejected the youth's argument that the Youth Court could not transfer the case to the adult court because he was not charged under 45-5-101 (now repealed) (criminal homicide). The Supreme Court stated that there is no separate offense of accountability, only the underlying offense which has been physically committed by another but for which the youth is equally responsible. In re B.D.C., 211 M 216, 687 P2d 655, 41 St. Rep. 1318 (1984), followed in St. v. Gollehon, 262 M 1, 864 P2d 249, 50 St. Rep. 1250 (1993), St. v. Turner, 262 M 39, 864 P2d 235, 50 St. Rep. 1267 (1993), and St. v. Hatten, 1999 MT 298, 297 M 127, 991 P2d 939, 56 St. Rep. 1198 (1999).

Accomplice — Suspicion That Another May Commit a Crime: The defendant was convicted of attempted deliberate homicide. On appeal, she contended that four witnesses for the state were accomplices and that their testimony had not been corroborated. The court held that two of the witnesses were arguably accomplices while the other two were clearly not. The mere fact that someone suspects that another may commit a crime does not make him an accomplice. There was no knowing, voluntary behavior necessary to make the witnesses accomplices; therefore, corroboration was not required. St. v. Nordahl, 208 M 513, 679 P2d 241, 41 St. Rep. 502 (1984), followed in St. v. Johnston, 267 M 474, 885 P2d 402, 51 St. Rep. 1078 (1994).

Effecting Commission of Crime by Another:

Where a defendant was present when his companions fatally beat another man and did not take part in the beating but did little to restrain his companions, the defendant was not criminally accountable for his companions' actions under this section. State ex rel. Murphy v. McKinnon, 171 M 120, 556 P2d 906 (1976), followed in St. v. Flatley, 2000 MT 295, 302 M 314, 14 P3d 1195, 57 St. Rep. 1249 (2000).

One is legally accountable for a crime committed by another when he, with the intent to facilitate the commission thereof, effects the commission of the crime by another. People v. Nelson, 33 Ill.2d 48, 210 N.E.2d 212, 214, certiorari denied 383 US 918 (1965). In applying this general rule to specific factual circumstances, it has been held that if a defendant knowingly drove a getaway car then he could be held legally responsible as a principal for the crime of robbery. People v. Richardson, 132 Ill. App.2d 712, 270 N.E.2d 568, 570 (1971). However, a defendant who did not strike the complaining witness or make any physical contact but merely watched while another codefendant struck the complaining witness could not be convicted as a principal in the battery. People v. Bowman, 132 Ill. App.2d 744, 270 N.E.2d 285, 287 (1971).

Construction and Application: Under this section it has been held that the fact that one codefendant who was jointly indicted for a crime and found not guilty by the trial court did not render it improper to find the other codefendant guilty, even though both defendants were identified as having participated in the crime, where evidence as to the two codefendants was not identical. People v. Jones, 132 Ill. App.2d 623, 270 N.E.2d 288, 290 (1971).

Solicitation: Under the Illinois Code (and under the new Montana Criminal Code) solicitation is a separate and distinct offense. It is punishable and triable as a distinct offense, and acquittal of the choate offense and an attempt to commit the choate offense do not operate as a bar to conviction under charges of solicitation. See People v. Hairston, 46 Ill.2d 348, 263 N.E.2d 840, 841 (1970).

Punishment as Principal:

As provided by this section there is no longer a distinction between accessory before the fact and principal. Both offenders may be punished in the same manner. See People v. Clements, 28 Ill.2d 534, 192 N.E.2d 923, 926 (1963).

Under 94-6423, R.C.M. 1947 (a forerunner of this section), the distinction between accessories before the fact and principals was abrogated and all were treated as principals. St. v. DeWolfe, 29 M 415, 74 P 1084 (1904), overruled on other grounds in St. v. Penna, 35 M 535, 90 P 787 (1907).

Entrapment: Where a stock detective solicited one to assist him in the larceny of cattle for the purpose of convicting another of the crime and the person so solicited on arrival at the scene of the intended taking declined to participate, he was not a principal to the crime, and hence the one upon whom the crime was sought to be fastened could not, under 94-6423, R.C.M. 1947 (a forerunner of this section), have become his accessory. St. v. Neely, 90 M 199, 300 P 561 (1931), distinguished in St. v. O'Donnell, 138 M 123, 354 P2d 1105 (1960).

Constitutionality: Section 94-6423, R.C.M. 1947 (a forerunner of this section), which abrogated the distinction between an accessory before the fact and the principal did not violate constitutional provision guaranteeing to an accused the right to demand the nature and cause of the accusation. St. v. Geddes, 22 M 68, 55 P 919 (1899).

COMMON DESIGN

Act of One Is Act of All: When two or more persons have a common design to accomplish an unlawful purpose, the act of one is the act of all and all are guilty of whatever crime is committed, even if circumstances show that one of the participants was not actively involved in assisting in the commission of the offense. People v. Smith, 8 Ill. App.3d 270, 290 N.E.2d 261, 263 (1972); People v. Hubbard, 4 Ill. App.3d, 729, 281 N.E.2d 767 (1972); People v. Harris, 105 Ill. App.2d 305, 245 N.E.2d 80, 85 (1969). See also People v. Walton, 6 Ill. App.3d 17, 284 N.E.2d 508 (1972); People v. Hairston, 46 Ill. App.2d 348, 263 N.E.2d 840 (1970), certiorari denied 402 US 972 (1971); People v. Morris, 1 Ill. App.3d 566, 274 N.E.2d 898 (1971); People v. Bracey, 110 Ill. App.2d 329, 249 N.E.2d 224 (1969); People v. Novak, 84 Ill. App.2d 276, 228 N.E.2d 139 (1967); People v. Chavis, 79 Ill. App.2d 10, 223 N.E.2d 196 (1967).

Circumstantial Proof Allowed: Illinois courts have held that the proof of common purpose need not be supported by words of agreement or by direct evidence but can be drawn from the circumstances surrounding the commission of an act by a group of individuals. People v. Hubbard, 4 Ill. App.3d 729, 281 N.E.2d 767, 770 (1972); People v. Roldan, 100 Ill. App.2d 81, 241 N.E.2d 591 (1968); People v. Norvak, 45 Ill.2d 158, 258 N.E.2d 313 (1970); People v. Williams, 104 Ill. App.2d 329, 244 N.E.2d 347 (1968); People v. Johnson, 35 Ill.2d 624, 221 N.E.2d 662 (1966).

Application of General Rules: In applying general rules to factual circumstances the Illinois courts have ruled that evidence in a murder prosecution of codefendants who returned to a tavern with weapons which they then held on the patrons in the tavern while a fatal blow was inflicted was sufficient to show common design among the defendants. People v. Spagnola, 123 Ill. App.2d 171, 260 N.E.2d 20, 27 (1970), certiorari denied 402 US 911 (1971). Similarly, it was held that evidence that a person voluntarily attached himself to a group which was bent on illegal activities with the knowledge of its design supported an inference that the defendant shared the common purpose and thus sustained a conviction as a principal for the crime committed by the other members of the group in furtherance of the venture. People v. Johnson, 35 Ill.2d 624, 221 N.E.2d 662, 663 (1966).

MERE PRESENCE

Circumstantial Evidence Establishing Defendant's Presence at Crime Scene When Victim Only Other Witness Sufficient for Conviction: Southern was charged with two counts of kidnapping, one count of burglary, one count of theft, and five counts of sexual intercourse without consent. Southern contended that the only evidence connecting him to the crimes, which included DNA and other physical evidence, was circumstantial and that even though the evidence placed him at the crime scene, it did not establish that he committed the crimes. The Supreme Court noted that under State ex rel. Murphy v. McKinnon, 171 M 120, 556 P2d 906 (1976), presence at a crime scene is insufficient, in itself, to prove criminal liability. However, this evidence not only placed Southern at the crime scene, but placed him there when the only people present were the victim and her attacker. Although the evidence was circumstantial, it was of sufficient quality and quantity that a reasonable jury could find Southern guilty. Judgment was affirmed. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999). The Southern standard that circumstantial evidence by itself was sufficient to sustain a conviction when the evidence was of sufficient quality and quantity that a reasonable jury could find defendant guilty was applied to a drug possession case in St. v. Hill, 2008 MT 260, 345 M 95, 189 P3d 1201 (2008).

Active Part in Crime Not Required to Establish Liability: Corroborative evidence did not create a prima facie case against defendant, but it tended to connect him with the charged crimes by demonstrating his presence at the crime scenes. Although the mere presence at the scene of a crime is not enough to establish accountability, the accused need not take an active part in any overt criminal acts to be adjudged criminally liable for the acts. St. v. Miller, 231 M 497, 757 P2d 1275, 45 St. Rep. 790 (1988), citing St. v. Bradford, 210 M 130, 683 P2d 924, 41 St. Rep. 962 (1984), and St. v. Hart, 191 M 375, 625 P2d 21, 38 St. Rep. 133 (1981), and followed in St. v. Lantis, 1998 MT 172, 289 M 480, 962 P2d 1169, 55 St. Rep. 694 (1998). See also St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Negative Acquiescence Insufficient:

More than mere presence at the scene of a crime is necessary to establish criminal responsibility. State ex rel. Murphy v. McKinnon, 171 M 120, 556 P2d 906 (1976), followed in St. v. Johnston, 267 M 474, 885 P2d 402, 51 St. Rep. 1078 (1994), St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999), and St. v. Flatley, 2000 MT 295, 302 M 314, 14 P3d 1195, 57 St. Rep. 1249 (2000). See also St. v. Davis, 2012 MT 129, 365 Mont. 259, 279 P.3d 162, in which the Supreme Court held that the defendant's presence during a failed transaction for methamphetamine days before the informant actually purchased the drug from another party was insufficient evidence for a rational trier of fact to find the essential elements of criminal distribution of dangerous drugs by accountability.

It is a settled rule that mere presence at the scene of a crime or "negative acquiescence" is insufficient to make a defendant accountable for the acts of another. However, one may aid and abet without actively participating in the overt acts, and presence at the scene of the crime without disapproving or approving of the commission of the crime is a factor which may be considered with other circumstances in determining whether the defendant aided and abetted in the commission of the offense. People v. Barnes, 2 Ill. App.3d 461, 276 N.E.2d 509, 511 (1971); People v. Woodell, 1 Ill. App.3d 257, 274 N.E.2d 105 (1971); People v. Winchell, 100 Ill. App.2d 149, 241 N.E.2d 200 (1968); People v. Bracken, 68 Ill. App.2d 466, 216 N.E.2d 176 (1966); People v. Richardson, 32 Ill.2d 472, 207 N.E.2d 478 (1965), certiorari denied 384 US 1021 (1966); People v. Harris, 105 Ill. App.2d 305, 245 N.E.2d 80, 85 (1969); People v. Washington, 26 Ill.2d 207, 186 N.E.2d 259 (1969); People v. Cole, 30 Ill.2d 375, 196 N.E.2d 691 (1964); People v. Tillman, 130 Ill. App.2d 743, 265 N.E.2d 904, 909 (1971); People v. Washington, 121 Ill. App.2d 174, 257 N.E.2d 190 (1970); People v. Ramirez, 93 Ill. App.2d 404, 236 N.E.2d 284 (1968).

State to Show Affirmative Conduct: While negative acquiescence may be a factor which may be considered in determination of guilt, it is generally held that to prove common design, aiding, abetting, or assisting, the State must show some conduct of an affirmative nature. People v. Williams, 104 Ill. App.2d 329, 244 N.E.2d 347, 351 (1968).

Knowledge: The mere knowledge of a person that a crime was about to be committed did not make him an accomplice; nor was the fact that one charged with receiving stolen property on prior occasions may have purchased such property sufficient to make the receiver an accomplice in the particular theft or give him the knowledge that it was to be committed. St. v. Mercer, 114 M 142, 133 P2d 358 (1943).

Duty: Mere presence at the commission of a crime does not render one an accomplice unless under the circumstances he had a duty to interfere. St. v. McComas, 85 M 428, 278 P 993 (1929).

Acquiescence by Wife: Acquiescence by wife and her failure to protest when her husband unlawfully sold whiskey in her presence in their home were not enough to make her guilty as a principal under 94-204, R.C.M. 1947 (repealed in 1973). St. v. Cornish, 73 M 205, 235 P 702 (1925).

WITHDRAWAL FROM THE CRIME

Quiet Withdrawal of Perpetrator Insufficient: One who encourages the commission of an unlawful act cannot escape responsibility for that act by quietly withdrawing from the scene. To be timely, his withdrawal must be sufficient to give the other coconspirators reasonable opportunity, if they desire, to follow the withdrawing person's example and refrain from further action before the crime is committed. Trial court must be able to say that the accused had wholly and effectively detached himself from the criminal enterprise. People v. Lacey, 49 Ill. App.2d 301, 200 N.E.2d 11, 14 (1964).

ACCOUNTABILITY FOR SPECIFIC OFFENSES

Getaway Driver Accountable for Robbery — Specificity of Charging Documents — Jury Instructions: The defendant was convicted of accountability for robbery after serving as the getaway driver. On appeal, the defendant argued that he was never specifically charged with and convicted of a subelement of accountability for robbery, that the jury instruction was improper because it did not require the jury to reach unanimity with regard to a specific element of robbery, and that the jury instruction regarding a getaway driver was inaccurate. The Supreme Court disagreed, holding that the charging documents and jury instruction provided accountability for any of the subelements of the crime and there was ample evidence that each subelement was satisfied, that the defendant failed to object to the robbery instruction's lack of a unanimity requirement and a plain error review was not warranted, and that the getaway driver jury instruction gave a full and fair explanation of the law. St. v. Hanna, 2014 MT 346, 377 Mont. 418, 341 P.3d 629.

Calculation of Restitution Reversed and Remanded — No Joint and Several Liability for Restitution for 11-Day Vandalism Spree When Youth Participated Only 2 Days: A youth pleaded guilty to participating in 2 nights of an 11-day vandalism spree. The judge ordered that he was jointly and severally liable for the amount of damage caused throughout the entire spree, which exceeded $70,000. The youth argued he should be ordered to pay restitution for only the damages caused during the 2 days instead because the state did not establish his accountability for the vandalism that occurred during the other 9 days of the spree. The state argued it did not have to establish his accountability under the criminal mischief statutes for each day of the spree. The youth appealed to the Supreme Court, which agreed with the youth that the state was required to prove his accountability for the acts of others. The Court reversed the District Court's order of restitution and remanded for a recalculation of restitution for the 2 days on which the youth participated in the acts of vandalism. In re B.W., 2014 MT 27, 373 Mont. 409, 318 P.3d 682.

Sufficient Evidence of Felony Criminal Mischief by Accountability — Denial of Directed Verdict Proper: Maetche had a rental contract for a mobile home and gave the owner 2 weeks' notice of the intent to move out. During that 2-week period, the home sustained over $11,000 in damages. Maetche's husband confessed to causing the damage, but Maetche was charged with felony criminal mischief by accountability. At the close of the state's case, Maetche moved for a directed verdict, asserting that the state failed to present any evidence that, either before or during the damage, Maetche had "solicited, aided, abetted, agreed, or attempted to aid" in committing the damage and thus could not be held legally accountable. The District Court denied the motion and found Maetche guilty, and on appeal, the Supreme Court affirmed. Circumstantial evidence placed Maetche at the crime scene while the damage was occurring, and an eyewitness observed Maetche removing a washer and dryer from the home, thereby contributing to the damage. This evidence, combined with direct evidence of the purposeful nature of the destruction, was sufficient to permit a rational trier of fact to conclude that Maetche was criminally accountable for other destruction to the home and thus guilty of criminal mischief beyond a reasonable doubt and provided a circumstantial basis for a determination that Maetche was also involved in destruction of other parts of the home as well. St. v. Maetche, 2008 MT 184, 343 M 464, 185 P3d 980 (2008), distinguishing St. v. Johnston, 267 M 474, 885 P2d 402 (1994), and St. v. Cochran, 1998 MT 138, 290 M 1, 964 P2d 707 (1998).

Criminal Possession of Dangerous Drugs, but Not Possession of Precursors to Dangerous Drugs, Considered Lesser Included Offense of Criminal Production or Manufacture of Dangerous Drugs by Accountability: Becker was convicted of criminal possession of dangerous drugs, accountability for criminal production or manufacture of dangerous drugs, and criminal possession of precursors to dangerous drugs. However, because the production or manufacture of dangerous drugs cannot be a criminal act until the drug has been created, the state had to first prove that Becker or one of his codefendants possessed drugs in order to convict Becker on the charge of producing or manufacturing those same drugs. Read together, 46-1-202(9)(a) and 46-11-410(2)(a) barred Becker's conviction for both criminal possession of dangerous drugs and accountability for criminal production or manufacture of dangerous drugs because criminal possession is a lesser included offense of criminal production or manufacture of dangerous drugs. However, criminal possession of precursors to dangerous drugs is not a lesser included offense of accountability for criminal production or manufacture of dangerous drugs. Thus, the Supreme Court reversed the criminal possession conviction and ordered resentencing on only the criminal possession of precursors and accountability for criminal production or manufacture. St. v. Becker, 2005 MT 75, 326 M 364, 110 P3d 1 (2005). See also St. v. Peterson, 227 M 511, 744 P2d 870 (1987).

Statute Prohibiting Impersonation of Public Servant Not Unconstitutionally Vague: In connection with his activities with the Montana "Freemen", Clay Taylor held himself out to be a Garfield County Justice of the Peace, signing numerous documents with that title, and was charged with impersonating a public servant. His wife, Karen, aided Clay in the offense, and she was charged with impersonating a public servant by accountability. Both were convicted and appealed on grounds that 45-7-209 requires proof that an actual person was impersonated, claiming that otherwise the section is unconstitutionally vague. Presuming pursuant to 1-2-101 that the statute is constitutional, the Supreme Court disagreed, affirming the conviction. The statute clearly sets forth that anyone who pretends to hold a position in public service with the purpose to induce others to submit to the pretended official authority or act in reliance on that pretense is within the proscribed conduct. It is not necessary that a person falsely pretend to hold a specific position in public service. The statutory language is sufficient to give a person of ordinary intelligence fair notice of the conduct that is forbidden and is not unconstitutionally vague. The Taylors failed to meet the burden of proving vagueness or unconstitutionality beyond a reasonable doubt, so any doubt was resolved in favor of the statute. St. v. Taylor, 2000 MT 202, 300 M 499, 5 P3d 1019, 57 St. Rep. 794 (2000).

Sufficient Evidence to Prove Accountability in Aiding Impersonation of a Public Servant: In connection with his activities with the Montana "Freemen", Clay Taylor held himself out to be a Garfield County Justice of the Peace, signing numerous documents with that title, and was charged with impersonating a public servant. His wife, Karen, aided Clay in the offense, also signing several documents as "Jurat in Law", including a document purporting to set forth Clay's appointment as Justice of the Peace, another purporting to remove the Garfield Board of County Commissioners, and another purporting to be a summons. She was charged with and convicted of impersonating a public servant by accountability. Karen contended on appeal that evidence was insufficient to prove her accountability. The Supreme Court affirmed, citing her signature on the documents and her presence during public Freemen activities as sufficient proof of her purpose to facilitate Clay's impersonation of a Justice of the Peace. St. v. Taylor, 2000 MT 202, 300 M 499, 5 P3d 1019, 57 St. Rep. 794 (2000).

Liability of Tavern Owner for Foreseeable Injury-Producing Conduct by Visibly Intoxicated Patron: Wells was served alcohol at the Town Tavern immediately prior to driving a car through the wall of the tavern, injuring another patron. The patron sued the tavern owner, Mortensen, under the dram shop law in 27-1-710, which provides tavern owner liability for accidents arising from an event involving a visibly intoxicated patron. In defense, Mortensen contended that the injuries to the patron resulted from an intervening, superseding, new, and independent cause that was not reasonably foreseeable, thereby severing the chain of causation from Mortensen's negligent act. Wells was in a wheelchair and appeared to be unable to operate the wheelchair himself. Causation requires a determination, ordinarily by the factfinder, that a defendant's conduct helped produce the injury and that the injury would not have occurred without it. In cases involving alleged intervening causes, foreseeability is properly considered with respect to causation. An intervening cause is one in which a force came into motion at the time of the defendant's negligent act and combined with the negligent act to cause the injury to the plaintiff and is also determined by foreseeability. The consequences, including criminal conduct, of serving alcohol to a visibly intoxicated person are reasonably foreseeable precisely because of the causal relationship between serving alcohol and drunken conduct. When a person consumes alcohol, subsequent driving resulting in an injury-producing accident is an intervening act, but it is an act that is reasonably foreseeable as a matter of law. Thus, the affirmative defense of an intervening, superseding cause did not apply. Cusenbary v. Mortensen, 1999 MT 221, 296 M 25, 987 P2d 351, 56 St. Rep. 864 (1999), following Nehring v. LaCounte, 219 M 462, 712 P2d 1329, 43 St. Rep. 93 (1986), and Jevning v. Skyline Bar, 223 M 422, 726 P2d 326, 43 St. Rep. 1845 (1986), and distinguishing USF&G v. Camp, 253 M 64, 831 P2d 586, 49 St. Rep. 372 (1992), King v. St., 259 M 393, 856 P2d 954, 50 St. Rep. 848 (1993), and Estate of Strever v. Cline, 278 M 165, 924 P2d 666, 53 St. Rep. 576 (1996). See also Palsgraf v. Long Island RR, 162 NE 99 (1928), and Deeds v. U.S., 306 F. Supp. 348 (D.C. Mont. 1969).

Direct Interference With Arrest Attempt Not Required to Constitute Obstruction of Justice: Section 45-7-303 does not require direct interference with an arrest attempt before obstruction of justice can occur. As long as the offender is liable to be arrested and the aid received constitutes money, transportation, weapon, disguise, or other means of avoiding discovery or apprehension, obstruction of justice can occur, notwithstanding the lack of any attempt by law enforcement officials to exercise an arrest warrant. In the present case, although there was conflicting testimony whether defendant was ignorant of the existence of a warrant at the time that he assisted a wanted person in escaping to another jurisdiction, a plethora of circumstantial evidence, coupled with defendant's actions, was sufficient for a rational trier of fact to find that defendant knew of the arrest warrant and acted with the purpose of promoting or facilitating obstruction of justice. St. v. Stucker, 1999 MT 14, 293 M 123, 973 P2d 835, 56 St. Rep. 65 (1999).

Parking Lot Gun Battle Participant Improperly Charged With Accountability for Death of Passenger: During a parking lot gun battle between Keyes and LaFromboise, a passenger in LaFromboise's vehicle was killed. Keyes was charged alternatively with deliberate homicide (Count I) under the felony-murder rule, deliberate homicide by accountability (Count II) under 45-5-102 and this section and deliberate homicide by accountability (Count III) under the alternative theory that an unknown person was in Keyes' vehicle and fired the shots that killed the passenger. After the District Court denied Keyes' motion to dismiss Count II, Keyes filed an application with the Supreme Court requesting supervisory control and assumption of supervisory jurisdiction as to whether Count II states an offense under Montana law. The Supreme Court dismissed Count II, ruling that it does not state an offense under Montana law. In its belief that both Keyes and LaFromboise caused the death of the passenger, the state did not charge Keyes with deliberate homicide under the felony-murder rule for causing the death of the passenger while in the course of committing a felony of attempted deliberate homicide against LaFromboise. Rather, the state, believing that both were responsible for the death, attempted to charge both with accountability without having to declare either a victim. In doing so, the state failed to charge Keyes with an offense under Montana law, but created an offense by combining elements from the accountability statute and the felony-murder statute. Since the accountability statute does not provide for transferred intent, Count II must be dismissed because the state cannot create a new offense by grafting elements of the felony-murder rule to the accountability statute. State ex rel. Keyes v. District Court, 1998 MT 34, 288 M 27, 955 P2d 639, 55 St. Rep. 125 (1998).

Sale of Marijuana — Conviction by Accountability Upheld: Long, an agent of the state Criminal Investigation Bureau who posed as a Butte resident, made several purchases of marijuana from Skarland. Tower, a friend of Skarland, was also present during the purchases and assisted Skarland. Tower maintained that he could not be convicted by accountability of sale of a dangerous drug because his participation in the sale was minimal. The Supreme Court found that Tower understood the purposes of Skarland's meetings with Agent Long, passed samples of marijuana between Skarland and Long, counted the money Long paid for the marijuana, carried packages of marijuana, and accompanied Skarland in the delivery of the marijuana. Based upon this evidence, the Supreme Court found that a rational trier of fact could have found Tower guilty of criminal sale of a dangerous drug. St. v. Tower, 267 M 63, 881 P2d 1317, 51 St. Rep. 946 (1994).

Homicide:

Appellant, charged with deliberate homicide through accountability, argued that the record did not contain sufficient evidence to prove that he actually shot and killed the victim. However, under 45-5-102, the felony-murder rule, conviction was warranted when evidence overwhelmingly indicated appellant either did the shooting or aided or abetted another in doing so. St. v. Duncan, 247 M 232, 805 P2d 1387, 48 St. Rep. 176 (1991).

Defendant was convicted of deliberate homicide in the death of victim under 45-2-301 and 45-2-302. On appeal, the court found that the State did not attempt to prove that defendant struck the blow which killed victim. The State's case was that defendant was a major participant in a systematic series of acts which led to the death of victim. The State proved that defendant's conduct was a cause of death. St. v. Riley, 199 M 413, 649 P2d 1273, 39 St. Rep. 1491 (1982).

Where the evidence showed that the mother of a child beating victim aided and abetted the other defendants in causing the victim's death by her failure or refusal to perform her duties as a parent, terminate the beatings and discipline, and provide the victim with the needed medical care and attention, a conviction of deliberate homicide was sustained. Where codefendants undertake a course of conduct or common design which results in a person's death, all can be held criminally responsible for the murder. St. v. Powers, 198 M 289, 645 P2d 1357, 39 St. Rep. 989 (1982).

Each of four defendants, while caring for a child at different times, engaged in incidences of child beating eventually leading to the child's death. Where codefendants undertake a course of conduct or common design that results in a person's death, all can be held criminally responsible for the murder. St. v. Powers, 198 M 289, 645 P2d 1357, 39 St. Rep. 989 (1982).

Fish had an argument with Miller at the bar where Miller worked over money Miller owed Fish. A fight ensued, which was broken up by patrons. Fish left saying he would settle with Miller. Fish recruited some friends and went to Miller's trailer park. Miller had already arrived and had some friends there. Fish, upon discovering that Miller was at home, began knocking and pounding on the door. Fish's friends, Hubbard and Lodge, were with him. Lodge began kicking on the door. Miller got a gun and shot through the door, killing Lodge. Hubbard got in his truck and Miller put the gun through the truck window. Hubbard took the gun away from Miller, who ran away from the truck. Hubbard shot and killed Miller. Fish was convicted of attempted burglary and Hubbard was convicted of mitigated deliberate homicide. The State argued that Fish's conviction is supportable on a theory of accountability for the actions of Lodge. The evidence which the State used to support its position is that after Fish stopped knocking on the door, Lodge ran up beside him and began kicking the door. Evidence was presented that the molding around the trailer door and the door latch were found torn off the door casing and that Lodge's body was found with his feet on the threshold. No evidence was presented that the damage was caused by Lodge or Fish. The evidence is more compatible with an intent by Fish to engage in a fist fight, which he admits. Criminal accountability contemplates an active role in facilitating the commission of an offense. Consequently, more than mere presence at the scene of a crime is necessary to establish criminal responsibility. St. v. Fish, 190 M 461, 621 P2d 1072, 37 St. Rep. 2065 (1980). People v. Ramirez, 93 Ill. App.2d 404, 236 N.E.2d 284 (1968); People v. Jordan, 38 Ill.2d 83, 230 N.E.2d 161 (1967); People v. Nelson, 33 Ill.2d 48, 210 N.E.2d 212 (1965), certiorari denied 383 US 918 (1966); People v. Robinson, 113 Ill. App.2d 89, 251 N.E.2d 766 (1969); People v. Bracey, 110 Ill. App.2d 329, 249 N.E.2d 224 (1969); People v. Hill, 39 Ill.2d 125, 233 N.E.2d 367, certiorari denied 392 US 936 (1968); People v. Chavis, 79 Ill. App.2d 10, 223 N.E.2d 196 (1967).

One of a band of Indians hunting together who was present and saw another member of the band shoot a sheepherder to prevent his reporting the killing of a cow by the Indians was an accomplice to the crime, so that his statement implicating defendant was insufficient unless corroborated. St. v. Spotted Hawk, 22 M 33, 55 P 1026 (1899).

Direct Evidence of Informant Sufficient to Show Accountability for Sale of Dangerous Drugs (now Criminal Distribution of Dangerous Drugs): Testimony by an informant constituted direct evidence that defendant aided or abetted his wife in the commission of the sale of dangerous drugs (now criminal distribution of dangerous drugs) when the testimony showed that defendant drove his wife to the informant's house, was present during the transaction, and made no attempt to terminate his efforts to facilitate the sale. The evidence was at least sufficient for a rational trier of fact to find the essential elements of accountability. St. v. Gommenginger, 242 M 265, 790 P2d 455, 47 St. Rep. 681 (1990).

No Separate Offense of Accountability: The youth was charged with criminal homicide under the accountability statute. The Supreme Court rejected the youth's argument that the Youth Court could not transfer the case to the adult court because he was not charged under 45-5-101 (now repealed) (criminal homicide). The Supreme Court stated that there is no separate offense of accountability, only the underlying offense which has been physically committed by another but for which the youth is equally responsible. In re B.D.C., 211 M 216, 687 P2d 655, 41 St. Rep. 1318 (1984), and St. v. Hatten, 1999 MT 298, 297 M 127, 991 P2d 939, 56 St. Rep. 1198 (1999).

Theft:

There was sufficient evidence to prove that defendant Dess was accountable within the meaning of this section for theft of two bicycles committed in violation of 45-6-301 when the following facts were proven at trial: (1) Dess was in the company of Haas and Owens (the perpetrators) immediately before the theft; (2) Dess was in his white station wagon at the time of the theft from where he could see the stealing of the bicycles; (3) a white station wagon was seen following the stolen bicycles; and (4) Dess was found driving his white station wagon, with one of the bicycles in the back, and was stopped only 200 yards past the other bicycle. St. v. Dess, 207 M 396, 674 P2d 501, 41 St. Rep. 81 (1984).

Defendant and four others decided to steal batteries for beer and gas money. They entered the property, and defendant went up the hill to get the batteries, while others entered the house. The batteries were too heavy to carry, so defendant left them. On appeal, challenging the sufficiency of the evidence, the Supreme Court held that defendant aided, agreed, and attempted to aid the others in both the planning and commission of the offense of theft. Defendant's active participation went beyond negative acquiescence or mere failure to restrain. He was legally accountable for the actions of his companions in crime. St. v. Hammons, 204 M 340, 664 P2d 922, 40 St. Rep. 884 (1983).

The theft crimes enumerated in 45-6-301 are statutorily distinct crimes; hence, a person who may have received stolen property, a possession theft crime under 45-6-301(3)(c), was not legally accountable for the same crime as the defendant charged with theft by actual taking under 45-6-301(1)(a) for the purposes of requiring corroboration of his testimony under 46-16-213. St. v. Lamere, 202 M 313, 658 P2d 376, 40 St. Rep. 110 (1983), distinguished in St. v. Hernandez, 213 M 221, 689 P2d 1261, 41 St. Rep. 2063 (1984).

In a prosecution for theft by accountability, the court did not err in submitting the case to the jury. Although presence at the scene of the crime and failure to take any action to halt its commission do not make a person liable for the crime, they are factors which may be considered by a jury to determine if a person aided in the commission of the crime. As the evidence showed the defendant's presence at the crime scene, diversion of the attention of other persons, silence, and flight after commission of the offense, the court properly submitted the case to the jury. St. v. Hart, 191 M 375, 625 P2d 21, 38 St. Rep. 133 (1981), followed in St. v. Bradford, 210 M 130, 683 P2d 924, 41 St. Rep. 962 (1984); St. v. Ortega, 209 M 285, 679 P2d 793, 41 St. Rep. 711 (1984).

In a prosecution for theft by accountability, the trial court did not err in denying the defendant's motion for a directed verdict made on the grounds that the prosecution failed to prove that the defendant intentionally promoted or facilitated the commission of the offense. When sufficiency of the evidence is assailed, it is the province of the court to view the evidence that tends to support the verdict and not to second-guess the jury. The decision to submit a case to the jury should not be disturbed on appeal absent an abuse of discretion. Upon a review of the record, the Supreme Court found the evidence sufficient and that no abuse of the trial court's discretion had been committed. St. v. Hart, 191 M 375, 625 P2d 21, 38 St. Rep. 133 (1981); People v. Hasty, 127 Ill. App.2d 330, 262 N.E.2d 292 (1970).

Parking Ordinance — Vicarious Criminal Responsibility: A city may, in the exercise of its police power, enact a parking ordinance that provides that the registered owner of a motor vehicle is vicariously criminally responsible for illegal parking of it by another unless it is shown that the vehicle was being used without the owner's consent. Such an ordinance does not violate due process restrictions (overruling a contrary holding in St. v. Jetty, 176 M 519, 579 P2d 1228 (1978)), but the ordinance must conform to the absolute liability requirements of 45-2-104. Missoula v. Shea, 202 M 286, 661 P2d 410, 40 St. Rep. 91 (1983).

Sale of Marijuana — Purchaser Not Accomplice to Acts of Seller: Where the arresting officer found a bag of marijuana on the front seat of the defendant's car and the defendant was later convicted of possession of the drug and sale to a juvenile, the Supreme Court found that the juvenile to whom some of the marijuana was given by the defendant was not an accomplice of the defendant and that the juvenile's testimony therefore did not need corroboration. The defendant had failed to demonstrate that the juvenile was legally accountable for the defendant's possession. St. v. Godsey, 202 M 100, 656 P2d 811, 39 St. Rep. 2354 (1982), followed in St. v. Haskins, 269 M 202, 887 P2d 1189, 51 St. Rep. 1474 (1994), and overruled in part in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Accomplice to Robbery — What Constitutes: Defense counsel elicited undisputed testimony from one of the codefendants that defendant did not engage in any of the acts proscribed by 45-2-302 either before the robbery of the bar or during the time the robbery was being committed. Defendant argues that his complicity arose, if at all, only after the robbery had concluded, thus removing him from any accountability for the robbery. Defendant drove the car during the getaway. Defendant's argument is dependent on the validity of his conclusion that the robbery ended the moment the codefendants stepped outside the bar. In Montana, the ensuing flight is considered part and parcel of a robbery until such time as the criminal purpose, including carrying away the spoils of the crime, is completed. Here, defendant's involvement commenced before the robbers had reached a place of seeming security and before the proceeds had been divided. By serving as a getaway driver, defendant aided in the commission of the robbery and became liable for the robbery under 45-2-302. St. v. Case, 190 M 450, 621 P2d 1066, 37 St. Rep. 2057 (1980), followed in St. v. Koontz, 249 M 109, 813 P2d 463, 48 St. Rep. 601 (1991).

Robbery: Defendant and three others came to Montana from California with plans for robberies of roadhouse saloons. Defendant and the others robbed Mac's Bar in Wolf Creek. They held the owners at gunpoint, placed them face down on the floor, and bound them with tape while they committed the robbery. Defendant contended that the State failed to produce evidence that the victims were placed in fear and therefore his conviction could not stand. The brandishing of the gun could hardly constitute anything less than sufficient circumstances to place the victims in fear. It is well within the province of the jury to determine that fear exists in such a situation. It would be contrary to the common experience of all mankind to conclude that a person would experience no fear when confronted with a robber wielding a gun. St. v. Case, 190 M 450, 621 P2d 1066, 37 St. Rep. 2057 (1980). People v. Williams, 3 Ill. App.3d 1, 279 N.E.2d 100, 103 (1971); People v. Sanders, 129 Ill. App.2d 444, 263 N.E.2d 615 (1970); People v. Knell, 129 Ill. App.2d 9, 262 N.E.2d 291 (1970); People v. Embery, 69 Ill. App.2d 269, 216 N.E.2d 24 (1966).

Burglary: Although circumstantial evidence was not sufficient to place defendant on the actual premises where the burglary occurred, it was sufficient to prove that defendant aided and abetted in the commission of the crime. In re McMaster, 165 M 450, 529 P2d 1391 (1974). People v. Gore, 64 Ill. App.2d 309, 211 N.E.2d 757 (1965).

Narcotics Sale: People v. Meid, 130 Ill. App.2d 482, 264 N.E.2d 209 (1970); People v. Van Riper, 127 Ill. App. 2d 394, 262 N.E.2d 141 (1970).

Kidnapping: Prison inmate who received custody of a guard from another inmate, then confined the guard against his will, could be found guilty of kidnapping as a principal even though the guard was originally seized by another and there was insufficient evidence of a preconceived plan of action. St. v. Frodsham, 139 M 222, 362 P2d 413 (1961).

Prostitution: Bartender who served drinks after hours and called prostitutes when customers arrived was in pari delicto and could not recover from his employer for injuries received in the course of that employment. Lencioni v. Long, 139 M 135, 361 P2d 455 (1961), overruled, to the extent that this case holds that no recovery can be allowed for an injury that results from an intervening act of a third party, in Estate of Strever v. Cline, 278 M 165, 924 P2d 666, 53 St. Rep. 576 (1996). See also Patten v. Raddatz, 271 M 276, 895 P2d 633, 52 St. Rep. 439 (1995).

Larceny: Under section 94-6423, R.C.M. 1947 (a forerunner of this section), a showing that the defendant aided or abetted in the taking of property from the person of another was sufficient to establish defendant's guilt of larceny. St. v. Maciel, 130 M 569, 305 P2d 335 (1957).

Assault — Second Degree: Under 94-6423 and 94-204, R.C.M. 1947 (forerunner of 45-2-301 and 45-2-302), evidence was sufficient to sustain a conviction of assault in the second degree where defendant was at the scene of the crime and was admittedly a participant therein; it is not necessary to show that he actually fired any one of the guns. St. v. Simon, 126 M 218, 247 P2d 481 (1952).

Receiving Stolen Property:

Defendant who became an accomplice to the theft of a calf by encouraging and advising the thief became a principal to the crime and was a constructive possessor of the stolen calf by virtue of the thief's actual possession; theory that constructive possessor could not "receive" same property from actual possessor did not preclude state from prosecuting accessory for being a receiver of stolen property upon his subsequent acquisition of actual possession of the calf. St. v. Webber, 112 M 284, 116 P2d 679, 136 ALR 1077 (1941).

Defendant who referred and accompanied thieves to another who bought stolen cattle could be found guilty as a principal of receiving stolen property. St. v. Huffman, 89 M 194, 296 P 789 (1931).

Maintaining Nuisance: Defendants who, during the owner's absence, were in charge of a place where liquor was unlawfully sold could be found guilty as principals of maintaining a common nuisance. St. v. Peters, 72 M 12, 231 P 392 (1924).

Assault — First Degree: Where defendants charged with assault in the first degree showed by their own testimony that they went to the home of the victim to ascertain whether he had made a certain derogatory statement, one of them struck him for denying having made the statement, and the other assaulted him for making the statement, each defendant was an accessory to the other and a principal in the carrying out of a common design. St. v. Maggert, 64 M 331, 209 P 989 (1922).

INDICTMENT

Alerting State to Charging Error Through Motion to Preclude Evidence — Appointed Counsel Not Ineffective — Defendant Not Entitled to Wait to Object to Charging Errors Midtrial: The defendant was charged with criminal distribution of dangerous drugs. His court-appointed attorney filed a motion to preclude evidence of the defendant's accountability for the same charge. The state subsequently filed an amended information to include an accountability charge. After the defendant unsuccessfully objected to the filing of the amended information, he was convicted of accountability. On appeal, the defendant claimed ineffective assistance of counsel, alleging that his attorney had improperly alerted the state to its initial charging error by filing a motion to preclude evidence of accountability. The Supreme Court rejected the notion that a defendant is allowed to wait until midtrial to object to the state's charges and affirmed his conviction. St. v. Carter, 2014 MT 65, 374 Mont. 206, 320 P.3d 451.

Theory of Accountability Not Required to Be Set Forth in Information: Tower was arrested for sale of a dangerous drug. Over Tower's objection at trial, the jury was instructed on the issue of accountability under 45-2-301 and this section. Tower contended that in order to fulfill the purpose of the criminal laws of Montana, notice must be given in the information that the theory of accountability will be relied upon. Tower also claimed that he was surprised by the jury instruction on accountability given at trial. The Supreme Court reviewed the development of the law of accountability and the requirements applicable to charging documents. The Supreme Court noted that 45-1-102 and the accountability statutes had been borrowed from the State of Illinois and that Illinois had not interpreted the accountability statutes to require that notice of the theory of accountability be included in the charging documents. Citing St. v. Zadick, 148 M 296, 419 P2d 749 (1966), the Supreme Court also noted that this interpretation was consistent with the previous law of accountability in Montana. The Supreme Court reviewed the trial record and determined that Tower had every reason to anticipate an accountability theory. Because accountability is not a separate offense, the Supreme Court held that due process did not require the state to set forth the theory in the information. St. v. Tower, 267 M 63, 881 P2d 1317, 51 St. Rep. 946 (1994), followed in St. v. Medrano, 285 M 69, 945 P2d 937, 54 St. Rep. 1048 (1997), St. v. Abe, 1998 MT 206, 290 M 393, 965 P2d 882, 55 St. Rep. 876 (1998), and St. v. Tellegen, 2013 MT 337, 372 Mont. 454, 314 P.3d 902.

Sufficiency of Homicide Information: An information charging a homicide is sufficient if it charges the offense in terms of a statute without reciting supporting evidentiary facts. In this case the information is sufficient. It charged three theories of homicide: (1) that the defendant as a principal purposely or knowingly caused the death of the victim by engaging in one or more of four enumerated kinds of conduct; (2) that the defendant aided and abetted in purposely or knowingly causing the death of victim by engaging in one or more of four kinds of conduct; and (3) that the death of the victim occurred while defendant was engaged in or aiding and abetting in the commission of aggravated assault. St. v. Riley, 199 M 413, 649 P2d 1273, 39 St. Rep. 1491 (1982).

Charging as Principal: Since this section eliminates the distinction between accessories and principals, an accused may be properly charged as a principal even though he was only an accessory to the crime. People v. Heuton, 2 Ill. App.3d 427, 276 N.E.2d 8, 9 (1971).

Effect of Dismissal of Codefendant: Where an indictment charges two or more defendants with an offense, dismissal as to one codefendant does not necessitate dismissal of the charge against the other codefendant. People v. Bodine, 114 Ill. App.2d 205, 252 N.E.2d 234, 235 (1969); People v. Jones, 132 Ill. App.2d 623, 270 N.E.2d 288 (1971).

No Distinction Between Principal and Accessory: Inasmuch as this section eliminates any distinction between an act performed by the accused himself and the act of another for which he is legally accountable, an indictment charging two or more persons jointly and individually with a crime has been held not to be invalid for its failure to state whether the defendant was being charged as a principal or as an accessory. People v. Nicholls, 42 Ill.2d 91, 245 N.E.2d 771, 777, certiorari denied 396 US 1016 (1969).

Sufficiency of Pleadings: An information containing a single count charging the crime of second-degree assault, as defined in 94-602, R.C.M. 1947 (now 45-5-201 and 45-5-202), was proper where only one crime was involved, namely, second-degree assault, with at least two different theories upon which to base a conviction, one by a direct assault and the other by aiding and abetting. St. v. Zadick, 148 M 296, 419 P2d 749 (1966).

Accessory Participation — Detail: It has been held that an indictment against an accessory is not required to describe the circumstances of the accessory's contact as they actually occurred. It is sufficient if the accessory is charged with the legal effect of the acts performed by him. People v. Ruscitti, 27 Ill.2d 545, 190 N.E.2d 314 (1963). See also People v. Allen, 132 Ill. App.2d 1015, 270 N.E.2d 54 (1971); People v. Touby, 31 Ill.2d 236, 201 N.E.2d 425 (1964).

BURDEN OF PROOF

Sufficient Evidence for Conviction for Deliberate Homicide by Accountability — Evidence of Underlying Crime Required: Doyle asserted that there was insufficient evidence to convict him of deliberate homicide by accountability and that the accountability statute violated due process by relieving the state of proving that an offense had been committed. The Supreme Court affirmed the conviction based on sufficient, corroborated, independent evidence that Doyle played an active role in the homicide. The court also noted that under the accountability statute, a person may be convicted although the other person claimed to have committed the offense has not been prosecuted or convicted, has been convicted of a different offense, is not amenable to justice, or has been acquitted, but the statute in no way violates due process by lessening the state's burden of proving that the underlying offense of deliberate homicide was committed. St. v. Doyle, 2007 MT 125, 337 M 308, 160 P3d 516 (2007).

Required to Be Proved Beyond Reasonable Doubt: In order for a person to be held legally accountable for the conduct of another, the State must prove beyond a reasonable doubt: (1) that the defendant solicited, aided, abetted, agreed, or attempted to aid another person in the planning or commission of an offense; (2) that participation took place either before or during commission of the offense; and (3) that it was with the concurrent specific intent to promote or facilitate the commission of an offense. People v. Tillman, 130 Ill. App.2d 743, 265 N.E.2d 904, 909 (1971). Accord, People v. Ramirez, 93 Ill. App.2d 404, 236 N.E.2d 284 (1968); People v. Brumbeloe, 97 Ill. App.2d 370, 240 N.E.2d 150 (1968).

Participation in Each Element Not Required: It is not necessary that the defendant be shown to have participated in each element of the offense; rather it is sufficient if the defendant is shown to have aided, abetted, or assisted in the commission of the crime. People v. Harris, 70 Ill. App.2d 173, 217 N.E.2d 503, 506 (1966).

SUFFICIENCY AND ADMISSION OF EVIDENCE

Proper Denial of Directed Verdict on Charges of Intimidation by Accountability: Spang moved for a directed verdict on charges of intimidation by accountability, contending that there was insufficient evidence to establish his accountability because there was no evidence to show that he aided in communicating any threat to the crime victims. The state asserted that the evidence was sufficient because it showed that Spang was not only present at the crime scene, but also took actions prior to and during the intimidation that aided in the commission of the crimes. The District Court denied a directed verdict, Spang appealed, and the Supreme Court affirmed. Although mere presence at a crime scene is not enough to establish accountability, an accused need not take an active part in any overt criminal acts to be adjudged criminally liable for the acts. Further, although mere presence and the failure to disapprove or oppose another's commission of an offense are insufficient to sustain an accountability charge, those factors may be considered along with other circumstances that might indicate that the accused in some way aided or abetted the principal in the commission of the crime. Here, Spang was not only associated with the principal prior to commission of a double homicide and present at the scene of the crime, but he also unloaded and reloaded a rifle used to intimidate the victims, helped collect items from the victim's garage, pulled telephone wires from the victim's wall, and failed to oppose or disapprove commission of the crimes—sufficient evidence upon which a rational trier of fact could find beyond a reasonable doubt the Spang committed two offenses of intimidation by accountability. St. v. Spang, 2002 MT 120, 310 M 52, 48 P3d 727 (2002). See also St. v. Hart, 191 M 375, 625 P2d 21 (1981), and St. v. Miller, 231 M 497, 757 P2d 1275 (1988).

Dissimilarity Between Misdemeanor Forgery and Felony Burglary — Evidence of Prior Crime Inadmissible: In a prosecution for accountability for felony burglary, the state sought to introduce evidence of Johnston's prior conviction for misdemeanor forgery. Under the modified Just rule, there was insufficient similarity between the two offenses to satisfy the requirement that the crimes be similar in nature before evidence of the prior crime may be allowed. St. v. Johnston, 267 M 474, 885 P2d 402, 51 St. Rep. 1078 (1994).

Accountability for Aggravated Kidnapping — Improper State's Evidence — Conviction Overturned: Conviction for accountability for aggravated kidnapping was overturned when the District Court improperly allowed the state to question a defense witness about his criminal history and improperly allowed into evidence photographs of the victim's injuries when bodily injury was not in dispute. St. v. Bristow, 267 M 170, 882 P2d 1041, 51 St. Rep. 1010 (1994).

Simulated Intercourse Not Constituting Incest — Finding of Accountability Improper: Under this section, a person is legally accountable for the conduct of another arising from the commission of an underlying offense. Henderson was charged with accountability for incest involving his stepchildren, but the state failed to produce evidence on which the jury could find that the children committed incest because none of the children engaged in intimate touching for the purpose of sexual arousal or gratification, an essential element of the offense. Henderson could not be legally accountable for an offense that was not proved. Henderson's motion for a directed verdict should have been granted, and the case was remanded for entry of a directed verdict of acquittal on the accountability charge. St. v. Henderson, 265 M 454, 877 P2d 1013, 51 St. Rep. 606 (1994).

Child Beating Death — Common Design — Other Acts: Defendants were members of a religious sect that practiced violent child discipline techniques. While caring for a child at different times, each of four defendants engaged in incidences of child beating, eventually leading to the child's death. It was not error to admit evidence of the acts by church members other than defendants and acts by the defendants against children other than the victim to show the common design toward disciplining children by beatings arising out of the church policy. The evidence also provided proof of defendants' motive, intent, and plan. St. v. Powers, 198 M 289, 645 P2d 1357, 39 St. Rep. 989 (1982).

Delinquent Youth Conviction — Inadmissible Hearsay — Corroboration of Testimony of Others Accountable for Same Offense: After a minor was cited for running a red light and for driving without a license, the County Attorney charged he was a delinquent youth under the Youth Court Act, alleging the minor had taken the car without the owner's consent. The minor appealed stating that the testimony of two police officers concerning the stolen property report was inadmissible hearsay and that his conviction declaring him a delinquent youth was improperly based on the testimony of other individuals who were legally accountable for the offense. The Supreme Court found that the officers' testimony was inadmissible hearsay. The court also found that the corroborating evidence supplied by the officer who stopped the vehicle tended to connect the youth directly with the offense and that, therefore, the testimony of other minors responsible or legally accountable for the same offense was properly admitted. Despite the fact that the testimony of the other youths in the car, in conjunction with the independent corroborating evidence, could support a conviction in some cases, the reviewing court reversed the conviction. It found that the admission of the hearsay so affected the substantial rights of the accused as to require reversal. In re D.W.L., A Youth, 189 M 267, 615 P2d 887, 37 St. Rep. 1452 (1980).

General: For decisions on the sufficiency or admissibility of certain specific evidence see the following cases: People v. McClelland, 96 Ill. App.2d 410, 238 N.E.2d 597 (1968); People v. Morgan, 20 Ill.2d 437, 170 N.E.2d 529 (1961); People v. Lawrence, 132 Ill. App.2d 513, 270 N.E.2d 510 (1971); People v. Gant, 121 Ill. App.2d 222, 257 N.E.2d 181 (1970); People v. Womack, 73 Ill. App.2d 317, 219 N.E.2d 592 (1966); People v. Brumbeloe, 97 Ill. App.2d 370, 240 N.E.2d 150 (1968); People v. Richardson, 132 Ill. App.2d 712, 270 N.E.2d 568 (1971).

Association With Group Bent on Illegal Acts: Evidence that a defendant voluntarily attaches himself to a group which is bent on illegal acts with knowledge of its design will support an inference that he shares in the common purpose and will sustain his conviction as a principal for the crime committed by another in furtherance of the venture. People v. Bracey, 110 Ill. App.2d 329, 249 N.E.2d 224, 228 (1969).

Evidence of Subsequent Acts: Although the proof tending to show that one is an accessory before the fact generally would be of the events occurring before the ultimate commission of the offense, evidence of subsequent acts is competent to be considered as proof of guilt of aiding and abetting. People v. Winchell, 100 Ill. App.2d 149, 241 N.E.2d 200 (1968); People v. Bracken, 68 Ill. App.2d 466, 216 N.E.2d 176 (1966); People v. Kolep, 29 Ill.2d 116, 193 N.E.2d 753 (1963); People v. Smith, 25 Ill.2d 428, 185 N.E.2d 150 (1962).

No Variance Between Crime and Proof: Under an information charging receipt of stolen property by one who became a principal by aiding and abetting another in receiving it, there was no fatal variance between the crime as alleged and the proof, showing him to have taken part only as an accessory. St. v. Huffman, 89 M 194, 296 P 789 (1931).

Proof of Advice and Encouragement: An indictment for murder, charging defendant as principal, was sustained by proof that he was guilty of advising and encouraging the crime. St. v. Geddes, 22 M 68, 55 P 919 (1899).

INSTRUCTIONS

Attorney Not Ineffective for Failure to Request Accomplice Jury Instruction — Defendant's Claims of Innocence Inconsistent With Instruction: The defendant was convicted of attempted deliberate homicide stemming from a stabbing incident involving three people. On appeal, he argued that his attorney was ineffective for not requesting an accomplice jury instruction for one of the witnesses allegedly involved. This witness was never charged for his actions stemming from the incident. The Supreme Court disagreed with the defendant, holding that the defendant's attorney was not ineffective because the accomplice instruction would have conflicted with the defendant's argument that he did not stab the victim. St. v. Root, 2015 MT 310, 381 Mont. 314, 359 P.3d 1088.

Getaway Driver Accountable for Robbery — Specificity of Charging Documents — Jury Instructions: The defendant was convicted of accountability for robbery after serving as the getaway driver. On appeal, the defendant argued that he was never specifically charged with and convicted of a subelement of accountability for robbery, that the jury instruction was improper because it did not require the jury to reach unanimity with regard to a specific element of robbery, and that the jury instruction regarding a getaway driver was inaccurate. The Supreme Court disagreed, holding that the charging documents and jury instruction provided accountability for any of the subelements of the crime and there was ample evidence that each subelement was satisfied, that the defendant failed to object to the robbery instruction's lack of a unanimity requirement and a plain error review was not warranted, and that the getaway driver jury instruction gave a full and fair explanation of the law. St. v. Hanna, 2014 MT 346, 377 Mont. 418, 341 P.3d 629.

Withdrawal of Proposed Instruction on Accountability — Waiver on Appeal: Sittner proposed a jury instruction stating that a defendant's knowledge that a crime is being committed, in conjunction with the defendant's presence during the crime, is insufficient to support a finding of guilt by accountability. The state's proposed instruction was that one may become an accomplice by being present and joining in the criminal act. Sittner withdrew his proposed instruction during settling of instructions, and the state's instruction was used. In the absence of a timely objection, Sittner's withdrawal of his proposed instruction constituted a waiver of the objection and precluded the raising of the issue on appeal, considering that none of the exceptions to the requirement for timely objection in 46-20-701 applied. St. v. Sittner, 1999 MT 103, 294 M 302, 980 P2d 1053, 56 St. Rep. 434 (1999).

Jury Instruction Properly Refused: Where the defendant was convicted of felony murder, aggravated kidnapping, and robbery, the trial court did not err in refusing defendant's offered instruction on liability for actions of other persons. The offered instruction would have told the jury that the defendant could not be held responsible for the crimes charged if someone else performed the offensive conduct. Defendant's proposed instruction was properly refused as the plain language of 45-2-302 shows that the defendant's instruction was incorrect. St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981).

False Arrest Action — Accountability Instruction Improper: The plaintiff and a companion were accused by the defendant's employee of shoplifting. Plaintiff's purse was searched and nothing was found. Defendant detained the plaintiff until the police arrived and arrested her. Plaintiff was acquitted on the shoplifting charge. Plaintiff then brought suit against the defendant charging false arrest. The District Court instructed the jury on the subject of accountability but the Supreme Court held that the accountability instruction should not have been given since the plaintiff was never charged or tried as an accomplice. Duran v. Buttrey Food, Inc., 189 M 381, 616 P2d 327, 37 St. Rep. 1545 (1980).

Proper Refusal: Defendant's proposed instruction on accountability that stated: "You are instructed that some evidence has been introduced tending to show that a person other than the defendant, Alfred Owens, is responsible for the crimes here charged. If, after a consideration of all the evidence, there remains in your minds a reasonable doubt as to who is responsible for the crimes, then it is your duty to acquit." was an incorrect statement of the law. It created the distinct impression that defendant could not be held responsible for the crimes charged if somebody else actually performed the offensive conduct and was therefore properly refused. The instruction given by the court in the language of 45-2-301 and 45-2-302 was a correct presentation of the law on accountability and a proper jury instruction. St. v. Owens, 182 M 338, 597 P2d 72 (1979).

Instruction Without Being Charged in Information: The trial court did not err in giving certain instructions regarding defendant's liability as an aider and abettor without charging him as an aider and abettor in the information. St. v. Murphy, 174 M 307, 570 P2d 1103 (1977).

Instruction Proper — Burglary: In a burglary prosecution it was proper to instruct the jury on accountability although there was an issue as to whether the defendant actually entered the store or waited outside while his cohorts burglarized the store. St. v. Miner, 169 M 260, 546 P2d 252 (1976).

Instruction on Issues Accompanying Accountability: An instruction that a person is responsible for the conduct of another when he aids and abets another in the commission of a crime should not be submitted to a jury unless instructions on accompanying issues are also given. People v. Hatfield, 5 Ill. App.3d 996, 284 N.E.2d 708, 713 (1972).

In General: The giving of instructions based upon this section was discussed in the following cases: Homicide: People v. Hexum, 83 Ill. App.2d 192, 226 N.E.2d 877, certiorari denied 391 US 907 (1967); People v. Kolep, 29 Ill.2d 116, 193 N.E.2d 753 (1963); People v. Coddington, 123 Ill. App.2d 351, 259 N.E.2d 382 (1970); Robbery: People v. Steptore, 51 Ill.2d 208, 281 N.E.2d 642 (1972); People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385 (1969); Assault: People v. Harris, 132 Ill. App.2d 801, 270 N.E.2d 232 (1971); Burglary: People v. Umphers, 133 Ill. App.2d 853, 272 N.E.2d 278 (1971). See also People v. Rollins, 119 Ill. App.2d 116, 255 N.E.2d 471 (1970).

Instruction Not Prejudicial — Defendant Indicted as Principal: The giving of an instruction defining an accessory in a case in which the defendant was indicted as a principal was held not to be prejudicial. People v. Weaver, 68 Ill. App.2d 240, 215 N.E.2d 675 (1966).

Verbal Declaration Insufficient to Establish Partnership: Where a verbal declaration of one codefendant that he and the other codefendant were partners was given in evidence, it was error for the court to refuse defendant's instruction that such verbal declaration was insufficient to establish a partnership. Although existence of partnership was immaterial due to 94-6423 and 94-204, R.C.M. 1947 (forerunners of 45-2-301 and 45-2-302), the jury may have given full consideration to the declaration and found defendant guilty on the strength thereof. St. v. Keller, 126 M 142, 246 P2d 817 (1952).

Instructions in Language of Former Law:

The use of the disjunctive "or" in an instruction in a criminal case defining who are principals, saying that one who aids "or" abets another in the commission of an offense is a principal, instead of aids "and" abets, the conjunctive used in 94-204, R.C.M. 1947 (a forerunner to 45-2-301), was error. St. v. Ludwick, 90 M 41, 300 P 558 (1931).

Where the State proceeded on the theory that defendant was present and directly committed the crime of horse stealing, not on the theory that he was not present but aided and abetted another, an instruction in the language of section 94-204, R.C.M. 1947 (a forerunner to 45-2-301), defining principals to include those not present but aiding and abetting another, was not reversible error, though not proper on retrial. St. v. Hamilton, 87 M 353, 287 P 933 (1930).

An instruction defining "principals" as all persons who "aid or abet" in the commission of an offense, instead of "aid and abet" as used in 94-204, R.C.M. 1947 (a forerunner to 45-2-301), was incorrect. St. v. McClain, 76 M 351, 246 P 956 (1926).

Instructions substantially in the words of 94-6423 and 94-204, R.C.M. 1947 (forerunners of 45-2-301 and 45-2-302), defining a principal and telling the jury that the distinction between a principal and an accessory had been abrogated by statute, were not improper as implying that a felony had been committed. St. v. Wiley, 53 M 383, 164 P 84 (1917).

In a prosecution for arson, where there was some testimony that defendant procured another to set the fire, instructions embodying the provisions of 94-6423 and 94-204, R.C.M. 1947 (forerunners of 45-2-301 and 45-2-302), were proper; court properly refused instructions directing the jury to find for the defendant unless satisfied beyond a reasonable doubt that he was present personally and set the fire himself. St. v. Chevigny, 48 M 382, 138 P 257 (1914).

JUDGMENT AND SENTENCE

Alleged New Evidence Not Extending Statutory Time Bar for Postconviction Relief:

Raugust contended that the period for filing for postconviction relief should be extended based on newly discovered evidence that the state mishandled a weapon found at the crime scene and that a key eyewitness confessed to the offense while waiting in the County Attorney's office to testify in Raugust's trial and because of ineffective assistance of counsel at trial. The Supreme Court disagreed. Raugust could not establish that the evidence regarding the weapon was so material that it would probably produce a different result at trial or that the evidence could not have been discovered in a timely manner. Evidence regarding the eyewitness directly conflicted with other evidence given at trial that tended to preclude the possibility that the eyewitness could have committed the crime, nor could Raugust show that the evidence could not have been discovered in a timely manner. The claims of ineffective counsel were not newly discovered evidence because Raugust was aware of the asserted deficiencies at trial. Raugust v. St., 2003 MT 367, 319 M 97, 82 P3d 890 (2003), following St. v. Greeno, 135 M 580, 342 P2d 1052 (1959).

Abe was found guilty of accountability for deliberate homicide and was sentenced to 60 years in prison. One year and 14 days after the deadline, Abe filed a petition for postconviction relief on grounds of newly discovered evidence. Allegedly, two jurors from Abe's trial sat in on the trial of Abe's coconspirator and heard two of the state's witnesses testify differently than they did in Abe's trial. The Supreme Court applied the factors to be considered when a District Court evaluates a motion for a new trial based on newly discovered evidence as set out in St. v. Sullivan, 285 M 235, 948 P2d 215 (1997) (see also St. v. Greeno, 135 M 580, 342 P2d 1052 (1959)), including the requirement that the evidence must have come to the knowledge of the defendant since trial and the requirement that the evidence must not be such as will tend only to impeach the character or credit of a witness. Here, Abe's counsel knew about the alleged discrepancies after Abe's trial but prior to Abe's appeal, so the discrepancies in testimony could have been raised on direct appeal. Further, the petition for postconviction relief alleged that the discrepancies undermined the credibility of the witnesses but did not establish that Abe did not engage in the criminal conduct for which he was convicted. Thus, the District Court concluded, and the Supreme Court agreed, that the alleged new evidence did not serve to extend the statutory bar for filing a petition for postconviction relief beyond the 1-year period in 46-21-102. Although Abe correctly pointed out that the state did not raise the issue of the statutory bar in District Court and that the District Court did not rule on the issue, the general rule that the Supreme Court will not address issues raised for the first time on appeal did not apply in this case because that rule does not apply when the issue is jurisdictional. The 1-year statute of limitations for postconviction relief is a jurisdictional limit, and lack of subject matter jurisdiction may be raised at any time under former Rule 12(h), M.R.Civ.P. (now superseded). Dismissal of Abe's petition for postconviction relief was affirmed as procedurally barred. St. v. Abe, 2001 MT 260, 307 M 233, 37 P3d 77 (2001).

Death Sentence Appropriate Penalty for Deliberate Homicide by Accountability: Once a defendant is found guilty of deliberate homicide (acting alone) or deliberate homicide by accountability (not acting alone), the death penalty is an appropriate sentence. St. v. Turner, 262 M 39, 864 P2d 235, 50 St. Rep. 1267 (1993); St. v. Gollehon, 262 M 1, 864 P2d 249, 50 St. Rep. 1250 (1993). See also People v. Ruiz, 447 NE 2d 148 (Ill. 1982).

Equal Sentences Not Required: Equality of sentence between two participants in a criminal offense is not required. People v. Winchell, 100 Ill. App.2d 149, 241 N.E.2d 200, 201 (1968).

Law Review Articles

A Common Law Crime Analysis of Pinkerton v. United States: Sixty Years of Impermissible Judicially-Created Criminal Liability, Manning, 67 Mont. L. Rev. 89 (2006).

45-2-303. Separate conviction of person accountable.

Criminal Law Commission Comments

Source: Ill. C.C., 1961, Chapter 38, §§ 5-3.

Even at common law two persons, both principals in the first degree, could be tried separately and although one was acquitted, the state was not precluded from proceeding to trial and obtaining a conviction against the second. The same result is possible under this code but the classification of principals and accessories is eliminated.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: Sections 45-2-301 and 45-2-302 of the new code discuss the general principals of accountability for conduct of others and eliminate distinctions made in the common law and continued under former Montana law between different types of accomplices. Under the new code any person who aids in the commission of a crime, with the purpose to facilitate the offense, either before or during its occurrence is liable as a principal. This section completes the task of eliminating common-law categorizations of parties to crime by allowing the conviction of an accomplice before the conviction of the principal. Additionally, the section ensures that the immunity or incapacity of one co-offender shall not be imputed to another. In effect, this section is merely a recodification of R.C.M. 1947, § 94-6425 and the leading Montana case interpreting the responsibility of coconspirators, St. v. Alton, 139 M 379, 365 P2d 527 (1961). The only significant change from the prior law is the elimination of references to "principals" and "accessories". The wording for this section was taken directly from the Illinois source.

Case Notes

Sufficient Evidence for Conviction for Deliberate Homicide by Accountability — Evidence of Underlying Crime Required: Doyle asserted that there was insufficient evidence to convict him of deliberate homicide by accountability and that the accountability statute violated due process by relieving the state of proving that an offense had been committed. The Supreme Court affirmed the conviction based on sufficient, corroborated, independent evidence that Doyle played an active role in the homicide. The court also noted that under the accountability statute, a person may be convicted although the other person claimed to have committed the offense has not been prosecuted or convicted, has been convicted of a different offense, is not amenable to justice, or has been acquitted, but the statute in no way violates due process by lessening the state's burden of proving that the underlying offense of deliberate homicide was committed. St. v. Doyle, 2007 MT 125, 337 M 308, 160 P3d 516 (2007).

Completed Underlying Felony Not Required for Felony-Murder Rule to Apply — Accountability: A conviction under the felony-murder rule requires that the evidence support a finding as to each element of deliberate homicide, including the underlying offense, not that there be a conviction for a completed felony. A completed attempt or completed felony is not required in order for the felony-murder rule to apply. As set out in St. v. Fish, 190 M 461, 621 P2d 1072 (1980), accountability for the deliberate homicide means that the defendant played an active part in facilitating the commission of the underlying offense. St. v. Turner, 265 M 337, 877 P2d 978, 51 St. Rep. 467 (1994).

Accountability Not Necessarily Founded on Conviction for Same Crime: It is not necessary that criminal accountability be founded on conviction for the same crime by the principal offender. A person may be convicted for accountability on proof that the offense was committed even though another person who allegedly committed the offense has not been convicted or is convicted of a different crime. St. v. Gibbs, 244 M 251, 797 P2d 928, 47 St. Rep. 1584 (1990), followed in St. v. Doyle, 2007 MT 125, 337 M 308, 160 P3d 516 (2007).

Acquittal of Principal: The general rule is that acquittal of other parties in the same cause is not grounds to relieve a particular codefendant of his responsibility. See People v. Spears, 106 Ill. App.2d 430, 245 N.E.2d 544 (1969); People v. Quinn, 96 Ill. App.2d 382, 238 N.E.2d 619 (1968).

Instructions: For cases interpreting instructions based upon this section see People v. Winchell, 100 Ill. App.2d 149, 241 N.E.2d 200 (1968); People v. Rosenfeld, 25 Ill.2d 473, 185 N.E.2d 236 (1962).

45-2-311. Criminal responsibility of corporations.

Criminal Law Commission Comments

Source: Ill. C. C., 1961, Chapter 38, § 5-4.

This section deals with the criminal responsibility of private corporate bodies.

Subsection (1)(a) deals with the corporate liability for misdemeanor offenses, such other offenses as may be expressly included, and those which clearly indicate a legislative purpose to impose corporate liability where the offense is defined by a statute not included in the Criminal Code. In dealing with regulatory offenses, the broadest scope of liability is provided. The corporation is made criminally responsible for criminal conduct performed by any corporate employee acting within the scope of his office or employment and in behalf of the corporation. The chief justification for such broad liability in this class of cases is to provide an inducement for high managerial officers in the corporation to supervise the behavior of minor employees in such a way as to avoid criminal conduct on the part of the corporate employees. In many of the regulatory offenses, the corporation which violates a criminal statute is not confronted by the threat of tort liability growing out of the same act. Thus, if the corporation is required to file a corporate report and fails to do so, the liability it will suffer may be criminal only. These provisions do not relieve the individual corporate employee from criminal liability for his own act. In many cases, criminal prosecution of the individual will prove more effective in enforcing the regulatory policy of the statute. There may be times, however, in which, while it is clear that someone in the corporate employ has committed the criminal act, it is impossible to identify the particular employee guilty of criminal behavior. In such cases, the only sanction available is the imposition of a fine on the corporate body. There may also be cases in which the criminal act is committed by a corporate employee of a foreign corporation residing outside the jurisdiction. In such a case the only feasible course open to the Montana prosecutor would be a criminal action against the corporation.

Since, however, the major purpose of subsection (1)(a) is to encourage diligence on the part of managerial personnel to prevent criminal conduct on the part of corporate employees, it seems appropriate to permit the corporation to defend by proof that the criminal conduct occurred despite the exercise of due diligence on the part of supervisory personnel. Consequently, subsection (2) provides that proof of due diligence is a defense to the criminal charge against the corporation. The burden of proof in this case, is placed upon the corporate defendant. This defense is further qualified by the provision that if the statute in question clearly intends that the defense of due diligence should not be available to the corporation, the particular provision of the statute shall prevail over the language of subsection (2).

Subsection (1)(b) relates to the scope of liability of corporations for criminal offenses of a more serious character. It provides that when a corporation is indicted for a felony such as embezzlement, or involuntary manslaughter, the corporation may not be held liable unless the criminal conduct was performed or participated in by the board of directors or by a high managerial agent. The restriction on the scope of corporate liability in this class of cases is justified by the consideration that before the stigma of serious criminality attaches to a corporate body, the conduct should involve someone close to the center of corporate power. Moreover, in these cases, the argument for the necessity of corporate fines to stimulate diligent supervision of minor employees is considerably less persuasive. This is true because most of the serious felonies also involve the possibility of corporate tort liability and this possibility should provide sufficient inducement for the exercise of proper supervision by managerial officials. The restriction of corporate liability in the case of serious felonies to acts of participating high managerial officials is supported by the case law of some American states and appears to be consistent with the English law on the same point. (E.g., People v. Canadian Fur Trappers Corp., 248 NY 159, 161 NE 455, 59 ALR 372 (1928); Rex v. I.C.R. Haulage Ltd. (1944) 1 K.B. 551; Welsh, "The Criminal Liability of Corporations," 62 L. Q. Rev. 345 (1946).) The definitions of "agent" and "high-managerial agent" defy precise definition because of the infinite variations in the organizational schemes of corporate bodies. The definition here provided, however, is probably more precise than that which has emerged from the case law. (See especially, People v. Canadian Fur Trappers Corp., 248 NY 159, 161 NE 455, 59 ALR 372 (1928).

Compiler's Comments

2009 Amendment: Chapter 400 in (1)(a) near beginning after "45-6-326" deleted "45-6-327"; and made minor changes in style. Amendment effective April 28, 2009.

Applicability: Section 8, Ch. 400, L. 2009, provided: "[This act] applies to proceedings begun on or after [the effective date of this act]." Effective April 28, 2009.

1997 Amendment: Chapter 42 in (1)(a) substituted "misdemeanor, is" for "misdemeanor and is" and substituted "82-10-104, or is defined by another statute" for "82-10-104 or by another statute"; and made minor changes in style. Amendment effective March 12, 1997.

1985 Amendment: In (1)(a) inserted "82-1-201" in list of citations.

1983 Amendment: In (1)(a), after "45-8-214," inserted "or 82-10-104".

Annotator's Note: The wording for this section is identical to the Illinois source. The meaning of the provision is explained fully in the [Criminal Law Commission Comments to this section].

Case Notes

In General: The Illinois courts have held that a corporate officer, when so named, may be sued for the acts or omissions of the corporation. Individual could not be held criminally accountable for failure of corporation to file state income tax return where complaint charged him individually as defendant without naming him as an officer of the corporation or setting forth any relationship he may have had with the corporation, and complaint was properly dismissed. People v. King, 5 Ill. App.3d 357, 283 N.E.2d 294 (1972).

Indictment and Information: Where act charged is criminal only when committed in a specific capacity, such capacity must be charged in the indictment. People v. King, 5 Ill. App.3d 357, 283 N.E.2d 294 (1972).

45-2-312. Accountability for conduct of corporation.

Criminal Law Commission Comments

Source: Ill. C.C., 1961, Chapter 38, § 5-5.

This section should make clear that an individual acting for a corporation is fully responsible for his own criminal acts and is punishable accordingly.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: The wording for this section was taken directly from the Illinois source. The section complements 45-2-311, to which attention is directed for case notes. The purpose of the statute is to prevent an offender from insulating himself from criminal liability by performing criminal acts through a corporation which itself cannot be liable due to the inapplicability of the assigned penalty. Subsection (1) makes it clear that an individual acting for a corporation is fully responsible for his acts, regardless of the responsibility of the corporation. Subsection (2) allows punishment for such criminal acts whether or not the corporation can be punished.

Case Notes

In General: Officers, directors, or agents of a corporation may be criminally liable for acts done by them in behalf of the corporation. People v. Floom, 52 Ill. App.3d 971, 368 N.E.2d 410 (1977). Corporate officer, named as such, may be sued for the acts or omissions of the corporation. People v. King, 5 Ill. App.3d 357, 283 N.E.2d 294 (1972).

Indictment and Information: Where act charged is criminal only when committed in a specific capacity, such capacity must be charged in the indictment. An individual could not be held criminally accountable for failure of corporation to file state income tax return where complaint charged him individually as defendant without naming him as an officer of the corporation or setting forth any relationship he may have had with the corporation, and complaint was properly dismissed. People v. King, 5 Ill. App.3d 357, 283 N.E.2d 294 (1972).

CHAPTER 3
JUSTIFIABLE USE OF FORCE

Chapter Compiler's Comments

Annotator's Note — Source: The compiler's comments entitled "Annotator's Note" are taken from the Montana Criminal Code of 1973 Annotated (1980 rev. ed.) produced by the Montana Criminal Law Information Research Center (MONTCLIRC) and printed under cosponsorship of the State Bar of Montana. Minor revisions have been made to conform to the style and format of the annotations.

Part 1
When Force Justified

45-3-101. Definitions.

Criminal Law Commission Comments

Source: Ill. C. C., 1961, Chapter 38, §§ 2-8, 7-8.

This section is intended to make clear the status of the practice of firing in the direction of any person. In some circumstances a peace officer may be authorized to use deadly force. While firing into the air without endangering an offender's safety is permissible, firing so close to him that his safety is endangered is the use of deadly force, which can be justified only in the circumstances in which the officer is authorized to use deadly force. (See Perkins, "The Law of Arrest," 25 Iowa L. Rev. 201 at 270, 288, 289 (1940); Note, "Use of Deadly Force in Preventing Escape of Fleeing Minor Felon," 34 N.C. L. Rev. 122 (1955).)

Compiler's Comments

Annotator's Note: This section defines terms used in this chapter which delineate the extent of force which may be used in self-defense, defense of property, and defense of others. Subsection (1) defining forcible felony comes from § 2-8 of the Illinois source. The term is also defined in MCA, 45-2-101. Under the section in this chapter on use of force by aggressor (MCA, 45-3-105), a person who is committing a forcible felony, such as assault, kidnapping, homicide, etc., has no right to use force to defend himself. Subsection (2) is substantially similar to section 7-8 of the Illinois Code. Under the provisions of this chapter, a person may use deadly force only if he reasonably believes that such force is necessary to prevent imminent death or bodily harm, or to prevent the commission of a forcible felony as defined above.

Case Notes

Strict Application of Graves Instruction on Self-Defense Not Required — Instruction Setting Out Statutory Elements of Defense Affirmed: At his trial on charges of assault with a weapon, Archambault offered a jury instruction on self-defense taken from St. v. Graves, 191 M 81, 622 P2d 203 (1981), that had been incorporated into the Montana Criminal Jury Instructions. The District Court concluded that the proposed instruction was inconsistent with law and declined to give the instruction in favor of an instruction that set out the statutory language of 45-3-102. On appeal, Archambault asserted that the trial court erred by not giving the proposed instruction. The Supreme Court agreed that the trial court erred in concluding that the Graves instruction was inconsistent with law, but also held that giving the Graves instruction is not necessarily mandated. Pursuant to a trial court's broad discretion in formulating jury instructions and the overriding principle that jury instructions must fully and fairly instruct the jury regarding the applicable law, the jury instruction that set out the statutory language fully and fairly set out the requisite elements of justifiable use of force in a manner sufficient to guide the jury. St. v. Archambault, 2007 MT 26, 336 M 6, 152 P3d 698 (2007), following St. v. White, 202 M 491, 658 P2d 1111 (1983), and followed in St. v. Bieber, 2007 MT 262, 339 M 309, 170 P3d 444 (2007), and St. v. Henson, 2010 MT 136, 356 Mont. 458, 235 P.3d 1274. However, see also St. v. Stone, 266 M 345, 880 P2d 1296 (1994), and St. v. Claric, 271 M 141, 894 P2d 946 (1995), applying the Graves instruction.

Threat of Physical Force or Violence: It has been held that there was a "threat of physical force and violence" within the meaning of this section defining forcible felony where the defendant advised the victim that he and another had been hired to kill the victim but if given a sum of money they would leave the city, regardless of the conditional character of the threat. People v. Rhodes, 38 Ill. App.2d 389, 231 N.E.2d 400 (1967). It was unimportant that defendant did not anticipate precise sequence of events that followed upon his entry into apartment of murder victim, i.e., that she would jump to her death, and as long as his unlawful acts precipitated those events, he was responsible for the consequence. People v. Smith, 56 Ill.2d 328, 307 N.E.2d 353 (1974).

45-3-102. Use of force in defense of person.

Criminal Law Commission Comments

Source: Ill. C. C., 1961, Chapter 38, § 7-1.

The law of self-defense has been interpreted in a large number of judicial decisions, agreeing in principle though differing somewhat in defining the borderlines such as the minimum situation in which the use of deadly force may be authorized. (The history of self-defense is traced in Perkins, "Self-defense Re-examined," 1 U.C.L.A. L. Rev. 133 at 137 to 142 (1954).) This section presents the general rule as to defense of person contemplating the simplest and probably most common situation—that in which a person who has done nothing to provoke the use of force against himself is confronted immediately with unlawful force under such circumstances that he believes that he must use force to defend himself, and his belief is reasonable. This statement contains several propositions:

(1) The person must not be the aggressor (the situation considered in section 94-3-105, R.C.M. 1947, [now 45-3-105, MCA]);

(2) The danger of harm must be a present one, not merely threatened at a future time, or without the present ability of carrying out the threat;

(3) The force threatened must be unlawful—either criminal or tortious;

(4) A person must actually believe that the danger exists, that his use of force is necessary to avert the danger, and that the kind and amount of force which he uses is necessary; and

(5) His belief, in each of the aspects described, is reasonable even if it is mistaken. The privilege extends to the protection not only of the person using the force, but of other individuals unlawfully threatened with harm; and in determining whether the use of force is necessary, a person need not consider whether the danger might be avoided if he were to give up some legal right or privilege. If a person under these circumstances uses only nondeadly force for protection, no further legal restriction should be necessary. (See Perkins, supra, at pages 133 to 137.)

The privilege of using force likely to cause death or serious bodily harm (often called deadly force) is limited to cases in which the force imminently threatened apparently will cause death or serious bodily harm, or in which a violent offense is being committed which in its nature involves serious risk of serious bodily harm, such as rape, robbery, burglary, arson or kidnapping.

This section codifies prior Montana law in which the section is intended to test the right of self-defense as measured by what a reasonable person would have done under like or the same circumstances. (St. v. Houk, 34 M 418, 423, 87 P 175 (1906).) A person attacked can act upon appearances and might justifiably kill his attacker, though not in actual peril if the circumstances are such that a reasonable man would be justified in acting the same way. Further, a person attacked with apparent murderous intent need not retreat and seek a place of safety before using deadly force on his attacker. (St. v. Merk, 53 M 454, 460, 164 P 655 (1917).) However, whether the circumstances attending a homicide claimed to have been committed in self-defense, are such as to justify a defendant's fears, as a reasonable person, in the belief that he was in imminent danger of losing his life or suffering serious bodily harm at the hands of the deceased, is a question of fact for the jury; bare fear of an assault does not justify the killing. (St. v. Harkins, 85 M 585, 602, 281 P 551 (1929).)

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: The wording for this section on self-defense and defense of others is substantially similar to the Illinois source. However, the phrase "threat to use force" has been added by the Criminal Law Commission to allow a person to commit acts which otherwise would be assaults in defense of person. The clause "when and to the extent he reasonably believes" pertains to the proper occasion for the use of force which is a question of fact for the jury. "Is necessary to defend himself or another" refers to the proper amount of force which may be used and remain justified—again a question to be determined by the jury. As indicated in the commission comment above, "imminent use of unlawful force" refers to those situations where the means of accomplishing the unlawful act are near at hand with the ability to inflict the threatened act.

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GENERAL

Inapplicable Jury Instructions — Self-Defense Issue Clearly Argued to Jury — No Review Under Plain Error or Ineffective Assistance: The District Court's specific purpose jury instruction instead of a more appropriate self-defense instruction did not warrant review under either the doctrine of plain error or ineffective assistance of counsel. Given the trial record, the Supreme Court was not firmly convinced that failure to review the inapplicable instruction would have resulted in a manifest miscarriage of justice, left unsettled the question of fundamental fairness of the trial, or compromised the integrity of the judicial process. The Supreme Court also determined that the instruction did not derail what was a clearly directed trial about the defendant's intentions and his assertion that his actions of stabbing the victim with a knife multiple times were justified by self-defense. St. v. St. Marks, 2020 MT 170, 400 Mont. 334, 467 P.3d 550.

Numerous Erroneous Rulings Amounting to Cumulative Error — Reversal Required: The defendant appealed his conviction for deliberate homicide, arguing that the District Court had made several erroneous rulings that required a new trial: (1) excluding as hearsay statements the victim had made to the defendant, which the defendant asserted showed his state of mind and the victim's and were relevant to his defense of justifiable use of force, and (2) preventing the defendant from impeaching the state's expert witness with evidence that the expert witness had mishandled other autopsies and testified falsely in other cases. On appeal, the Supreme Court reversed and remanded for a new trial, concluding that the District Court had erred in excluding the victim's statements and preventing the defendant from impeaching the state's expert witness and that, although the errors might not individually warrant reversal, the cumulative effect prejudiced the defendant's ability to present his justifiable use of force defense and denied him a fair trial. St. v. Cunningham, 2018 MT 56, 390 Mont. 408, 414 P.3d 289.

Testimony on Use of Force Necessary to Shift Burden to State: After the defendant stole a tool set from a store, he was pursued by the store's employees and others. After they caught him, he hit and spat at them until the police arrived. He was charged with felony theft and pleaded the affirmative defense of justifiable use of force (JUOF). At trial, however, he did not testify and the state challenged a jury instruction on JUOF, arguing that the defendant had not offered any evidence to warrant the jury instruction. The District Court agreed that the defense's cross-examination of witnesses was not sufficient to shift the burden from the defendant to the state and determined that the defendant had to testify in order to plead the defense of JUOF. The defendant testified and was subsequently convicted. On appeal, the defendant claimed that the District Court had erred in ruling that he had to testify in order to plead JUOF. The Supreme Court affirmed, holding that under the facts of this case, the defendant had to offer some evidence of his use of force in order to contend that the force was justified. St. v. R.S.A., 2015 MT 202, 380 Mont. 118, 357 P.3d 899.

Justifiable Use of Force in Defense of Another — Three Parties Required: The defense of justifiable use of force in defense of another is not available, as a matter of law, in a situation involving only two individuals; the defense must involve three parties: the defendant, the person being defended, and the aggressor. St. v. King, 2013 MT 139, 370 Mont. 277, 304 P.3d 1.

Burden on State in Justifiable Use of Force Case to Prove Absence of Justification: The enactment of 46-16-131 in 2009 abrogated St. v. Henson, 2010 MT 136, 356 Mont. 458, 235 P.3d 1274, St. v. Longstreth, 1999 MT 204, 295 Mont. 457, 984 P.2d 157, and other cases to the extent they held the burden of establishing justifiable use of force was the defendant's. Under 46-16-131, a defendant has the initial burden of offering evidence of justifiable use of force; the burden then shifts to the state to prove the absence of justification beyond a reasonable doubt. St. v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 623.

Sufficient Evidence of Defendant's Conscious Intent to Strike Victim — Aggravated Assault Conviction Affirmed: Nick contended that there was inadequate evidence of a conscious object to strike the victim with a screwdriver when Nick was attacked by the victim while sitting in a vehicle. The Supreme Court disagreed. Despite Nick's assertion of self-defense, there was ample evidence for the jury to conclude beyond a reasonable doubt that it was Nick's conscious object to grasp the screwdriver as a weapon and strike the attacker and that Nick was aware that doing so could cause serious bodily injury, thus satisfying the mental state element of aggravated assault. St. v. Nick, 2009 MT 174, 350 M 533, 208 P3d 864 (2009).

Evidence of Victim's Possession of Pornography Properly Excluded as Irrelevant: Johnson asserted a defense of justifiable use of force in the assault of Heltne. Johnson contended that Heltne invited Johnson into his bedroom, began showing Johnson a pornographic movie, and tried to touch Johnson, but Johnson refused Heltne's advances. Heltne allegedly offered Johnson money and tried to touch Johnson again, at which point Johnson punched Heltne repeatedly and fled the house. Johnson was later arrested and charged with aggravated assault. The trial court refused to allow Johnson to introduce evidence of Heltne's pornography, and on appeal, Johnson asserted error, but the Supreme Court affirmed. The physical evidence that Johnson sought to introduce did not relate in any way to the reasonableness of force used by Johnson and was thus irrelevant, while the potential prejudice to Heltne had the evidence been allowed was massive. The trial court did not abuse its discretion in disallowing the irrelevant, prejudicial pornographic evidence. St. v. Johnson, 2008 MT 227, 344 M 313, 187 P3d 662 (2008).

Justifiable Use of Force Not Raised at Trial — Character Evidence of Victim Inadmissible: Nelson was charged with partner assault after striking his wife several times in the face and breaking her jaw. At trial, he sought to introduce evidence of his wife's prior convictions for assault to show that he used reasonable force against her. On appeal, the Supreme Court noted that Nelson had not relied on the defense of justifiable use of force, claiming instead that the contact was accidental, and that evidence of his wife's prior convictions lacked relevance because Nelson never asserted that he knew of the convictions when he struck her. Nelson's mere mention of self-defense in his notice of intent to rely on the defense of self-defense, in his trial brief, and in response to the city's motion in limine did not place the matter at issue in the trial. Thus, evidence of his wife's prior convictions was not relevant to the defense of accident upon which Nelson relied and was properly disallowed. Red Lodge v. Nelson, 1999 MT 246, 296 M 190, 989 P2d 300, 56 St. Rep. 955 (1999).

Question of Fact: The necessity for using force in defense of oneself or another and the amount of force necessary to repel the attack are questions of fact for the jury. St. v. Miller, 1998 MT 177, 290 M 97, 966 P2d 721, 55 St. Rep. 719 (1998); St. v. Crabb, 232 M 170, 756 P2d 1120, 45 St. Rep. 966 (1988); St. v. Larson, 175 M 395, 574 P2d 266 (1978); St. v. Fuger, 170 M 442, 554 P2d 1338 (1976).

Mitigated Deliberate Homicide and Affirmative Defense of Justification — Elements and Burdens Involved: Defendant was charged with deliberate homicide, asserted the affirmative defense of justification or self-defense as provided in 45-3-102, and was convicted of the lesser included offense of mitigated deliberate homicide. In analyzing the relationships of burdens of proof and persuasion between the affirmative defense and the lesser included offense, the Supreme Court held that the state has the burden of proving beyond a reasonable doubt every element of the offense charged or any lesser included crime within such charge; the defendant, if he raises an affirmative defense, has the burden of producing sufficient evidence on the issue to raise a reasonable doubt of his guilt. St. v. Daniels, 210 M 1, 682 P2d 173, 41 St. Rep. 880 (1984), followed in St. v. Miller, 1998 MT 177, 290 M 97, 966 P2d 721, 55 St. Rep. 719 (1998), and St. v. Longstreth, 1999 MT 204, 295 M 457, 984 P2d 157, 56 St. Rep. 795 (1999). See also St. v. Lafley, 1998 MT 21, 287 M 276, 954 P2d 1112, 55 St. Rep. 76 (1998). St. v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 623, held that the enactment of 46-16-131 in 2009 abrogated Longstreth, St. v. Henson, 2010 MT 136, 356 Mont. 458, 235 P.3d 1274, and other cases to the extent they held the burden of establishing justifiable use of force was the defendant's in a justifiable use of force case.

District Court Refusal to Permit Self-Defense Testimony — Reversible Error: After a jury trial, defendant was convicted of assault. In his opening statement, defendant's attorney had said he would call two witnesses who would testify that defendant had acted in self-defense. The State did not object to this assertion. In cross-examining the victim, defendant's attorney laid the foundation for the impeachment testimony to come from the two witnesses alluded to in the opening statement. The State did not object to this line of questioning. However, after resting its case, the State filed a motion in limine requesting that the defense not be permitted to present the testimony of the two witnesses because of the defendant's failure to comply with the notice provisions of 46-15-301 (repealed in 1985 and replaced by 46-15-321 through 46-15-329 (46-15-321 now repealed)). The District Court granted the State's motion. Later, in the State's rebuttal in closing argument, the State mentioned defendant's failure to produce the witnesses he had promised during the opening statement. On appeal, the Supreme Court reversed and ordered a new trial. The court ruled that reversal was required by the State's unethical argument to the jury. The Supreme Court further ruled that although no formal written notice within the time limits required under 46-15-301 (repealed in 1985 and replaced by 46-15-321 through 46-15-329 (46-15-321 now repealed)) had been given, the trial court abused its discretion in not permitting the defense witnesses to testify because the State knew the defendant intended to rely on self-defense and the State's motion in limine was filed too late under local court rules. Finally, the court ruled that the State by its failure to object earlier had waived its right to file the motion in limine. St. v. Keller, 204 M 1, 662 P2d 604, 40 St. Rep. 614 (1983).

Justifiable Use of Force: A person is justified in using force against another if and to the extent that he reasonably believes that such conduct is necessary to defend himself against another person's use of unlawful force. It is not necessary that blood be first drawn before the right of self-defense arises. People v. Speed, 52 Ill.2d 141, 284 N.E.2d 636, 639 (1972); People v. Fort, 119 Ill. App.2d 350, 256 N.E.2d 63 (1970).

Right Not Lost — Trespasser: It has been held that a trespasser who is carrying a gun without a permit did not lose his right of self-defense to use such a weapon when he was confronted by imminent danger of death and great bodily harm. People v. Dillard, 5 Ill. App.3d 896, 284 N.E.2d 490, 494 (1972). But see 45-3-105, on use of force by aggressor.

CONSTRUCTION AND APPLICATION

Burden on Defendant in Justifiable Use of Force Case to Raise Reasonable Doubt of Guilt: Longstreth was charged with deliberate homicide and relied on a defense of justifiable use of force. After being convicted of negligent homicide, Longstreth alleged that the jury was incorrectly instructed in violation of her due process rights, contending that the instructions improperly allocated the burden of proof by failing to require the state to prove an absence of justification beyond a reasonable doubt. Citing St. v. Daniels, 210 M 1, 682 P2d 173, 41 St. Rep. 880 (1984), and St. v. Miller, 1998 MT 177, 290 M 97, 966 P2d 721 (1998), the Supreme Court reiterated that justifiable use of force is an affirmative defense and that only the defendant has the burden of producing sufficient evidence to raise a reasonable doubt of guilt. The state's burden is to prove the elements of the charged offense beyond a reasonable doubt, which does not include the absence of justification. Further, 45-5-112 allows for a permissive inference by the jury rather than a mandatory inference. As long as the instructions given to the jury make it clear that the burden of proof of guilt and all necessary elements of guilt lies squarely with the state, placing the burden of presenting evidence to raise a reasonable doubt of guilt on the defendant is not unconstitutional. St. v. Longstreth, 1999 MT 204, 295 M 457, 984 P2d 157, 56 St. Rep. 795 (1999). See also Leland v. Oreg., 343 US 790, 96 L Ed 1302, 72 S Ct 1002 (1952), Patterson v. N.Y., 432 US 197, 53 L Ed 281, 97 S Ct 2319 (1977), and St. v. Lopez, 185 M 187, 605 P2d 178 (1980). St. v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 623, held that the enactment of 46-16-131 in 2009 abrogated Longstreth, St. v. Henson, 2010 MT 136, 356 Mont. 458, 235 P.3d 1274, and other cases to the extent they held the burden of establishing justifiable use of force was the defendant's in a justifiable use of force case.

Evidence of Victim's Character and Prior Violent Act Inadmissible as Element of Self-Defense: Sattler claimed that his homicide of Martinson was in self-defense and sought to introduce evidence of a prior act of violence that was committed by Martinson 8 years before his death as proof of Martinson's aggressiveness and Sattler's need to use force in his defense. However, nothing in this section relates directly to the question of the identity of the aggressor as an essential element of the justifiable use of force defense. Further, evidence of the prior act did not support any claim that the force used against Martinson was reasonable based on Sattler's knowledge of Martinson's history of violence. Also, the act was remote in time, and the lapse of time between the prior act and Martinson's death rendered the probity of the act minimal at best. Refusing to admit the evidence would not have resulted in prejudicial and reversible error or affected Sattler's substantial rights in light of the other evidence of record. Thus, reversal was not warranted. St. v. Sattler, 1998 MT 57, 288 M 79, 956 P2d 54, 55 St. Rep. 230 (1998), distinguished in Red Lodge v. Nelson, 1999 MT 246, 296 M 190, 989 P2d 300, 56 St. Rep. 955 (1999). See also St. v. Benton, 251 M 401, 825 P2d 565 (1992).

In St. v. Branham, 2012 MT 1, 363 Mont. 281, 269 P.3d 891, the defendant asserted the defense of justifiable use of force and argued that evidence of the victim's character that was unknown to the defendant when he committed the offense was admissible to show that the victim was the aggressor. The Supreme Court concluded that evidence of the victim's character was limited to facts known to the defendant at the time he committed the offense and overruled St. v. Harville, 2006 MT 292, 334 Mont. 380, 147 P.3d 22, St. v. Russell, 2001 MT 278, 307 Mont. 322, 37 P.3d 678, and St. v. Sattler, 1998 MT 57, 288 Mont. 79, 956 P.2d 54, to the extent that those cases held that the identity of the aggressor is an essential element of the defense of justifiable use of force.

No Additional Right to Use of Force by Residing in Remote Area: Defendant contended he had a right to be more protective of himself because he lived in an isolated area with no full-time law enforcement. The Supreme Court conceded that an isolated situation might more often result in facts that allow the justifiable use or threat of force; however, the laws governing the justifiable use or threat of force remain the same throughout the state and control an individual's actions wherever he resides in the state. St. v. Crabb, 232 M 170, 756 P2d 1120, 45 St. Rep. 966 (1988).

"Stop and Frisk" by Private Security Guard Held Proper: A "stop and frisk" by a private security guard of a suspected thief on the hotel grounds was justifiable as an action taken to protect the hotel and its occupants against trespassers in the process of committing an offense, since a person has the right to use any necessary force to protect himself or his employer or his employer's property from wrongful injury. St. v. Bradford, 210 M 130, 683 P2d 924, 41 St. Rep. 962 (1984).

When Alleged Aggressor Not Victim of Defendant's Force: This section which describes those situations where force may be justified under the theory that is commonly known as self-defense has been held to have no application where the alleged aggressor is not the party who has suffered harm at the hands of the accused. People v. Benson, 132 Ill. App.2d 786, 270 N.E.2d 181 (1971).

Excessive Force: Defendant who fired bullet through apartment door striking investigating police officer, who was privileged to open apartment door to limit of night latch and who announced that he was policeman, used excessive force and was properly convicted of first-degree assault. St. v. Lukus, 149 M 45, 423 P2d 49 (1967).

Aiding Victim of Battery: A person who comes to the aid of the victim of a battery has the right to use deadly force if the assailants attack him and if the other requirements of self-defense have been met. People v. Williams, 56 Ill. App.2d 159, 205 N.E.2d 749, 754 (1965). See also People v. Bowman, 132 Ill. App.2d 806, 270 N.E.2d 285 (1971).

Prior Acts or Threats:

Fact that decedent had to defendant's knowledge inflicted serious injury to another man about a year before was admissible on question of defendant's apprehension of danger to himself, and refusal to admit such evidence was reversible error. St. v. Jennings, 96 M 80, 28 P2d 448 (1934).

Testimony as to prior threats by deceased, though not communicated to defendant, was admissible to characterize decedent's conduct. St. v. Shadwell, 26 M 52, 66 P 508 (1901); St. v. Felker, 27 M 451, 71 P 668 (1903), distinguished in St. v. Heaston, 109 M 303, 97 P2d 330 (1939); St. v. Whitworth, 47 M 424, 133 P 364 (1913); distinguished in St. v. Heaston, supra.

Testimony as to prior acts of violence and threats by deceased communicated to defendants is admissible as to the defendants' state of mind when coupled with evidence of some overt act by the deceased. St. v. Hanlon, 38 M 557, 100 P 1035 (1909), distinguished in St. v. Heaston, 109 M 303, 97 P2d 330 (1939).

On issue whether defendant, when he killed deceased, believed that deceased was about to assault his wife (defendant's sister), testimony showing that, to defendant's knowledge, deceased had made prior assaults on his wife was admissible, and the fact that the prior assaults occurred more than 2 weeks before did not make evidence inadmissible as too remote. St. v. Felker, 27 M 451, 71 P 668 (1903), distinguished in St. v. Park, 88 M 21, 289 P 1037 (1930).

It was reversible error to instruct the jury to disregard prior threats by decedent unless the accused, at the time of the killing, was actually assailed or believed he was in great bodily danger. St. v. Shadwell, 26 M 52, 66 P 508 (1901).

Defense of Others: The provisions of 94-2513, R.C.M. 1947 (now part of this section), put persons acting in defense of others upon the same plane as those acting in defense of themselves. Every fact, therefore, that would be competent to establish justification in the one case would, for the same reasons, be competent to establish it in the other. St. v. Felker, 27 M 451, 71 P 668 (1903).

ELEMENTS OF SELF-DEFENSE

Sufficient Evidence to Support Assault Convictions — Motion to Dismiss for Insufficient Evidence Properly Denied: Following the close of the state's case against McCaslin for aggravated assault and assault with a weapon, McCaslin moved to dismiss both counts on grounds of insufficient evidence, asserting that the state failed to prove that he purposely or knowingly caused bodily harm to another and that because he was not the aggressor, a self-defense argument was justified. The motion was denied, and the jury subsequently convicted McCaslin on both counts. On appeal, the Supreme Court reviewed the record and concluded that, with deference to the jury and in a light most favorable to the prosecution, a reasonable trier of fact could have found the essential elements of both crimes beyond a reasonable doubt. McCaslin's convictions were affirmed. St. v. McCaslin, 2004 MT 212, 322 M 350, 96 P3d 722 (2004). See also St. v. Erickson, 2014 MT 304, 377 Mont. 84, 338 P.3d 598.

Use-of-Force Defense Applicable Only to Another's Unlawful Use of Force: The Supreme Court held that this section "requires that the use of force against another alleged to be imminent, and to justify a corresponding use of force, must be "unlawful"". Defendants who blocked access to an abortion clinic could not rely on the justifiable-use-of-force defense because under Roe v. Wade, 410 US 113, 35 L Ed 2d 147, 93 S Ct 705 (1973), the clinic's activities did not constitute the unlawful force required for application of that defense. Missoula v. Asbury, 265 M 14, 873 P2d 936, 51 St. Rep. 383 (1994).

Use of Reasonable Force Defense Not Available to Abortion Clinic Trespassers: The defendants in a case for criminal trespass at an abortion clinic argued that their actions were justified as a use of reasonable force. The Supreme Court held that the defense was not available to the defendants because the statute requires that the person using the force believes that the force is necessary to defend against another's imminent use of unlawful force and that the operations of the clinic were lawful. Helena v. Lewis, 260 M 421, 860 P2d 698, 50 St. Rep. 1103 (1993).

When Defense Justified:

The elements of proof necessary to establish justifiable use of force as set out in St. v. DeMers, 234 M 273, 762 P2d 866, 45 St. Rep. 1901 (1988), are that the defendant: (1) was not the aggressor; (2) reasonably believed that he was in imminent danger of unlawful harm; and (3) used reasonable force necessary to defend himself. St. v. Popescu, 237 M 493, 774 P2d 395, 46 St. Rep. 996 (1989), followed in St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994). See also St. v. Miller, 1998 MT 177, 290 M 97, 966 P2d 721, 55 St. Rep. 719 (1998).

The elements justifying use of force in self-defense are: (1) that the force is threatened against the person; (2) that the person threatened is not the aggressor; (3) that the danger of harm is imminent; (4) that force threatened is unlawful; (5) that the person threatened must actually believe that danger exists; (6) that the use of force is necessary to avert danger; (7) that the kind and amount of force which he uses are necessary; and (8) that such beliefs are reasonable. People v. Brumbeloe, 97 Ill. App.2d 370, 240 N.E.2d 150, 154 (1968); People v. Williams, 56 Ill. App.2d 159, 205 N.E.2d 749 (1965).

DUTY TO RETREAT

Person in Lawful Place — No Duty:

The general rule is that if one is not the first assailant and is in a place he has a lawful right to be and is put in apparent danger of his life or of suffering great bodily harm, he need not attempt to escape but may lawfully stand his ground and use any reasonable force in self-defense even to the taking of his assailant's life. People v. Taylor, 3 Ill. App.3d 734, 279 N.E.2d 143 (1972); People

v. Martinez, 4 Ill. App.3d 1072, 283 N.E.2d 268 (1972); People v. Millet, 60 Ill. App.2d 22, 208 N.E.2d 670 (1965); People v. Williams, 56 Ill. App.2d 159, 205 N.E.2d 749 (1965).

A person assailed with apparent murderous intent need not retreat and seek a place of safety before slaying his assailant. St. v. Merk, 53 M 454, 164 P 655 (1917).

NATURE OF SELF-DEFENSE

Criminal Liability Based on Failure to Act When Self-Preservation at Issue — No Legal Duty to Perform Legal Duty at Personal Risk: For criminal liability to be based on a failure to act, there must be a legally imposed duty to act and the person must be physically capable of performing the act. When self-preservation is at stake, the law does not require a person to save another's life by sacrificing one's own. No crime is committed by a person who in saving one's own life in the struggle for the only means of safety causes the death of another. Accountability may still exist for the results of the peril into which one person places another, but the law does not require a person to risk serious bodily injury to perform a legal duty. (See 40 Am. Jur. Homicide § 116 (1999).) State ex rel. Kuntz v. District Court, 2000 MT 22, 298 M 146, 995 P2d 951, 57 St. Rep. 111 (2000), following St. v. Mally, 139 M 599, 366 P2d 868 (1961), and distinguishing People v. Beardsley, 113 NW 1128 (1907). See also Burns v. Fisher, 132 M 26, 313 P2d 1044 (1957).

Justifiable Use of Force — No Duty to Assist Aggressor in Zone of Risk — Revival of Duty to Summon Aid: Kuntz was charged with negligent homicide for stabbing Becker and then failing to immediately call for medical assistance. Kuntz pleaded justifiable use of force. The state contended that even if the use of force was justified, a proved subsequent failure by Kuntz to summon aid could constitute a gross deviation from ordinary care. The Supreme Court held that when a person justifiably uses force to fend off an aggressor, that person has no duty to assist the aggressor in any manner that could conceivably create the risk of bodily injury to that person or to other persons. This absence of a duty necessarily includes any conduct that would require the person to remain in or return to the zone of risk created by the original aggressor. The victim has but one duty after fending off an attack, and that is the duty owed to one's self, as a matter of self-preservation, to seek and secure safety away from the place where the attack occurs. Thus, a person who justifiably acts in self-defense is temporarily afforded the same status as an innocent bystander (see Pope v. St., 396 A2d 1054 (Md. 1979)). However, the duty to summon aid may in fact be revived but only after the victim has fully exercised the right to secure safety from personal harm. Only then may a legal duty be imposed to summon aid for the person placed in peril by an act of self-defense, and before that duty is imposed, there must be a showing that: (1) the person had knowledge of the facts indicating a duty to act; and (2) the person was physically capable of performing the act. Even so, a proved breach of the legal duty may still fall short of negligent homicide, which requires a gross deviation from an ordinary or reasonable standard of care. To find a person who justifiably acts in self-defense criminally culpable for causing the death of the aggressor, the failure to summon aid must be the cause in fact of the aggressor's death, not the justified use of force itself. State ex rel. Kuntz v. District Court, 2000 MT 22, 298 M 146, 995 P2d 951, 57 St. Rep. 111 (2000), following St. v. Bier, 181 M 27, 591 P2d 1115, 36 St. Rep. 466 (1979), and followed in St. v. Bowen, 2015 MT 246, 380 Mont. 433, 356 P.3d 449.

Multiple Knife Wounds as Defense to Punch in the Eye: Thompson hit Gonzales in a bar. Gonzales slashed Thompson on the arm with a carpet knife, causing a deep wound along the whole lower arm, and cut Thompson in several other places in the chest and back. Gonzales's only injury was a black eye. The jury, which convicted Gonzales of assault, could properly find that Gonzales's self-defense went beyond the use of reasonable force. St. v. Gonzales, 278 M 525, 926 P2d 705, 53 St. Rep. 1015 (1996).

General: Self-defense relates to the use of force which a person reasonably believes necessary to defend or to protect himself. By its very nature self-defense relates to knowingly and intentionally using force to deter another and not to accidental use of force. People v. Joyner, 50 Ill.2d 302, 278 N.E.2d 756, 760 (1972).

No Revenge: It is a general rule that the right of self-defense does not permit the use of force in retaliation or revenge. People v. Welsch, 110 Ill. App.2d 450, 249 N.E.2d 714 (1969); People v. Peery, 81 Ill. App.2d 372, 225 N.E.2d 730 (1967); People v. Thornton, 26 Ill.2d 218, 186 N.E.2d 239 (1963); People v. Dulakis, 45 Ill. App.2d 128, 195 N.E.2d 402 (1964); People v. McBride, 130 Ill. App.2d 201, 264 N.E.2d 446, 450 (1970).

Peace Officer: A peace officer is held to the same standard as a private person with respect to killing in self-defense. Schnepf v. Grubb, 125 Ill. App.2d 432, 261 N.E.2d 47, 49 (1970).

REASONABLE BELIEF

Use of Force in Self-Defense Distinguished From Use of Force in Resisting Arrest — Jury Instruction Proper: Courville was stopped by an officer who had reports of underage drinking in the area. When the officer tried to arrest Courville, Courville assaulted the officer. Courville claimed that his conduct was self-defense. The jury was instructed regarding the justifiable use of force and the unlawful use of force in resisting arrest. Courville contended that the instructions confused the jury by creating two classes of persons against whom the use of force is justified, in violation of equal protection. The Supreme Court disagreed. The use of self-defense applies equally to both classes of persons and depends on a reasonable belief of imminent harm based on the facts of the situation. The fact that the actor against whom the defensive conduct is directed happens to be a police officer is inapplicable to the self-defense defense. A person cannot use force to resist arrest, but can use defensive force if it is reasonably believed that force is necessary as against the imminent use of unlawful force. The claim of self-defense in justification of one's conduct is always considered within context and circumstances of the specific event at issue so that the factfinder can determine whether the accused's belief is reasonable. The jury was properly instructed, but found no merit in Courville's defense that the use of force against the officer was reasonable in this case. No substantial right of Courville was prejudiced, so the conviction was affirmed. St. v. Courville, 2002 MT 330, 313 M 218, 61 P3d 749 (2002).

"Imminent" — Applies to Threat of Injury Rather Than Reaction by Threatened Person: It was error for the District Court to instruct the jury on the use of the word "imminent" as used in this section to require that the threatened person must act instantly; "imminent" applies to the aggression, and the person threatened by imminent harm of the aggressor may act "when" necessary. St. v. Daniels, 210 M 1, 682 P2d 173, 41 St. Rep. 880 (1984).

Apparent Versus Real Danger:

The law allows a defender who has reasonable ground to believe himself in danger of suffering bodily harm to protect himself by use of reasonable force. People v. Hill, 116 Ill. App.2d 157, 253 N.E.2d 617, 619 (1969). Thus, a killing is justified if the person had reasonable ground to believe himself in danger of losing his life or of suffering great bodily harm even though the danger was apparent only and not real. People v. Lockett, 85 Ill. App.2d 410, 229 N.E.2d 150 (1968).

A belief that circumstances necessitated the use of deadly force is reasonable even if the defendant is mistaken. People v. Williams, 56 Ill.2d 159, 205 N.E.2d 749, 753 (1965).

The rules stated in the Illinois decisions above have long been a part of Montana law. See, for example, St. v. Daw, 99 M 232, 43 P2d 240 (1935).

A person has the right to defend himself against what he reasonably believes to be a threat of death or great bodily harm even though the danger is not real, and the failure to make this distinction in a self-defense instruction in an assault prosecution is reversible error. St. v. Daw, 99 M 232, 43 P2d 240 (1935).

Where self-defense was pleaded to a charge of homicide, the question whether the circumstances were such as to justify defendant's fears, as a reasonable person, in the belief that he was in imminent danger of losing his life or suffering great bodily harm at the hands of deceased was for the jury. St. v. Fine, 90 M 311, 2 P2d 1016 (1931).

Whether the circumstances attending the homicide claimed by defendant to have been committed in self-defense were such as to justify his fears, as a reasonable person, in the belief that he was in imminent danger of losing his life or suffering great bodily harm at the hands of deceased was a question of fact for the jury; bare fear on his part of an assault by the latter, of a quarrelsome and violent disposition, was not alone insufficient to justify the killing. St. v. Harkins, 85 M 585, 281 P 551 (1929).

Under 94-2513, R.C.M. 1947 (now part of this section), a person assailed could act upon appearances as they presented themselves to him, meet force with force, and even slay his assailant; and though in fact he was not in any actual peril, yet if the circumstances were such that a reasonable man would be justified in acting as he did, the slayer would be held blameless. St. v. Merk, 53 M 454, 164 P 655 (1917).

Unarmed Assailant: Where defendant pleading self-defense to a charge of murder was a much smaller and weaker man than deceased, the fact that after the first blow the latter lost his weapon did not deprive defendant of his right to claim self-defense in thereafter retaliating with a knife, since in view of the disparity in physique he could reasonably apprehend great bodily harm to himself even though his assailant was unarmed. St. v. Jennings, 96 M 80, 28 P2d 448 (1934).

THE USE OF DEADLY FORCE

Failure of Defendant to Establish Knowledge of Victim's Past as Element of Justifiable Use of Force — Evidence of Victim's Violent History Inadmissible: At Montgomery's negligent homicide trial, Montgomery relied on a justifiable use of force defense. Anticipating that Montgomery would seek to introduce evidence of the victim's prior acts of violence and reputation for violence, the state requested and was granted a motion in limine prohibiting use of the victim's criminal history or reputation. Following conviction, Montgomery appealed on grounds that the victim's character evidence should not have been prohibited. However, trial testimony showed that Montgomery's fear of the victim was based on the victim's behavior just before the shooting, and Montgomery failed to establish that knowledge of the victim's past led him to use lethal force. Thus, evidence of the victim's alleged violent past was irrelevant and inadmissible, and the motion in limine was properly granted. St. v. Montgomery, 2005 MT 120, 327 M 138, 112 P3d 1014 (2005).

Refusal to Give Jury Instructions on Third-Party Bystander Not Error: During an altercation between McCaslin and three other men, Tolman, who was not involved in the fight, entered the fray in an effort to calm the situation. McCaslin claimed that he thought that Tolman was one of the assailants, and McCaslin punched and stabbed Tolman. At trial, McCaslin offered a third-party bystander instruction, asserting that McCaslin was not responsible for injury to Tolman because Tolman's injury was sustained while McCaslin was involved in a justifiable use of force against the other men. The instruction was denied, and on appeal, the Supreme Court affirmed. Tolman was not a third-party bystander as the term is commonly understood, and the evidence did not support McCaslin's proposed instruction. St. v. McCaslin, 2004 MT 212, 322 M 350, 96 P3d 722 (2004).

No Prejudice to Defendant When Assistance of Counsel Not Deficient: Following conviction for deliberate homicide, Sellner filed a petition for postconviction relief based on ineffective assistance of counsel, contending that counsel was deficient in: (1) failing to investigate and present a case for justifiable use of force; (2) abandoning an attempted mitigated deliberate homicide defense; (3) pursuing a defense based on a civil suit filed against defendant; (4) failing to offer a "failure to agree" instruction to the jury; and (5) making other errors. The Supreme Court applied the Strickland test to determine whether counsel's performance was deficient and prejudicial, addressing each argument in turn, and concluded that Sellner's contentions of deficient counsel were unfounded. Absent a showing of deficient counsel, Sellner could not show prejudice, and the denial of the petition for postconviction relief was affirmed. Sellner v. St., 2004 MT 205, 322 M 310, 95 P3d 708 (2004), following St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001).

Degree of Force Commensurate With Threat of Harm: The degree of force that a person uses to defend oneself must be commensurate with the threat of harm that the person faces. A person's belief of imminent death or bodily harm may be reasonable even if that belief is mistaken, but the absence of a reasonable belief as to imminent death or bodily harm renders the use of deadly force unreasonable. In the present case, defendant and the victim were relatively the same size and, although the victim had an argumentative and combative disposition, past arguments had been resolved nonviolently. Coupled with the fact that the victim was unarmed and suffered several physical disabilities, any rational trier of fact could have found that the victim would not or could not have carried out a threat to kill or seriously injure defendant, rendering defendant's use of deadly force unreasonable. Although defendant was angry and intoxicated, the use of deadly force was not justified, and defendant's motions to dismiss the mitigated deliberate homicide charge and for judgment as a matter of law on the basis of insufficient evidence were properly denied. St. v. Miller, 1998 MT 177, 290 M 97, 966 P2d 721, 55 St. Rep. 719 (1998).

Appearance of Danger:

A recent decision has held that a shotgun is per se a deadly weapon and the use of such a weapon allows a victim to use deadly force in self-defense. Ewurs v. Pakenham, 8 Ill. App.3d 733, 290 N.E.2d 319, 321 (1972).

Because it is the appearance of danger rather than actual danger, whether such danger of great bodily harm is actual or apparent so as to justify killing in self-defense does not depend upon the assailant's use of a deadly weapon or actually having one in his possession. Schnepf v. Grubb, 125 Ill. App.2d 432, 261 N.E.2d 47 (1970); People v. Brumbeloe, 97 Ill. App.2d 370, 240 N.E.2d 150 (1968).

General: As provided by this section, one may use force against another when and to the extent that he reasonably believes that force is necessary to defend himself against another's imminent use of unlawful force. He may use such force as is likely to cause death or great bodily harm to another if and only if he reasonably believes it is necessary to prevent imminent death or great bodily harm to himself or to another. People v. Knox, 116 Ill. App.2d 427, 252 N.E.2d 549, 554 (1969); People v. Fort, 119 Ill. App.2d 350, 256 N.E.2d 63 (1970); People v. Williams, 95 Ill. App.2d 421, 237 N.E.2d 740 (1968); People v. Knox, 94 Ill. App.2d 36, 236 N.E.2d 384 (1968); People v. Lockett, 85 Ill. App.2d 410, 229 N.E.2d 386 (1967); People v. Pirovolos, 116 Ill. App.2d 73, 253 N.E.2d 481 (1969), Supp. 126 Ill. App.2d 361, 261 N.E.2d 701 (1970); People v. Williams, 56 Ill. App.2d 159, 205 N.E.2d 749 (1965).

INSTRUCTIONS

Unlawful Entry Prerequisite to Justifiable Use of Force Instruction: In a deliberate homicide trial in which the defendant asserted justifiable use of force, the District Court properly denied the defendant's proffered jury instructions regarding use of force in defense of an occupied structure and the definition of burglary as a forcible felony. Unlawful entry is a prerequisite to both of the proffered instructions, and the evidence clearly established the victim entered the defendant's house lawfully. St. v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 623.

Strict Application of Graves Instruction on Self-Defense Not Required — Instruction Setting Out Statutory Elements of Defense Affirmed: At his trial on charges of assault with a weapon, Archambault offered a jury instruction on self-defense taken from St. v. Graves, 191 M 81, 622 P2d 203 (1981), that had been incorporated into the Montana Criminal Jury Instructions. The District Court concluded that the proposed instruction was inconsistent with law and declined to give the instruction in favor of an instruction that set out the statutory language of this section. On appeal, Archambault asserted that the trial court erred by not giving the proposed instruction. The Supreme Court agreed that the trial court erred in concluding that the Graves instruction was inconsistent with law, but also held that giving the Graves instruction is not necessarily mandated. Pursuant to a trial court's broad discretion in formulating jury instructions and the overriding principle that jury instructions must fully and fairly instruct the jury regarding the applicable law, the jury instruction that set out the statutory language fully and fairly set out the requisite elements of justifiable use of force in a manner sufficient to guide the jury. St. v. Archambault, 2007 MT 26, 336 M 6, 152 P3d 698 (2007), following St. v. White, 202 M 491, 658 P2d 1111 (1983), and followed in St. v. Bieber, 2007 MT 262, 339 M 309, 170 P3d 444 (2007), and St. v. Henson, 2010 MT 136, 356 Mont. 458, 235 P.3d 1274. However, see also St. v. Stone, 266 M 345, 880 P2d 1296 (1994), and St. v. Claric, 271 M 141, 894 P2d 946 (1995), applying the Graves instruction.

Jury Instruction Regarding Witness Credibility Not Erroneous: Marble contended that the trial court erred in giving a jury instruction regarding witness credibility. The Supreme Court looked at the jury instructions as a whole and concluded that the instructions fully and fairly instructed the jury on the law applicable to the case and gave the jury adequate guidance on assessing and weighing the credibility of witnesses. Marble was not prejudiced by the jury instructions, and his conviction was affirmed. St. v. Marble, 2005 MT 208, 328 M 223, 119 P3d 88 (2005), following St. v. Grindheim, 2004 MT 311, 323 M 519, 101 P3d 267 (2004).

Jury Instruction Denying Intoxication Defense When Defendant Claims Justifiable Use of Force — No Error: Contesting a jury instruction based on 45-2-203 that intoxication was not a defense, McCaslin contended that it was fundamentally unfair for the state to introduce evidence of McCaslin's intoxicated condition to illustrate that McCaslin was too intoxicated to act reasonably in self-defense, rebutting McCaslin's justifiable use of force defense, while on the other hand prohibiting McCaslin from using the inebriated condition as a defense or for determining intent. However, the jury was instructed on: (1) the elements of each offense and the state's burden of proving each element beyond a reasonable doubt; (2) the definitions of purposely and knowingly; (3) the ability to infer the existence of a mental state from the acts of an accused and from the facts and circumstances connected with an offense; (4) the difference between direct and circumstantial evidence; (5) witness credibility; and (6) the need for a unanimous verdict. As a whole, the jury instructions did not prejudicially affect McCaslin's substantial rights, and the District Court did not abuse its discretion in giving the contested jury instruction. St. v. McCaslin, 2004 MT 212, 322 M 350, 96 P3d 722 (2004). See also St. v. Grindheim, 2004 MT 311, 323 M 519, 101 P3d 267 (2004).

Burden on Defendant in Justifiable Use of Force Case to Raise Reasonable Doubt of Guilt: Longstreth was charged with deliberate homicide and relied on a defense of justifiable use of force. After being convicted of negligent homicide, Longstreth alleged that the jury was incorrectly instructed in violation of her due process rights, contending that the instructions improperly allocated the burden of proof by failing to require the state to prove an absence of justification beyond a reasonable doubt. Citing St. v. Daniels, 210 M 1, 682 P2d 173, 41 St. Rep. 880 (1984), and St. v. Miller, 1998 MT 177, 290 M 97, 966 P2d 721 (1998), the Supreme Court reiterated that justifiable use of force is an affirmative defense and that only the defendant has the burden of producing sufficient evidence to raise a reasonable doubt of guilt. The state's burden is to prove the elements of the charged offense beyond a reasonable doubt, which does not include the absence of justification. Further, 45-5-112 allows for a permissive inference by the jury rather than a mandatory inference. As long as the instructions given to the jury make it clear that the burden of proof of guilt and all necessary elements of guilt lies squarely with the state, placing the burden of presenting evidence to raise a reasonable doubt of guilt on the defendant is not unconstitutional. St. v. Longstreth, 1999 MT 204, 295 M 457, 984 P2d 157, 56 St. Rep. 795 (1999). See also Leland v. Oreg., 343 US 790, 96 L Ed 1302, 72 S Ct 1002 (1952), Patterson v. N.Y., 432 US 197, 53 L Ed 281, 97 S Ct 2319 (1977), and St. v. Lopez, 185 M 187, 605 P2d 178 (1980). St. v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 623, held that the enactment of 46-16-131 in 2009 abrogated Longstreth, St. v. Henson, 2010 MT 136, 356 Mont. 458, 235 P.3d 1274, and other cases to the extent they held the burden of establishing justifiable use of force was the defendant's in a justifiable use of force case.

No Evidence to Support Self-Defense Theory — Instruction Unwarranted: The District Court did not err in refusing to give an instruction on justifiable use of force when there was no evidence given at trial that defendant: (1) was not the aggressor; (2) reasonably believed that he was in imminent danger of unlawful harm; and (3) used reasonable force necessary to defend himself. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Instruction on Justifiable Use of Force Not Requested but Given — Supporting Evidence — No Error: Neither party requested an instruction on justifiable use of force or self-defense, but the District Court decided to give one. Defendant claimed the instruction lacked evidentiary support and confused the jury with conflicting theories of negligent homicide and self-defense. The Supreme Court found that defendant's testimony describing the victim's statements and his own actions could have led the jury to conclude defendant was not the aggressor. Because the theory was supported in the evidence, giving of the instruction was not error. St. v. DeMers, 234 M 273, 762 P2d 866, 45 St. Rep. 1901 (1988).

Self-Defense — Judge's Refusal to Give Instruction Without Testimony of Defendant — Not Contrary to Right Against Self-Incrimination: Defendant raised the affirmative defense of self-defense in his trial for homicide. There were no witnesses to the killing other than the defendant. The defendant argued that he could introduce evidence tending to show the decedent was the aggressor by showing his reputation and specific acts of turbulence or violence. It was not error for the District Court to require the defendant to testify as to his own fear or apprehension, based upon the deceased's reputation, to lay a foundation for other witnesses to testify as to the deceased's violence or risk being denied an instruction on self-defense. Neither at that point nor during the trial did defense counsel object to the ruling or assert his client could not be compelled to testify against himself, and it was never asserted, even at appellate argument, that defendant would not have testified except for that ruling. St. v. Kutnyak, 211 M 155, 685 P2d 901, 41 St. Rep. 1277 (1984).

Standard Self-Defense Instruction Given — Second Instruction Tailored to Facts Improper: In aggravated assault trial, the 9th instruction fully set forth the elements of self-defense and the 10th instruction related to self-defense by one assaulted with fists, as defendant claimed he had been. The 10th instruction was repetitious and may have placed undue emphasis on the requirements for self-defense. On remand following reversal on another issue, the court recommended that the repetitious instruction not be given. St. v. White, 202 M 491, 658 P2d 1111, 40 St. Rep. 235 (1983).

Use of Term "Reasonable Man" in Context Other Than Self-Defense: A group of people standing at a street corner verbally harassed the defendant as he repeatedly walked past. A shooting incident resulted, with the defendant at trial pleading self-defense. In his closing argument the prosecutor asked the jury whether a "reasonable person" would repeatedly return to the corner. While the use of the term "reasonable man" in a context other than self-defense could cause confusion, no likelihood of confusion was demonstrated here. The jury instructions and explanations by counsel pertaining to self-defense clearly set forth the standard. St. v. Dupre, 200 M 165, 650 P2d 1381, 39 St. Rep. 1660 (1982).

Misstatement of Law Regarding Self-Defense in Jury Instruction:

Jury instructions given in a state court trial involve questions of state law. It is only where the instructions rendered the trial fundamentally unfair that a federal question cognizable in a habeas corpus proceeding is presented. Where jury instructions on self-defense contained several phrases that could be read as a misstatement of the law, but when read in their entirety clearly informed the jury, no error of constitutional magnitude was committed. Bashor v. Risley, 539 F. Supp. 259, 39 St. Rep. 960 (D.C. Mont. 1982).

Although a jury instruction to the effect that absence of justifiable use of force is an element of the crime of deliberate homicide to be proven by the prosecutor is erroneous, and the more correct statement of law which should have been phrased in the jury instruction is that justification for use of force is an affirmative defense that requires the defendant to produce sufficient evidence before justification for use of force is placed in issue, the District Court did not commit prejudicial error in giving the erroneous instruction since, viewing the instruction as a part of the whole body of instruction, the defendant was not limited from fairly presenting his theory of defense. Nor was omission of defendant's proposed instruction prejudicial error since defendant's instruction was merely repetitive. St. v. Graves, 191 M 81, 622 P2d 203, 38 St. Rep. 9 (1981). J. Sheehy, specially concurring, sets out the elements, which should be contained in a jury instruction, to be considered by a jury in determining whether the use of force is justified. Additional instructions regarding justification in use of force are suggested. Graves was followed in St. v. Stone, 266 M 345, 880 P2d 1296, 51 St. Rep. 790 (1994). See also St. v. Enfinger, 222 M 438, 722 P2d 1170, 43 St. Rep. 1403 (1986).

Jury Instruction — Justifiable Use of Force Necessitating Acquittal: Collins was convicted of mitigated deliberate homicide in the death of Darrell Gardipee. Collins relied on the defense of self-defense. The jury instruction given on mitigated deliberate homicide and on self-defense recited almost verbatim 45-5-103 and 45-3-102 through 45-3-104. Collins argued that the justifiable use of force instruction did not adequately instruct the jury that if they found his use of force justified, he was entitled to an acquittal. Rather, the instruction would lead a jury to conclude that justifiable use of force was merely a justification or excuse which would reduce deliberate homicide to mitigated deliberate homicide. The federal court agreed with Collins and granted his petition for a Writ of Habeas Corpus. United States ex rel. Collins v. Blodgett, 513 F. Supp. 1056, 38 St. Rep. 792 (D.C. Mont. 1981), distinguished in St. v. Enfinger, 222 M 438, 722 P2d 1170, 43 St. Rep. 1403 (1986).

Jury Instructions on Self-Defense Requirements: Three jury instructions allegedly gave incorrect statements of the law because they did not clearly express the self-defense requirements. Although the precise statutory phrase "reasonably believes" was not used, the Montana Supreme Court found that two of the instructions made it absolutely clear to the jury that the danger need not be actual, it need only be what a reasonable person would perceive as being a threat to the person's life or a threat of serious bodily harm. In the third instruction appealed from, the words "necessary self-defense" conceivably could be an incorrect statement of the law. However, the instruction contains the proviso "as explained and defined in these instructions". Therefore, no error occurred by giving the three instructions. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Jury Instructions on "Serious Bodily Harm" and "Serious Bodily Injury" — Applicability — Requirements: Defendant in a deliberate homicide case contended on appeal that the trial court failed to instruct the jury fully and fairly on the law of self-defense. The disagreement centered on the differences between "serious bodily harm" and "serious bodily injury", and the proper use of instructions on the two terms. The Montana Supreme Court said that the test is whether the instructions given on justifiable force gave the defendant ample opportunity to expound to the jury in argument his theory with respect to the use of force as self-defense against an unlawful act. The court found the test had been passed in this case. Further, the court agreed that "harm" and "injury" are not necessarily synonymous and that there was no indication that the Legislature intended to integrate the definition of "serious bodily injury" into the self-defense statute. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Jury Instruction on "Aggressor" — Self-Defense: An instruction defining "aggressor" and stating the unavailability of the defense of self-defense to an aggressor was appealed because there allegedly was no evidence presented in support of the instruction and, as given, allegedly was an incorrect statement of the law. The Supreme Court said that the trial judge must instruct the jury on every essential question presented by the evidence. Testimony that the defendant and a friend had made efforts to attract the victim's attention as he came out of the bar just before the shooting, coupled with the testimony of the defendant's prior acts of hostility toward the victim and his girlfriend, was sufficient to justify the aggressor instruction. Defendant's allegation that the jury instruction incorrectly stated the law was also rejected on appeal. The exceptions to the lack of availability of the defense of self-defense to an aggressor were inapplicable to the facts. Furthermore, the State had offered an instruction incorporating statutory language of 45-3-105, but the defendant rejected that proposed jury instruction. The reviewing court held that having objected to the very instruction he now asserts should have been included, defendant may not then predicate error on the absence of the qualifying instruction. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Self-Defense Admits Purposeful Act — No Undue Burden: Defendant contends the jury was incorrectly and incompletely instructed on the affirmative defense of self-defense. Self-defense admits a purposeful act but claims the purposeful act was justified. Defendant asserts the trial court's instructions failed to explain self-defense as a concept of fear to be judged in light of appearances and failed to explain that he had no duty to retreat. The concepts of self-defense were conveyed to the jury by the body of the instructions. The defendant was given ample opportunity to present his theory of defense to the jury. Evidence presented by the State showing the totality of the circumstances surrounding the homicides did not raise the issue of self-defense. The defendant was required to present evidence of self-defense, and no undue burden was placed upon him by the trial court. St. v. Sunday, 187 M 292, 609 P2d 1188 (1980).

Assault — Self-Defense: Defendant, charged with mitigated deliberate homicide, alleged as error the refusal of defendant's offered instruction on self-defense. The defendant argued that because of the expert testimony regarding the intimidating effects on defendant caused by his bizarre relationship with his mother, it was essential that the jury be instructed in terms of the apparent danger which he perceived and not the actual dangers which faced him. The court said that, where counsel is not limited under the instructions given from fairly presenting his defense to the jury, the defendant will not be heard to complain that the court failed to give the many different nuances on a theory of defense that might have been devised. It was therefore not reversible error to refuse the defendant's offered instruction. St. v. Hamilton, 185 M 522, 605 P2d 1121 (1980), following St. v. Reiner, 179 M 239, 587 P2d 950 (1978).

Fair Trial — Self-Defense Instruction Proper: The jury was given the following instruction: "You are instructed that the defense of justifiable use of force or self-defense is an affirmative defense and the defendant has the burden of proving self-defense to raise a reasonable doubt of his guilt." In light of the Patterson and Leland cases, the court held that, despite a stronger wording than it favors, the burden of proof did not shift to defendant with this instruction. Time and again the jury was instructed that the defendant was presumed to be innocent and that the State must prove the defendant's guilt beyond a reasonable doubt. St. v. Lopez, 185 M 187, 605 P2d 178 (1980), following Patterson v. N.Y., 432 US 197, 97 S Ct 2319, 53 L Ed 2d 281 (1977) and Leland v. Oregon, 343 US 790, 72 S Ct 1002, 96 L Ed 1302 (1952), distinguishing Sandstrom v. St., 442 US 510, 99 S Ct 2450, 61 L Ed 2d 39 (1979).

Refusal to Give Jury Instruction — Self-Defense: Following St. v. Lagge, 143 M 289, 388 P2d 792 (1964), the court held that it is not error to refuse to give a requested instruction if the instruction's legal theory is adequately covered by the instruction given and as long as the rights of the defendant are fully protected. Following St. v. Collins, 178 M 36, 582 P2d 1179 (1978), the court held that the instructions given on justifiable force gave the defendant ample opportunity to expound to the jury in argument his theory with respect to the use of force as self-defense against an unlawful act. St. v. Freeman, 183 M 334, 599 P2d 368 (1979). See also St. v. Bingman, 229 M 101, 745 P2d 342, 44 St. Rep. 1813 (1987).

Use of Force — Statutory Language: Where a defendant claims to have acted in self-defense, it is not reversible error to give an instruction on use of force by an aggressor in the statutory language without relating the instruction to the facts of the case if the jury can readily relate the facts to the instruction and no prejudicial effect is created. St. v. Reiner, 179 M 239, 587 P2d 950 (1978).

Instructions — "Knowledge": The court did not err by refusing repetitious instructions regarding self-defense and defense of another or by giving an instruction further defining "knowledge" beyond the language contained in defendant's proposed instruction. The jury was entitled to a complete definition of "knowledge" since the crimes charged require "knowledge" or "purpose" on the part of the accused. St. v. Larson, 175 M 395, 574 P2d 266 (1978).

Instruction Refused — No Reasonable Apprehension:

Instruction on self-defense was not required in the absence of evidence of apprehension of harm to herself by defendant but where all of defendant's evidence tended to establish accident or justifiable homicide as defense. St. v. Eisenman, 155 M 370, 472 P2d 857 (1970).

Court properly refused defendant's instruction relative to self-defense where there was no evidence whatever that defendant acted under reasonable apprehension of death or great bodily harm and where witnesses for State gave no indication that defendant acted in fear nor did defendant himself claim that he acted under any fear of harm. St. v. Brooks, 150 M 399, 436 P2d 91 (1967).

Reasonable Man:

An instruction in a prosecution for murder that the right of self-defense was to be measured by what a reasonable person would have done under like or the same circumstances conformed to the requirements of 94-2513, R.C.M. 1947 (now part of this section), and was sufficient to state the right of self-defense. St. v. Houk, 34 M 418, 87 P 175 (1906).

In a prosecution for murder, where the defendant relied upon the plea of self-defense, an instruction which made the measure of justification "that sense of danger appearing to the defendant, and to men or individuals of his race, standing, individuality, and intelligence", was properly refused where another instruction covered the reasonable man standard on self-defense. St. v. Cadotte, 17 M 315, 42 P 857 (1895).

SUFFICIENCY OF EVIDENCE

Defendant's Offer of Own Out-of-Court Statement in Support of Justifiable Use of Force Claim Inadmissible: Following a fatal shooting, the defendant was charged with deliberate homicide and claimed justifiable use of force. Through cross-examination of law enforcement and in order to demonstrate what he knew and relied on at the time of the shooting, the defendant sought to introduce into evidence an out-of-court statement that he had made to law enforcement in which he described violent acts allegedly committed by the victim that a third party had described to the defendant. After the District Court ruled in the defendant's favor, the state petitioned for supervisory control. The Supreme Court vacated the District Court ruling, concluding that evidence introduced at trial must be admissible under the Montana Rules of Evidence and that the defendant's attempt to offer his own out-of-court statement did not fit within a hearsay exception and was not allowed under the Rules of Evidence. The defendant also argued that 45-3-112 and 46-16-131 rendered the Rules of Evidence inapplicable and required disclosure of the statement to the jury. The Supreme Court disagreed, concluding that 45-3-112 does not mandate disclosure of investigative materials to the jury in violation of the Rules of Evidence and that requiring the defendant to comply with the Rules of Evidence does not shift the burden of proof in violation of 46-16-131. St. v. Ninth Judicial District Court, 2014 MT 188, 375 Mont. 488, 329 P.3d 603.

Use of Evidence to Rebut Claim of Justifiable Use of Force: Pursuant to this section, a person is justified in the use of force or threat to use force against another when and to the extent that the person reasonably believes that such conduct is necessary to defend against the imminent use of unlawful force. Under St. v. Daniels, 210 M 1, 682 P2d 173, 41 St. Rep. 880 (1984), that person has the burden of producing sufficient evidence on the issue to raise a reasonable doubt of guilt. Ultimately, whether the use of force was justified will be determined by the jury based on evidence of what the person reasonably believed when confronted with the imminent use of unlawful force. Thus, evidence of the person's postincident actions is immaterial in determining whether the use of force was justified and would in no sense tend to make the person's reasonable belief at the time of the attack more or less probable under Rule 401, M.R.Ev. (Title 26, ch. 10). State ex rel. Kuntz v. District Court, 2000 MT 22, 298 M 146, 995 P2d 951, 57 St. Rep. 111 (2000). See also People v. Fowler, 174 P 892 (Calif. 1918), and St. v. Barrack, 267 M 154, 882 P2d 1028, 51 St. Rep. 983 (1994).

Threats and Improper Influence in Official and Political Matters — Use of Force Unjustified: After a confrontation with state highway crew members, the Heffners were convicted of threats and other improper influence in official and political matters, a felony under 45-7-102. They appealed on grounds that their actions were made in self-defense. Their theory was wholly dependent on their version of the facts, which the jury was entitled to reject. The jury weighed the evidence, assessed the credibility of the witnesses, and found the state's version more credible. Viewing the evidence in the light most favorable to the prosecution, the Supreme Court held that there existed sufficient evidence from which a rational jury could find that the Heffners injured a road grader operator because of the discharge of his duties or to prevent him from discharging his duties and that the Heffners were not justified in their use of force against the grader operator. St. v. Heffner, 1998 MT 181, 290 M 114, 964 P2d 736, 55 St. Rep. 732 (1998).

Sufficiency of Evidence When Self-Defense Claimed: On appeal, defendant convicted of aggravated assault argued that she met her burden of proof of self-defense, which she correctly stated as raising a reasonable doubt as to her guilt. The Supreme Court's function on appeal is not to determine whether she raised a reasonable doubt as to her guilt but whether the evidence was sufficient to support her conviction when viewed in the light most favorable to the state (see St. v. Lamb, 198 M 323, 646 P2d 516, 39 St. Rep. 1021 (1982)). Disputed questions of fact and the credibility of witnesses will not be considered on appeal (see St. v. DeGeorge, 173 M 35, 566 P2d 59 (1977)). Finding substantial evidence in the record, the court held that defendant was not justified in using force likely to cause death or serious bodily harm. St. v. Tonkovich, 221 M 8, 716 P2d 615, 43 St. Rep. 592 (1986).

Self-Defense and Mitigated Deliberate Homicide Not Inconsistent: The defense of self-defense is not inconsistent with the conviction of mitigated deliberate homicide. The jury could have found that the defendant was acting under mental or emotional stress brought about by the attack of the victim but could also have found that the counterforce used by the defendant was so excessive as not to be reasonable and justified. In such an instance a verdict of mitigated deliberate homicide is justified. St. v. Freeman, 183 M 334, 599 P2d 368 (1979), following St. v. Collins, 178 M 36, 582 P2d 1179 (1978).

Standard of Proof: The Supreme Court reaffirmed its holding in St. v. Grady, 166 M 175, 531 P2d 684 (1975), and held that when a criminal defendant seeks to avail himself of the affirmative defense of the use of force in defense of a person pursuant to this section, he has the "burden of producing sufficient evidence on the issue to raise a reasonable doubt of his guilt". St. v. Cooper, 180 M 68, 589 P2d 133 (1979).

Jury Function When Evidence Conflicts: If the evidence on a claim of self-defense is conflicting, it is the jury's function to weigh the testimony and decide whether a person acted with the belief that the use of force was necessary and whether this belief was reasonable. When presented with these factual issues, the jury has the prerogative to accept or reject defendant's claims. St. v. Reiner, 179 M 239, 587 P2d 950 (1978), followed in St. v. Bower, 254 M 1, 833 P2d 1106, 49 St. Rep. 586 (1992).

Defense of Another: There was sufficient evidence for the jury to determine that defendant's fatal shooting of an individual and his wounding of another were not justified, as defendant contends, by defense of his brother. St. v. Larson, 175 M 395, 574 P2d 266 (1978).

Reputation of Decedent: Evidence of reputation of decedent for turbulence and violence was admissible, even though unknown to defendant, where there was a question as to which party was the aggressor. St. v. Jones, 48 M 505, 139 P 441 (1914), distinguished in St. v. Heaston, 109 M 303, 97 P2d 330 (1939).

Law Review Articles

Lightning v. the Lightning Bug: A Problem of Statutory Interpretation in State v. Cooksey, Boland, 75 Mont. L. Rev. 149 (2014).

Rescuing Your Attacker: State of Montana ex rel. Kuntz v. Montana Thirteenth Judicial District Court, Merreot, 63 Mont. L. Rev. 229 (2002).

45-3-103. Use of force in defense of occupied structure.

Criminal Law Commission Comments

Source: Ill. C. C., 1961, Chapter 38, § 7-2.

This aspect of justification seems to be rather well-settled: a person may prevent or repel with force another's unlawful entry into a dwelling, whether the dwelling is occupied by the person using such force or by someone else, and whether the trespasser uses force or enters without force; but the use of deadly force is limited to instances of violent or forcible felonies and violent entries with apparent threat of personal violence to someone in the occupied structure. The reasonable-belief and no-retreat principles apply.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 332 in (2) at beginning inserted "A person justified in the use of force pursuant to subsection (1)"; in (2)(a) near beginning after "attempted" deleted "in violent, riotous, or tumultuous manner" and near middle after "assault upon" deleted "or offer of personal violence to"; and made minor changes in style. Amendment effective April 27, 2009.

Preamble: The preamble attached to Ch. 332, L. 2009, provided: "WHEREAS, the Legislature declares that:

(1) the right of Montanans to defend their lives and liberties, as provided in Article II, section 3, of the Montana Constitution, and their right to keep or bear arms in defense of their homes, persons, and property, as provided in Article II, section 12, of the Montana Constitution, are fundamental and may not be called into question;

(2) the use of firearms for self-defense is recognized within the right reserved to the individual people of Montana in Article II, section 12, of the Montana Constitution;

(3) self-defense is a natural right under section 1-2-104, MCA, and is included in sections 49-1-101 and 49-1-103, MCA;

(4) the lawful use of firearms for self-defense is not a crime or an offense against the people of the state;

(5) in a criminal case in which self-defense is asserted, the burden of proof is as provided in [section 10] [actually section 9, Ch. 332, L. 2009, enacting 46-16-131];

(6) in self-defense, the use of justifiable force discourages violent crime and prevents victimization; and

(7) the purpose of [sections 1 through 3] [enacting 45-3-110 through 45-3-112] is to clarify and secure the ability of the people to protect themselves."

Annotator's Note: This section defines the extent to which force may be used to defend an occupied structure. Since the definition of occupied structure is broad (see MCA, 45-2-101), the privilege granted by this section extends to virtually any vehicle or building suited for human habitation whether or not occupied. Under this section, a person is allowed to use nondeadly force to protect a dwelling from unlawful entry. This privilege to protect unoccupied structures is covered by MCA, 45-3-104.

Subsections (1) and (2) continue the privilege to use deadly force to protect an occupied structure when the intruder enters with violence. Because the clause "offer of personal violence" extends to forces which are not likely to inflict great bodily harm the privilege to use deadly force in defense of dwellings is broad. However, justified use of deadly force does not include killing or severely injuring a person merely because that person trespasses when his presence is without violence. The wording for this section is substantially the same as the Illinois source.

Illinois case law indicates that the entry must be unlawful before this section is applicable, thus excluding the possibility of justification under this section where the victim enters lawfully but subsequently engages in unlawful conduct for which the occupant of the dwelling expels the victim. See People v. Brown, 19 Ill. App.3d 757, 312 N.E.2d 789 (1974), in which the court held that a defense under this section is untenable where the evidence discloses a lawful entry by the victim, and People v. Chapman, 49 Ill. App.3d 553, 364 N.E.2d 577 (1977), in which this section was held inapplicable where the victim was not an unlawful intruder (victim shared apartment with defendant) even if the defendant acted to prevent the commission of a forcible felony by the victim in defendant's home. This interpretation of the statutes renders this section somewhat more restrictive than R.C.M. 1947, § 94-605(3) under former law. R.C.M. 1947, § 94-605(3) provided that the use or attempt or offer to use force or violence upon or towards another was not unlawful when committed in preventing or attempting to prevent a trespass or other unlawful interference with real or personal property in his possession, if the force or violence used was not more than sufficient to prevent the offense. That section was interpreted to allow the occupant of a dwelling to use force to expel one who entered the dwelling with the permission of the occupant but who then became a "trespasser" and whose privilege to remain was subsequently withdrawn. St. v. Nickerson, 126 M 157, 247 P2d 188 (1952). The present statute does not use the word "trespass" (which would cover the withdrawn privilege situation) and only allows the use of force or threat of force in defense of an occupied structure where such conduct reasonably seems necessary to "prevent or terminate such other's unlawful entry into or attack upon an occupied structure". This section may, therefore, require an amendment to cover the situation in which the visitor's entry was lawful but his privilege to remain has been withdrawn.

Case Notes

Unlawful Entry Prerequisite to Justifiable Use of Force Instruction: In a deliberate homicide trial in which the defendant asserted justifiable use of force, the District Court properly denied the defendant's proffered jury instructions regarding use of force in defense of an occupied structure and the definition of burglary as a forcible felony. Unlawful entry is a prerequisite to both of the proffered instructions, and the evidence clearly established the victim entered the defendant's house lawfully. St. v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 623.

No Additional Right to Use of Force by Residing in Remote Area: Defendant contended he had a right to be more protective of himself because he lived in an isolated area with no full-time law enforcement. The Supreme Court conceded that an isolated situation might more often result in facts that allow the justifiable use or threat of force; however, the laws governing the justifiable use or threat of force remain the same throughout the state and control an individual's actions wherever he resides in the state. St. v. Crabb, 232 M 170, 756 P2d 1120, 45 St. Rep. 966 (1988).

Jury Instruction — Justifiable Use of Force Necessitating Acquittal: Collins was convicted of mitigated deliberate homicide in the death of Darrell Gardipee. Collins relied on the defense of self-defense. The jury instruction given on mitigated deliberate homicide and on self-defense recited almost verbatim 45-5-103 and 45-3-102 through 45-3-104. Collins argued that the justifiable use of force instruction did not adequately instruct the jury that if they found his use of force justified, he was entitled to an acquittal. Rather, the instruction would lead a jury to conclude that justifiable use of force was merely a justification or excuse which would reduce deliberate homicide to mitigated deliberate homicide. The federal court agreed with Collins and granted his petition for a Writ of Habeas Corpus. United States ex rel. Collins v. Blodgett, 513 F. Supp. 1056, 38 St. Rep. 792 (D.C. Mont. 1981), distinguished in St. v. Enfinger, 222 M 438, 722 P2d 1170, 43 St. Rep. 1403 (1986).

Defense of Occupied Structure Not Available if Entry Made Peacefully or Lawfully: The Montana statute defining the justifiable use of force in defense of an occupied structure is derived from Illinois law, which requires an unlawful entry to trigger the statute. The defendant could not assert justification when the victims entered her premises lawfully and then engaged in unlawful conduct for which the defendant sought to expel the victims. The appellant asserted that once she had ordered the customers out of her bar and they refused to go, their continued presence became an unlawful entry. The reviewing court concluded that the shooting did not occur while the appellant was trying to prevent or terminate an entry into her premises. No authority was cited by the appellant or found by the court to support the theory that a "tumultuous entry" into a tavern makes the entry unlawful. The refusal of the offered instructions was proper. St. v. Sorenson, 190 M 155, 619 P2d 1185, 37 St. Rep. 1834 (1980). See also St. v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 623.

Jury Instruction on "Occupied Structure"— Coverage of Vehicles: On appeal from a conviction for deliberate homicide, the defendant claimed his proposed jury instruction on "occupied structure" was correct because the statutory definition includes "vehicle". However, the Chevrolet Blazer in which the defendant was sitting when he shot the victim was not covered by the definition, since the structure must be suitable for human occupancy or night lodging of persons or for carrying on business, and the Blazer was not so suitable. A defendant is entitled to an instruction having support in the evidence presented but not if there is no such support. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

In General: This section, which provides that a person is justified in using force to prevent or terminate another's unlawful entry into or attack upon a dwelling, is for the benefit of not only the tenant or occupant of the dwelling but for guests as well. People v. Stombaugh, 52 Ill.2d 130, 284 N.E.2d 640 (1972). See also People v. Daulikis, 45 Ill. App.2d 128, 195 N.E.2d 402 (1964). Defendant's assertion of defense to homicide prosecution based on this section was held untenable where the evidence discloses a lawful entry by the homicide victim. People v. Brown, 19 Ill. App.3d 757, 312 N.E.2d 789 (1974). Where the entry is lawful and the victim is not an intruder (here the victim shared an apartment with the defendant), this section does not provide a defense even where the defendant acted to prevent the commission of a forcible felony by the victim in the defendant's home. People v. Chapman, 49 Ill. App.3d 553, 364 N.E.2d 577 (1977).

Instructions: The defendant has the responsibility of tendering instructions which are based upon this section. People v. Davis, 74 Ill. App.2d 450, 221 N.E.2d 63, 66 (1966). An instruction on the defense of a dwelling is inappropriate where the evidence indicates that the defendant was acting in defense of himself and not of a dwelling. People v. Stombaugh, 52 Ill.2d 130, 284 N.E.2d 640 (1972).

Excessive Force: Defendant who fired bullets through apartment door striking investigating police officer was properly convicted of first-degree assault for use of excessive force where the police officer was privileged to open the apartment door to the limit of the night latch and where he announced that he was a policeman prior to the firing of the shot. St. v. Lukus, 149 M 45, 423 P2d 49 (1967).

Justifiable Force: Defendant was justified in pointing a loaded revolver at an unknown person entering his home after he had forcibly evicted an unauthorized occupant and had had timber stolen, and the fact that defendant surrendered his weapon after identifying the person entering indicated that he had no intention to fire except in defense of his home. St. v. Nickerson, 126 M 157, 247 P2d 188 (1952).

Possession Necessary for Defense: The defendant, who had been in peaceable possession of the premises as owner thereof for months, had the right to defend such possession, provided he used no more force than was necessary for that purpose. It was error to refuse an instruction to that effect. St. v. Howell, 21 M 165, 53 P 314 (1898).

45-3-104. Use of force in defense of other property.

Criminal Law Commission Comments

Source: Ill. C. C., 1961, Chapter 38, § 7-3.

The general principles of justification concerning the defense of person and occupied structure are applicable to a limited extent to the defense of real property other than an occupied structure, and personal property lawfully in the person's possession (or the possession of certain other persons): he may use force which he reasonably believes to be necessary to protect the property, but he may not use deadly force except to prevent the commission of a forcible felony.

The right of a person to use force in preventing a trespass upon or interference with another person's property is limited to property in the possession of a member of the immediate family or household of the person using the preventive force, or is property the person using the preventive force has a legal duty to protect. The right of a private person to arrest one who commits or attempts a criminal offense in his presence supplements the right to use force in the defense of other property. See R.C.M. 1947, section 95-611 [now 46-6-502, MCA].

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This section defining the extent of force which may be used to defend unoccupied structures, land, and personal property must be read in conjunction with sections 45-6-201 and 45-6-203 which set out the offenses of Criminal Trespass. Under section 45-6-201, a person is privileged to enter land unless he is given personal notice or posting that he is a trespasser. Section 45-6-203 enlarges the category of persons criminally liable for knowing trespasses to anyone who knowingly enters or remains unlawfully on the premises of another. Under former law, criminal trespass generally extended only to those who engaged in some prohibited act after entering upon the premises. When taken together, these sections clearly indicate that the landowner has no right to use or threaten force against an unknowing trespasser. After a person has been notified that he is trespassing he must leave or be found guilty of a misdemeanor, regardless of whether he does some unlawful act on the property. By making the knowing trespasser a misdemeanant, the property owner can call for official aid in expelling the trespasser rather than using self-help. While the new code seeks to prevent violent confrontations between trespassers and property owners, this section does not preclude the landowner from using force to expel a knowing trespasser if law enforcement help is not available. It should be noted that deadly force may only be used to prevent the commission of a forcible felony (45-2-101). The wording for this section is substantially similar to the Illinois source.

Case Notes

Adequate Instructions on Use of Force: Claric contended that the trial court erred in giving jury instructions on his defense of justifiable use of force. A defendant is not entitled to have the jury instructed on every nuance of the defendant's theory of the case. The court adequately instructed the jury that Claric was free to act upon his perceptions, if reasonable, even if mistaken, using the instruction previously approved in St. v. Stone, 266 M 345, 880 P2d 1296 (1994). Claric's proposed instruction regarding the defense was repetitious and thus unnecessary. Further, Claric's assertion of court error in not giving an instruction on the reasonable apprehension of harm when the assailant is larger and stronger was misplaced, given the presence of both parties in the court and the jury's ability to observe them, along with Claric's opportunity to argue the issue in closing. St. v. Claric, 271 M 141, 894 P2d 946, 52 St. Rep. 377 (1995). See also St. v. Hess, 252 M 205, 828 P2d 382 (1992), and St. v. Webb, 252 M 248, 828 P2d 1351 (1992).

No Instruction on Justifiable Use of Force in Defense of Property When Ownership of Property Not Proved — Instructions on Self-Defense Proper: Claric contended that his use of force was justified in order to eject McCready, a trespasser, from Claric's property and that the trial court erred in not giving an instruction on justifiable use of force, thereby depriving Claric of his defense theory. However, ownership of the property was disputed, and absent evidence that Claric was in lawful possession of the property, McCready could not be considered a trespasser. Claric had no legal right to evict McCready, and the court properly refused Claric's instructions regarding defense of property. St. v. Claric, 271 M 141, 894 P2d 946, 52 St. Rep. 377 (1995).

"Stop and Frisk" by Private Security Guard Held Proper: A "stop and frisk" by a private security guard of a suspected thief on the hotel grounds was justifiable as an action taken to protect the hotel and its occupants against trespassers in the process of committing an offense, since a person has the right to use any necessary force to protect himself or his employer or his employer's property from wrongful injury. St. v. Bradford, 210 M 130, 683 P2d 924, 41 St. Rep. 962 (1984).

Jury Instruction — Justifiable Use of Force Necessitating Acquittal: Collins was convicted of mitigated deliberate homicide in the death of Darrell Gardipee. Collins relied on the defense of self-defense. The jury instruction given on mitigated deliberate homicide and on self-defense recited almost verbatim 45-5-103 and 45-3-102 through 45-3-104. Collins argued that the justifiable use of force instruction did not adequately instruct the jury that if they found his use of force justified, he was entitled to an acquittal. Rather, the instruction would lead a jury to conclude that justifiable use of force was merely a justification or excuse which would reduce deliberate homicide to mitigated deliberate homicide. The federal court agreed with Collins and granted his petition for a Writ of Habeas Corpus. United States ex rel. Collins v. Blodgett, 513 F. Supp. 1056, 38 St. Rep. 792 (D.C. Mont. 1981), distinguished in St. v. Enfinger, 222 M 438, 722 P2d 1170, 43 St. Rep. 1403 (1986).

In General:

The owner of property or his representative has the right under this section to use reasonable force to terminate a trespass. But in the absence of preventing a forcible felony, neither the owner nor his representative is entitled to use such force as was intended or likely to cause death or great bodily harm. People v. Dillard, 5 Ill. App.3d 896, 284 N.E.2d 490 (1972).

The fact that a person has a mistaken belief as to his authority to enter land of another does not alter his status as a trespasser nor terminate the landowner's right to use force in deterring the trespass. People v. Raber, 130 Ill. App.2d 813, 264 N.E.2d 274, 275 (1970).

Instructions: The defendant has the responsibility of tendering instructions based upon this section which necessarily bear favorably upon some aspect of his defense. People v. Davis, 74 Ill. App.2d 450, 221 N.E.2d 63, 66 (1966). A defendant's instruction based upon this section, however, was held to be inappropriate where it appeared that the defendant was using force in making a citizen's arrest rather than in defense of his property. People v. Fort, 133 Ill. App.2d 694, 273 N.E.2d 439, 448 (1971).

Burden of Proof: As is the general rule in Illinois with regard to all affirmative defenses, where the defendant raises an issue of justification as an affirmative defense by presenting some evidence upon it, the State must sustain the burden of proving guilt beyond a reasonable doubt as to that issue together with all other elements of the offense. People v. Raber, 130 Ill. App.2d 813, 264 N.E.2d 274, 275 (1970).

Game Law Violation: Landowner had a constitutionally protected right to kill elk out of season when necessary to prevent damage to his pasturage and other property and all other measures had failed. St. v. Rathbone, 110 M 225, 100 P2d 86 (1940).

45-3-105. Use of force by aggressor.

Criminal Law Commission Comments

Source: Ill. C.C., 1961, Chapter 38, § 7-4.

Each of the preceding sections of this chapter has assumed that the person using force in defense has not committed an unlawful act which has inspired the use or threat of force against him, and has not otherwise provoked such force. This section concerns the much more limited right which a person has to defend himself, when he has committed an unlawful act or otherwise provoked the use of force. A person has no right of defense if he is attempting or committing a forcible felony, or is escaping after committing it; or if he has deliberately provoked the use of force against himself. Only a completed withdrawal, followed by a new encounter initiated by the other person, will reinstate a right of defense. (See Perkins, "Self-Defense Re-Examined," 1 U.C.L.A. L. Rev. 133 at 147 (1954).) However, if a person voluntarily engages in a fight or in some other manner, by words or actions provokes the use of force against himself which apparently will not involve the use of deadly force, but unexpectedly is threatened with deadly force, he has a qualified right to protect himself by using deadly force. First, however, the original provocateur must use any method which is reasonably available to avoid the use of deadly force including a "retreat to the wall."

Subsections (2)(a) and (b) outline the cases in which the aggressor's right of self-defense is reinstated. The first is that which obtains when the aggressor, not using deadly force, is suddenly confronted with deadly force and has retreated, as he reasonably believes, to the practical limit but nevertheless reasonably believes that he must use deadly force to prevent death or serious bodily harm to himself.

The second case is that in which the aggressor in good faith withdraws from the conflict and effectively communicates to the victim his intention to withdraw, but the victim continues or resumes the conflict. The relation between the participants should be regarded as reversed, the initial aggressor becoming the victim. Section (2)(b) applies only to the use of nondeadly force in self-defense. (See St. v. Merk, 53 M 454, 164 P 655 (1917).)

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This subsection is primarily the same as the parent Illinois source. The application of the section is discussed fully in the comment above.

Case Notes

Brief Misstatements During Closing by Prosecutor — Plain Error Review Declined: The defendant did not object at trial but subsequently sought plain error review concerning certain prosecutorial statements made during closing arguments. The defendant argued that the prosecutor engaged in prosecutorial misconduct when the prosecutor stated that a person could not shoot another person because of a punch and invited the jury to conclude that displaying a weapon was a provocation. However, the defendant did not demonstrate that failure to review these asserted errors would result in a miscarriage of justice, raise a question about the fundamental fairness of the proceedings, or compromise the integrity of the judicial process when, during a 4-day trial that focused extensively on the law, the defendant had wide latitude to try the case as he wanted, had proper jury instructions, and adamantly argued for his interpretation of the law throughout the trial. St. v. Lau, 2018 MT 93, 391 Mont. 204, 415 P.3d 993.

Separate Jury Instructions Required by Conflicting Testimony — Jury to Decide Credibility: The District Court had a duty to provide separate jury instructions regarding the law of justifiable use of force, with one providing for no duty to retreat and the other creating an obligation to retreat. Providing both instructions allowed the jury to decide whether either factual account was credible. To do otherwise would have invaded the province of the jury as a rational finder of fact. St. v. King, 2016 MT 323, 385 Mont. 483, 385 P.3d 561.

Aggressor — Use of Force Instruction Warranted by Conflicting Evidence: The criminal defendant objected to the District Court giving a jury instruction that implied he was the aggressor in a bar fight, claiming he was not the aggressor. The District Court agreed with the state that there was conflicting testimony as to whether the defendant was the aggressor. After he was convicted of criminal endangerment, the defendant appealed, arguing that the District Court had abused its discretion in giving the jury instruction regarding justifiable use of force. The Supreme Court affirmed, agreeing there was conflicting testimony about who was the aggressor as well as ample evidence for jurors to conclude the aggressor was the defendant. St. v. Erickson, 2014 MT 304, 377 Mont. 84, 338 P.3d 598. See also St. v. Polak, 2018 MT 174, 392 Mont. 90, 422 P.3d 112.

Justifiable Use of Force Defense — Motion to Dismiss for Insufficient Evidence Properly Denied: The defendant was charged with several counts related to a bar fight. He gave notice that he intended to claim justifiable use of force in his defense. At the close of the prosecutor's case, the defendant moved to dismiss the charges on the grounds that the state had not met its burden under 46-16-131. The District Court denied the motion, and the defendant was convicted of criminal endangerment. On appeal, the Supreme Court affirmed, concluding that when viewed in the light most favorable to the prosecution, there was sufficient evidence for the jury to conclude that the defendant's use of force was not reasonable. St. v. Erickson, 2014 MT 304, 377 Mont. 84, 338 P.3d 598.

Refusal to Give Jury Instructions on Third-Party Bystander Not Error: During an altercation between McCaslin and three other men, Tolman, who was not involved in the fight, entered the fray in an effort to calm the situation. McCaslin claimed that he thought that Tolman was one of the assailants, and McCaslin punched and stabbed Tolman. At trial, McCaslin offered a third-party bystander instruction, asserting that McCaslin was not responsible for injury to Tolman because Tolman's injury was sustained while McCaslin was involved in a justifiable use of force against the other men. The instruction was denied, and on appeal, the Supreme Court affirmed. Tolman was not a third-party bystander as the term is commonly understood, and the evidence did not support McCaslin's proposed instruction. St. v. McCaslin, 2004 MT 212, 322 M 350, 96 P3d 722 (2004).

No Prejudice to Defendant When Assistance of Counsel Not Deficient: Following conviction for deliberate homicide, Sellner filed a petition for postconviction relief based on ineffective assistance of counsel, contending that counsel was deficient in: (1) failing to investigate and present a case for justifiable use of force; (2) abandoning an attempted mitigated deliberate homicide defense; (3) pursuing a defense based on a civil suit filed against defendant; (4) failing to offer a "failure to agree" instruction to the jury; and (5) making other errors. The Supreme Court applied the

Strickland test to determine whether counsel's performance was deficient and prejudicial, addressing each argument in turn, and concluded that Sellner's contentions of deficient counsel were unfounded. Absent a showing of deficient counsel, Sellner could not show prejudice, and the denial of the petition for postconviction relief was affirmed. Sellner v. St., 2004 MT 205, 322 M 310, 95 P3d 708 (2004), following St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001).

Bar Patrons' Use of Physical Force Following Unprovoked Assault — Aggressor Status Unaffected: The defendant was convicted of felony assault (now assault with a weapon) with a dangerous weapon after he entered a bar and attacked a patron with a metal table leg. On appeal, the defendant argued that his actions constituted a justifiable use of force because he was attacked by all of the bar patrons. The Supreme Court affirmed the District Court's decision, ruling that the evidence supported a finding that the defendant's assault was unprovoked and not in response to any threat to the defendant, nor did the assault follow any attempt by the defendant to escape. As a result, the record contained substantial credible evidence that the defendant was the aggressor and that his use of force was not justified. St. v. Lafley, 1998 MT 21, 287 M 276, 954 P2d 1112, 55 St. Rep. 76 (1998).

Appeal From Failure to Grant Self-Defense Instruction — Failure to Object: Assault defendant who failed to object to or offer other instructions regarding the "no aggressor" rule contained in the court's self-defense instructions could not, on appeal, raise the issue of failure to instruct on exceptions to that rule. The issue would not be addressed under the common-law plain error rule because declining review did not rise to the level of a manifest miscarriage of justice, did not leave unsettled the question of the fundamental fairness of the trial, and did not compromise the integrity of the judicial process. St. v. Gonzales, 278 M 525, 926 P2d 705, 53 St. Rep. 1015 (1996).

Failure to Request Instruction on Nonaggressor Principle of Self-Defense — Claim That Victim Was Aggressor — No Ineffective Assistance: Assault defendant's defense was that the victim was the initial aggressor. No one testified that defendant was the aggressor. The court instructed on self-defense, including the rule that the person using the defense cannot have been the aggressor, but did not instruct on exceptions to the rule. Defense counsel decided as a tactical matter not to request an exceptions instruction because it would not be consistent with the defense that the victim was the aggressor. That decision was based on informed professional deliberation and was not the result of neglect or ignorance. Thus, there was no ineffective assistance of counsel. St. v. Gonzales, 278 M 525, 926 P2d 705, 53 St. Rep. 1015 (1996).

No Additional Right to Use of Force by Residing in Remote Area: Defendant contended he had a right to be more protective of himself because he lived in an isolated area with no full-time law enforcement. The Supreme Court conceded that an isolated situation might more often result in facts that allow the justifiable use or threat of force; however, the laws governing the justifiable use or threat of force remain the same throughout the state and control an individual's actions wherever he resides in the state. St. v. Crabb, 232 M 170, 756 P2d 1120, 45 St. Rep. 966 (1988).

Use of Term "Reasonable Man" in Context Other Than Self-Defense: A group of people standing at a street corner verbally harassed the defendant as he repeatedly walked past. A shooting incident resulted, with the defendant at trial pleading self-defense. In his closing argument the prosecutor asked the jury whether a "reasonable person" would repeatedly return to the corner. While the use of the term "reasonable man" in a context other than self-defense could cause confusion, no likelihood of confusion was demonstrated here. The jury instructions and explanations by counsel pertaining to self-defense clearly set forth the standard. St. v. Dupre, 200 M 165, 650 P2d 1381, 39 St. Rep. 1660 (1982).

Aggressor — Self-Defense Instruction Unwarranted: Defendant was an aggressor where he found that girl he had been living with entered his home and took most of his guns after their relationship had deteriorated, defendant told a houseguest he was going to go get his guns back and shoot the girl, he drove 50 miles to find the girl, taking a loaded .22 rifle with him, and after finding the girl he told her that she had 24 hours to live. While talking to the girl, he stayed in his car with the motor running and was parked for an easy exit. The girl was armed with a broken cue stick. Defendant had ample opportunity to leave. During a struggle for the gun between the defendant, the girl, and the girl's brother, the brother was shot. Rather than trying to drive off and escape, defendant then shot the girl, killing her. He then drove off, stopping after a short distance to fire more shots. Defendant was not entitled to jury instructions on self-defense in his trial for deliberate homicide and attempted deliberate homicide. St. v. Cartwright, 200 M 91, 650 P2d 758, 39 St. Rep. 1598 (1982).

Evidence of Threats Against Homicide Defendant — Showing of Self-Defense a Necessary Foundation: Defendant charged with deliberate homicide did not admit the killing, and therefore no issue of whether he acted in self-defense was raised at the trial. Before he could introduce evidence that victim and members of her family had in the past made threats against defendant, he had to introduce evidence that he acted in self-defense. Thus, the trial court properly refused to admit evidence of the threats. St. v. Cartwright, 200 M 91, 650 P2d 758, 39 St. Rep. 1598 (1982).

Defense of Occupied Structure Not Available if Entry Made Peacefully or Lawfully: The Montana statute defining the justifiable use of force in defense of an occupied structure is derived from Illinois law, which requires an unlawful entry to trigger the statute. The defendant could not assert justification when the victims entered her premises lawfully and then engaged in unlawful conduct for which the defendant sought to expel the victims. The appellant asserted that once she had ordered the customers out of her bar and they refused to go, their continued presence became an unlawful entry. The reviewing court concluded that the shooting did not occur while the appellant was trying to prevent or terminate an entry into her premises. No authority was cited by the appellant or found by the court to support the theory that a "tumultuous entry" into a tavern makes the entry unlawful. The refusal of the offered instructions was proper. St. v. Sorenson, 190 M 155, 619 P2d 1185, 37 St. Rep. 1834 (1980). See also St. v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 623.

Verbal Provocation Enough to Become Aggressor: In appealing her conviction for deliberate homicide and aggravated assault, the defendant alleged error in jury instructions on an aggressor's use of force in self-defense and an aggressor's duty to withdraw. She contended she was not the aggressor and argued that the instructions were abstract and incomplete statements of the law and that a person must have the specific intent to become an aggressor before he or she may be deprived of the right of self-defense on the ground of provocation. The reviewing court held that the evidence supported the giving of the instructions and stated that a person could become an aggressor if he or she purposely or knowingly provoked the victim verbally. The court noted that the jury was instructed on the requisite mental state in both challenged instructions. St. v. Sorenson, 190 M 155, 619 P2d 1185, 37 St. Rep. 1834 (1980).

Aggressor — Self-Defense: An instruction defining "aggressor" and stating the unavailability of the defense of self-defense to an aggressor was appealed because there allegedly was no evidence presented in support of the instruction and, as given, it allegedly was an incorrect statement of the law. The Supreme Court said that the trial judge must instruct the jury on every essential question presented by the evidence. Testimony that the defendant and a friend had made efforts to attract the victim's attention as he came out of the bar just before the shooting, coupled with the testimony of the defendant's prior acts of hostility towards the victim and his girlfriend, was sufficient to justify the aggressor instruction. Defendant's allegation that the jury instruction incorrectly stated the law was also rejected on appeal. The exceptions to the lack of availability of the defense of self-defense to an aggressor were inapplicable to the facts. Furthermore, the State had offered an instruction incorporating statutory language of 45-3-105, but the defendant rejected that proposed jury instruction. The reviewing court held that having objected to the very instruction he now asserts should have been included, defendant may not then predicate error on the absence of the qualifying instruction. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Aggressor — Instruction in Terms of Statute Not Facts: Where a defendant claims to have acted in self-defense, it is not reversible error to give an instruction on use of force by an aggressor in the statutory language without relating the instruction to the facts of the case if the jury can readily relate the facts to the instruction and no prejudicial effect is created. St. v. Reiner, 179 M 239, 587 P2d 950 (1978), followed in St. v. Stone, 266 M 345, 880 P2d 1296, 51 St. Rep. 790 (1994).

Aggressors — Generally: An instruction that defense of self-defense is not available to a person who initially provokes the use of force against himself except under special circumstances is not error. People v. McBride, 130 Ill. App.2d 201, 264 N.E.2d 446, 450 (1970); People v. Day, 2 Ill. App.3d 811, 277 N.E.2d 745 (1972).

Sufficiency and Admissibility of Evidence: Even if the victim were an aggressor in an earlier quarrel with defendant, this does not in itself prove that he was an aggressor just prior to a subsequent quarrel. People v. Wilson, 3 Ill. App.3d 481, 278 N.E.2d 473, 476 (1972). But where evidence indicates that defendant first fought with victim, then left to arm himself, such evidence supports the determination that the claim of self-defense is not justified. People v. Hill, 116 Ill. App.2d 157, 253 N.E.2d 617, 618 (1969). Similarly, evidence which indicates prior aggressive behavior of defendant toward his alleged victim is admissible to determine the defendant's attitude and aggressiveness toward the victim. People v. Smythe, 132 Ill. App.2d 685, 270 N.E.2d 431, 434 (1971).

In General: As provided by this section, an aggressor may not prevail in a prosecution for battery by asserting self-defense even though victim may have struck first blow. People v. Bowman, 132 Ill. App.2d 744, 270 N.E.2d 285, 287 (1971).

Withdrawal From Combat: If the party committing the homicide was the assailant or engaged in mortal combat, he must in good faith have endeavored to decline any further struggle before the killing was done, otherwise he could not invoke self-defense. St. v. Merk, 53 M 454, 164 P 655 (1917).

45-3-106. Use of force to prevent escape.

Criminal Law Commission Comments

Source: Ill. C. C., 1961, Chapter 38, § 7-9.

An attempted escape by a person in custody after arrest and before being placed in confinement, or in a place of confinement, requires the authorization of force necessary to recapture him. This section concerns the use of deadly force to prevent escape and not the use of force which is justifiable in making the original arrest.

The usual statement seems to be that a person lawfully arrested or confined may be killed if that is necessary to prevent escape; and no distinction is drawn between a felon and any other offender.

Recapture must be evaluated in the same manner as if it were an original arrest, and whether deadly force may be used to prevent an escape does not depend upon whether such force might have been authorized at the time of the original arrest. If the offense for which the person was arrested was not a forcible felony, but the offender was armed with a deadly weapon, deadly force might have been used to effect the arrest. If the offender was arrested and disarmed and later attempted to escape unarmed and without threatening death or serious bodily harm to anyone, deadly force to prevent his escape is not authorized. Conversely, if the offender was not armed or otherwise dangerous when arrested, but in attempting to escape he commits a forcible felony, or seizes an officer's gun and threatens to shoot anyone who opposes his escape, deadly force may be used to prevent the escape.

Subsection (2) concerns escape from a place of confinement, as distinguished from personal custody after arrest. Here, other persons are likely to be in the same position of legal restraint as the one attempting to escape and may be encouraged by a successful escape to make a similar attempt either immediately or at a later time. Also, a guard or other person in charge of prisoners cannot be expected to know the history of each prisoner and whether his offense was a forcible felony or whether he is likely to endanger the lives of others if his escape is successful. In addition, the sudden and unexpected nature of an escape from confinement leaves the guard no time to investigate into the person's possession of a deadly weapon. In view of the often desperate nature of an escape of this kind, the prisoner can be expected to use any deadly force which he finds available. Consequently, a less restrictive rule as to the use of deadly force to prevent escape seems logical with respect to a guard, as compared with the rule concerning a personal custodian after the arrest but before the confinement of an offender or suspect.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: While this section on use of force to prevent escape is identical to the Illinois source, when interpreted by the courts the laws may be significantly different. This section defines the amount of force which may be used to prevent escape in terms of the amount of force necessary in making an arrest, which is set forth in MCA, 46-6-104, and is different from the comparable Illinois statute.

45-3-107. Use of force by parent, guardian, or teacher.

Criminal Law Commission Comments

Source: R.C.M. 1947, § 94-605(4), repealed, Sec. 32, Ch. 513, Laws of Montana 1973.

This is a rewording of former section 94-605(4). However "reasonable and necessary" was substituted for "reasonable in manner and moderate in degree."

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: Under former law, assault was said to be justified and homicide excusable if done in lawfully correcting a child. This section which is a rewording of section 94-605(4), R.C.M. 1947, makes the use of "reasonable and necessary force" a justification in the form of an affirmative defense. But the correction of a child which results in the child's death is no longer excused. The leading Montana case on the subject is St. v. Straight, cited below.

Case Notes

Nonrecord-Based Assertion of Ineffective Counsel for Failure to Raise Parental Discipline Defense at Trial for Partner or Family Member Assault Appropriate for Postconviction Proceedings, Not Direct Appeal: At her trial for partner or family member assault, Fender's counsel did not raise a parental discipline defense. Fender asserted that she was entitled to a new trial because failure of counsel to raise the defense constituted ineffective assistance of counsel, but the District Court denied the motion for a new trial. On appeal, the Supreme Court was unable to determine from the record whether counsel's action was strategic, but because the alleged error was nonrecord-based, the question of whether there was merit to the parental discipline defense was more appropriate for postconviction proceedings, so the denial of a new trial was affirmed. St. v. Fender, 2007 MT 268, 339 M 395, 170 P3d 971 (2007).

Constitutionality Not Considered: Defendant alleged for the first time on appeal that 45-5-201 is unconstitutional because it fails to provide a parent, who may use reasonable and necessary force to restrain or correct his child under this section, with any guidance in determining what is or is not reasonable or necessary force. The Supreme Court refused to consider the allegation on appeal, since none of the exceptions of 46-20-702 (now 46-20-701(2)) were found to apply. St. v. Probert, 221 M 476, 719 P2d 783, 43 St. Rep. 988 (1986).

Reasonable Force Instruction Unnecessary: In trial of parent for assault against child, since statute permits use of "reasonable" force to restrain or correct child, no jury instruction specifying what conduct is "reasonable" need be given. St. v. Probert, 221 M 476, 719 P2d 783, 43 St. Rep. 988 (1986).

Instructions: Stepfather charged with murder in alleged beating death of his stepchild was entitled to instructions on voluntary and involuntary manslaughter in view of testimony that his striking the child was for disciplinary purposes and that he never intended to hurt her. St. v. Taylor, 163 M 106, 515 P2d 695 (1973).

Reasonable and Moderate: Under subsection (4) of 94-605, R.C.M. 1947 (now 45-3-107), a person standing in loco parentis was not entitled to a presumption that punishment was reasonable and moderate, but state must prove that parent's act was willful, wrongful, and unlawful and, in order to convict, jury must find that punishment was clearly unreasonable and immoderate after considering all the circumstances including: (1) the age and understanding of the child; (2) the nature and seriousness of the act being punished; (3) the instrument used for punishment; and (4) the severity and permanent or temporary nature of the resulting injuries. St. v. Straight, 136 M 255, 347 P2d 482 (1959).

45-3-108. Use of force in resisting arrest.

Criminal Law Commission Comments

Source: Ill. C. C. 1961, Chapter 38, § 7-7.

Section 94-3-108 [R.C.M. 1947, now MCA, 45-3-108] states a corollary to the justification accorded to an officer in using force to make an arrest. Even if the arrest is unlawful, the person arrested is not privileged to resist the arrest with force. The resort to force invites the officer to use greater force to accomplish the arrest. The public interest in discouraging violence and insisting upon the use of peaceable methods for obtaining release from unlawful arrest clearly outweighs the right of self-help or any momentary individual satisfaction. (This was the view of the Uniform Arrest Act, § 6: see Warner, "The Uniform Arrest Act," 28 Va. L. Rev. 316 at 330, 331 (1942).) A partial recognition of the inadvisability of sanctioning resistance in the case of an unlawful arrest appears in the old rule that a person who kills an officer attempting an unlawful arrest is not justified, but is guilty of manslaughter rather than murder, in the absence of express malice. (1 Wharton's Criminal Law (12th ed.) §§ 542 and 853; 1 Bishop on Criminal Law (9th ed.) § 868 and 1 Bishop's New Criminal Procedure (3rd ed.) § 162.)

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: The purpose of this section on use of force in resisting arrest is to change the common-law rule that an illegal arrest could be resisted lawfully. That rule encouraged resistance and breaches of the peace. This section requires submission to arrest. If the arrest is illegal (a determination which few citizens can make while being arrested), the arrestee should pursue civil and criminal remedies rather than resort to self-help. In applying this section a number of caveats are in order. First, the section has no application to persons fleeing from a possible arrest or from a stop under the new Stop and Frisk statute (MCA, 46-5-401, 46-5-402, now repealed). Second, the arresting officer must identify himself to the arrestee. If the arrestee does not know that the person making the arrest is authorized to do so, he may justifiably defend himself. Third, the section has been interpreted by the Illinois courts as not preventing an arrestee from protecting himself from unlawful and excessive force by the arresting officer. The wording for this section is identical to the Illinois source.

Case Notes

Denial of In Camera Review Request of Officer's Personnel File for Instances of Excessive Force — Excessive Force No Defense to Resisting Arrest — No Abuse of Discretion: The Municipal Court did not abuse its discretion in finding that the defendant failed to present a substantial need justifying an in camera review of the arresting officer's personnel file for instances of excessive force because the defendant did not present any evidence that the arresting officer had a motive to testify falsely and the defendant failed to demonstrate that the nonexculpatory impeachment information was constitutionally material and that failure to make it available would undermine confidence in the fairness of the trial, especially since 45-3-108 and 45-7-301 prohibit the use of force as a defense to resisting arrest. Bozeman v. Howard, 2021 MT 230, 405 Mont. 321, 495 P.3d 72.

Use of Force in Resisting Arrest Committed After Investigative Stop — Exclusionary Rule Inapplicable: Courville was stopped by an officer who had reports of underage drinking in the area. When the officer tried to arrest Courville, Courville assaulted the officer. Courville moved to suppress the evidence under the exclusionary rule because the officer did not have a particularized suspicion to make the stop in the first place. The motion was denied, and Courville appealed, but the Supreme Court affirmed. An officer must have a particularized suspicion to conduct an investigatory stop, and if no particularized suspicion exists, the exclusionary rule precludes introduction of evidence gathered from the illegal stop. However, the rule does not apply in every case. If the evidence is so attenuated or dissipated from the government's constitutional violation that the evidence loses its primary constitutional taint, then the evidence is admissible. To allow a person whose right to be free from unreasonable searches and seizures was allegedly violated to respond with unlimited violence would create intolerable results. Here, the evidence of Courville's criminal conduct committed against the officer was so attenuated from the claimed improper investigatory stop that it lost its primary constitutional taint, if any existed. Thus, the exclusionary rule did not apply, and the motion to suppress was properly denied. St. v. Courville, 2002 MT 330, 313 M 218, 61 P3d 749 (2002), following St. v. Ottwell, 240 M 376, 784 P2d 402 (1989).

Use of Force in Self-Defense Distinguished From Use of Force in Resisting Arrest — Jury Instruction Proper: Courville was stopped by an officer who had reports of underage drinking in the area. When the officer tried to arrest Courville, Courville assaulted the officer. Courville claimed that his conduct was self-defense. The jury was instructed regarding the justifiable use of force and the unlawful use of force in resisting arrest. Courville contended that the instructions confused the jury by creating two classes of persons against whom the use of force is justified, in violation of equal protection. The Supreme Court disagreed. The use of self-defense applies equally to both classes of persons and depends on a reasonable belief of imminent harm based on the facts of the situation. The fact that the actor against whom the defensive conduct is directed happens to be a police officer is inapplicable to the self-defense defense. A person cannot use force to resist arrest, but can use defensive force if it is reasonably believed that force is necessary as against the imminent use of unlawful force. The claim of self-defense in justification of one's conduct is always considered within context and circumstances of the specific event at issue so that the factfinder can determine whether the accused's belief is reasonable. The jury was properly instructed, but found no merit in Courville's defense that the use of force against the officer was reasonable in this case. No substantial right of Courville was prejudiced, so the conviction was affirmed. St. v. Courville, 2002 MT 330, 313 M 218, 61 P3d 749 (2002).

Resisting Arrest Unlawful Despite Legality of Arrest: A person is never entitled to resist arrest regardless of the legality of the arrest. Should the person resist, that person will not be excused from the consequences of the actions extending from the resistance even if the underlying arrest is itself unlawful. St. v. Laughlin, 281 M 179, 933 P2d 813, 54 St. Rep. 124 (1997). See also Bozeman v. Howard, 2021 MT 230, 405 Mont. 321, 495 P.3d 72.

Prosecutor's Quasi-Judicial Immunity From Prosecution: Plaintiff's civil action against a County Attorney, based upon alleged unlawful arrest by certain policemen and challenging the legality of the criminal prosecution against him, must be dismissed because the County Attorney enjoys absolute immunity for prosecutorial actions done in a quasi-judicial capacity. Hall v. Lympus, 478 F. Supp. 644 (D.C. Mont. 1979).

In General: When a person is known to be a policeman in the performance of his lawful duties, it is the duty of persons being arrested by him to submit peacefully. People v. Gnatz, 8 Ill. App.3d 396, 290 N.E.2d 392, 395 (1972). Even if a probable cause for arrest is lacking, the arrestee has no right to resist. People v. Suriwka, 2 Ill. App.3d 384, 276 N.E.2d 490, 496 (1971). See also People v. Carroll, 133 Ill. App.2d 78, 272 N.E.2d 822 (1971); People v. Franks, 108 Ill. App.2d 438, 247 N.E.2d 811 (1969); People v. Fort, 91 Ill. App.2d 212, 234 N.E.2d 384 (1968), certiorari denied 393 US 1014 (1969); People v. Shinn, 5 Ill. App.3d 468, 283 N.E.2d 502 (1972).

Instructions: Refusal of an instruction on use of force in making an arrest is proper where such an instruction is not accompanied by an instruction on use of force in defense of person. People v. Shinn, 5 Ill. App.3d 468, 283 N.E.2d 502 (1972).

Burden of Proof: To sustain a charge of resisting arrest, the prosecution must show that the defendant knowingly resisted performance of an authorized act by a person known to the defendant to be a peace officer acting within his official capacity. People v. Royer, 101 Ill. App.2d 44, 242 N.E.2d 288, 290 (1968).

45-3-109. Execution of death sentence.

Criminal Law Commission Comments

Source: Ill. C. C., 1961, Chapter 38, § 7-10.

This section states an obvious aspect of justification for homicide. It is included for the sake of completeness, and because it is one of the more commonly described statutory instances of justification. Section 94-3-109 [now MCA, 45-3-109] is intended to state the essentials of the prior provision in language similar to that of the other sections of this chapter. However, in view of the deliberate nature of the homicide, the explicit legal instructions concerning the execution and the much more relaxed time element involved in an execution as compared with self-defense, arrest, or escape, no need exists for recognizing a reasonable but mistaken belief of the executioner as to his authority for or method of performing his duty.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1983 Amendment — Applicability: Near beginning of section, changed "public servant who in the exercise of his official duty" to "person who".

Section 7, Ch. 411, L. 1983, provided: "This act applies to death sentences whether first pronounced before or after its effective date. The legislature intends this act to apply retroactively under 1-2-109." Effective on passage and approval, April 7, 1983.

Annotator's Note: This section preserves the former Montana provision listed above. The wording is [almost] identical to the Illinois source. See the 1983 amendment note.

45-3-110. No duty to summon help or flee.

Compiler's Comments

Preamble: The preamble attached to Ch. 332, L. 2009, provided: "WHEREAS, the Legislature declares that:

(1) the right of Montanans to defend their lives and liberties, as provided in Article II, section 3, of the Montana Constitution, and their right to keep or bear arms in defense of their homes, persons, and property, as provided in Article II, section 12, of the Montana Constitution, are fundamental and may not be called into question;

(2) the use of firearms for self-defense is recognized within the right reserved to the individual people of Montana in Article II, section 12, of the Montana Constitution;

(3) self-defense is a natural right under section 1-2-104, MCA, and is included in sections 49-1-101 and 49-1-103, MCA;

(4) the lawful use of firearms for self-defense is not a crime or an offense against the people of the state;

(5) in a criminal case in which self-defense is asserted, the burden of proof is as provided in [section 10] [actually section 9, Ch. 332, L. 2009, enacting 46-16-131];

(6) in self-defense, the use of justifiable force discourages violent crime and prevents victimization; and

(7) the purpose of [sections 1 through 3] [enacting 45-3-110 through 45-3-112] is to clarify and secure the ability of the people to protect themselves."

Effective Date: Section 11, Ch. 332, L. 2009, provided: "[This act] is effective on passage and approval." Approved April 27, 2009.

Case Notes

No Objection to Closing Statement and No Intervention by Court — No Plain Error: A defendant appealed his murder conviction for stabbing another person from behind. The defendant had asserted self-defense; the state argued in closing it was not reasonable as a matter of fact under the circumstances to attack someone from behind, and the defendant did not object. The Supreme Court affirmed, finding that the District Court did not commit plain error by not intervening sua sponte to limit or cure the state's closing arguments. St. v. Trujillo, 2020 MT 128, 400 Mont. 124, 464 P.3d 72.

Separate Jury Instructions Required by Conflicting Testimony — Jury to Decide Credibility: The District Court had a duty to provide separate jury instructions regarding the law of justifiable use of force, with one providing for no duty to retreat and the other creating an obligation to retreat. Providing both instructions allowed the jury to decide whether either factual account was credible. To do otherwise would have invaded the province of the jury as a rational finder of fact. St. v. King, 2016 MT 323, 385 Mont. 483, 385 P.3d 561.

45-3-111. Openly carrying weapon — display.

Compiler's Comments

2021 Amendment: Chapter 3 deleted former (3) that read: "(3) This section does not limit the authority of the board of regents or other postsecondary institutions to regulate the carrying of weapons, as defined in 45-8-361(5)(b), on their campuses." Amendment effective February 18, 2021.

Severability: Section 13, Ch. 3, L. 2021, was a severability clause.

Preamble: The preamble attached to Ch. 332, L. 2009, provided: "WHEREAS, the Legislature declares that:

(1) the right of Montanans to defend their lives and liberties, as provided in Article II, section 3, of the Montana Constitution, and their right to keep or bear arms in defense of their homes, persons, and property, as provided in Article II, section 12, of the Montana Constitution, are fundamental and may not be called into question;

(2) the use of firearms for self-defense is recognized within the right reserved to the individual people of Montana in Article II, section 12, of the Montana Constitution;

(3) self-defense is a natural right under section 1-2-104, MCA, and is included in sections 49-1-101 and 49-1-103, MCA;

(4) the lawful use of firearms for self-defense is not a crime or an offense against the people of the state;

(5) in a criminal case in which self-defense is asserted, the burden of proof is as provided in [section 10] [actually section 9, Ch. 332, L. 2009, enacting 46-16-131];

(6) in self-defense, the use of justifiable force discourages violent crime and prevents victimization; and

(7) the purpose of [sections 1 through 3] [enacting 45-3-110 through 45-3-112] is to clarify and secure the ability of the people to protect themselves."

Effective Date: Section 11, Ch. 332, L. 2009, provided: "[This act] is effective on passage and approval." Approved April 27, 2009.

Case Notes

Board of Regents of Higher Education — Exclusive Authority to Regulate Firearms on College Campuses Granted by Constitution — Legislative Bill Held Unconstitutional. Bd. of Regents of Higher Educ. v. St., 2022 MT 128, 409 Mont. 96, 512 P.3d 748.

Brief Misstatements During Closing by Prosecutor — Plain Error Review Declined: The defendant did not object at trial but subsequently sought plain error review concerning certain prosecutorial statements made during closing arguments. The defendant argued that the prosecutor engaged in prosecutorial misconduct when the prosecutor stated that a person could not shoot another person because of a punch and invited the jury to conclude that displaying a weapon was a provocation. However, the defendant did not demonstrate that failure to review these asserted errors would result in a miscarriage of justice, raise a question about the fundamental fairness of the proceedings, or compromise the integrity of the judicial process when, during a 4-day trial that focused extensively on the law, the defendant had wide latitude to try the case as he wanted, had proper jury instructions, and adamantly argued for his interpretation of the law throughout the trial. St. v. Lau, 2018 MT 93, 391 Mont. 204, 415 P.3d 993.

45-3-112. Investigation of alleged offense involving claim of justifiable use of force.

Compiler's Comments

Preamble: The preamble attached to Ch. 332, L. 2009, provided: "WHEREAS, the Legislature declares that:

(1) the right of Montanans to defend their lives and liberties, as provided in Article II, section 3, of the Montana Constitution, and their right to keep or bear arms in defense of their homes, persons, and property, as provided in Article II, section 12, of the Montana Constitution, are fundamental and may not be called into question;

(2) the use of firearms for self-defense is recognized within the right reserved to the individual people of Montana in Article II, section 12, of the Montana Constitution;

(3) self-defense is a natural right under section 1-2-104, MCA, and is included in sections 49-1-101 and 49-1-103, MCA;

(4) the lawful use of firearms for self-defense is not a crime or an offense against the people of the state;

(5) in a criminal case in which self-defense is asserted, the burden of proof is as provided in [section 10] [actually section 9, Ch. 332, L. 2009, enacting 46-16-131];

(6) in self-defense, the use of justifiable force discourages violent crime and prevents victimization; and

(7) the purpose of [sections 1 through 3] [enacting 45-3-110 through 45-3-112] is to clarify and secure the ability of the people to protect themselves."

Effective Date: Section 11, Ch. 332, L. 2009, provided: "[This act] is effective on passage and approval." Approved April 27, 2009.

Case Notes

Justifiable Use of Force Defense — Motion to Dismiss for Insufficient Evidence Properly Denied: The defendant was charged with several counts related to a bar fight. He gave notice that he intended to claim justifiable use of force in his defense. At the close of the prosecutor's case, the defendant moved to dismiss the charges on the grounds that the state had not met its burden under 46-16-131. The District Court denied the motion, and the defendant was convicted of criminal endangerment. On appeal, the Supreme Court affirmed, concluding that when viewed in the light most favorable to the prosecution, there was sufficient evidence for the jury to conclude that the defendant's use of force was not reasonable. St. v. Erickson, 2014 MT 304, 377 Mont. 84, 338 P.3d 598.

Defendant's Offer of Own Out-of-Court Statement in Support of Justifiable Use of Force Claim Inadmissible: Following a fatal shooting, the defendant was charged with deliberate homicide and claimed justifiable use of force. Through cross-examination of law enforcement and in order to demonstrate what he knew and relied on at the time of the shooting, the defendant sought to introduce into evidence an out-of-court statement that he had made to law enforcement in which he described violent acts allegedly committed by the victim that a third party had described to the defendant. After the District Court ruled in the defendant's favor, the state petitioned for supervisory control. The Supreme Court vacated the District Court ruling, concluding that evidence introduced at trial must be admissible under the Montana Rules of Evidence and that the defendant's attempt to offer his own out-of-court statement did not fit within a hearsay exception and was not allowed under the Rules of Evidence. The defendant also argued that 45-3-112 and 46-16-131 rendered the Rules of Evidence inapplicable and required disclosure of the statement to the jury. The Supreme Court disagreed, concluding that 45-3-112 does not mandate disclosure of investigative materials to the jury in violation of the Rules of Evidence and that requiring the defendant to comply with the Rules of Evidence does not shift the burden of proof in violation of 46-16-131. St. v. Ninth Judicial District Court, 2014 MT 188, 375 Mont. 488, 329 P.3d 603.

Failure to Investigate Justifiable Use of Force Claim — No Plain Error — No Ineffective Assistance: The defendant got into a fight with the victim and was holding the victim in a sleeper hold when police arrived on the scene. In his trial for aggravated assault, the defendant asserted a defense of justifiable use of force based on the victim's act of reaching for a multi-tool on his belt, which the defendant thought was a knife. The police questioned both men about the multi-tool and observed the tool in a case on the victim's belt but did not confiscate it as evidence. On appeal, the defendant asserted that this section imposed an affirmative duty on the police to collect the multi-tool and that their failure to do so violated his due process rights. The Supreme Court disagreed and, citing St. v. Cooksey, 2012 MT 226, 366 Mont. 346, 286 P.3d 1174, held that this section reflects long-established obligations that the prosecution disclose evidence of justifiable use of force but imposes no duty to investigate. In light of this interpretation, the Supreme Court declined to reverse the conviction under common-law plain error review, concluding that the defendant did not demonstrate that failure to review the claimed error would negatively affect the fairness or integrity of the judicial process. Additionally, the Supreme Court dismissed the defendant's claim that he was denied effective assistance of counsel by his attorney's failure to move for dismissal based on the police's failure to collect the multi-tool as evidence. Relying on the second prong of the Strickland test, the court held that the defendant could not demonstrate that the result of the proceedings would have been different if the motion had been filed, based on the court's holding in Cooksey. St. v. Mitchell, 2012 MT 227, 366 Mont. 379, 286 P.3d 1196.

No Affirmative Duty to Investigate Assertion of Justifiable Use of Force: The defendant was charged with the deliberate homicide of the decedent, his neighbor, after shooting the decedent during a verbal altercation. Before trial, the defendant filed a motion for compliance with this section, arguing that this section imposed an independent duty on law enforcement to investigate the defendant's claim of justifiable use of force and that the investigation conducted did not satisfy that duty. After holding a hearing regarding the defendant's motion, the District Court disagreed and found that this section did not impose any new and independent duty for law enforcement to investigate cases involving justifiable use of force. The Supreme Court upheld the District Court's interpretation and held that language in this section is consistent with law enforcement's existing obligation to investigate thoroughly and with the prosecution's existing obligation to disclose evidence to the defense under Brady v. Maryland, 373 US 83 (1963). The defendant did not point to any evidence supporting his defense that had not been disclosed, and thus his conviction was affirmed. St. v. Cooksey, 2012 MT 226, 366 Mont. 346, 286 P.3d 1174, followed in St. v. Mitchell, 2012 MT 227, 366 Mont. 379, 286 P.3d 1196

Law Review Articles

Lightning v. the Lightning Bug: A Problem of Statutory Interpretation in State v. Cooksey, Boland, 75 Mont. L. Rev. 149 (2014).

45-3-115. Affirmative defense.

Criminal Law Commission Comments

Source: Ill. C. C., 1961, Chapter 38, § 7-14.

A defense based upon any of the provisions of this chapter is an affirmative defense, and if not put in issue by the prosecution's evidence, the defendant, to raise it as an issue, must present some evidence thereon.

Compiler's Comments

Annotator's Note: Montana law requires that the prosecution prove the defendant guilty of each element of the offense charged beyond all reasonable doubt (MCA, 46-16-601) [renumbered 46-16-204]. But, the prosecution is not required to negate in the first instance all possible defenses which might be raised by the defendant. After the prosecution has developed a prima facie case, the defense has the burden of going forward with evidence to raise doubt as to the defendant's guilt. The amount of evidence which the defendant must submit in raising an affirmative defense is not stated in this section. Relatively recent Montana case law makes it clear that the Legislature can determine the amount of evidence required to raise a particular affirmative defense, whether only a "reasonable doubt" or a "preponderance of the evidence". The statutory burden imposed under the former insanity defense statute (former MCA, 46-14-201(1), repealed, L. 1979) [section renumbered 46-14-214, but see 1979 revision that abolished the defense] was a "preponderance of the evidence". St. v. McKenzie, 186 M 481, 608 P2d 428 (1980). Where the Legislature is silent, the court can, and in some instances has, determined the extent of the defendant's burden of going forward with the evidence in establishing an affirmative defense. The defendant need only raise a reasonable doubt where the affirmative defense offered is self-defense (St. v. Grady, 166 M 168, 531 P2d 681 (1975)), but must establish the defense by a preponderance of the evidence where the defense is diminished capacity (St. v. McKenzie, 186 M 481, 608 P2d 428 (1980)), reasonable belief of age (St. v. Smith, 176 M 159, 576 P2d 1110 (1978)), or justification (i.e. compulsion) (St. v. Stuit, 176 M 84, 576 P2d 264 (1978)). There does not seem to be any federal constitutional problem in establishing a burden greater than a "reasonable doubt" since the U.S. Supreme Court has indicated that a state need not allow any affirmative defenses at all. Patterson v. New York, 432 US 197 (1977). And, where it chooses to allow such defenses, the state may regulate the burden of producing evidence and the burden of persuasion as long as it does not thereby shift to the defendant its own burden of proof as to each of the elements of the offense beyond a reasonable doubt. Id. The Supreme Court has even held that an Oregon statute, which required the defendant to prove the defense of insanity beyond a reasonable doubt, was not violative of due process. Leland v. Oregon, 343 US 790 (1952).

Case Notes

Affirmative Defense Requires Admission and Justification: A man in a detention center attacked a corrections officer. At trial for felony assault on a police officer, the man sought a jury instruction on justifiable use of force, but he presented no evidence and did nothing to justify his actions. The judge declined to instruct the jury on justifiable use of force, and the man was convicted. On appeal, the Supreme Court affirmed, explaining that it is the defendant's burden to raise justifiable use of force before being entitled to instructions on it. St. v. Marquez, 2021 MT 263, 406 Mont. 9, 496 P.3d 963.

Strict Application of Graves Instruction on Self-Defense Not Required — Instruction Setting Out Statutory Elements of Defense Affirmed: At his trial on charges of assault with a weapon, Archambault offered a jury instruction on self-defense taken from St. v. Graves, 191 M 81, 622 P2d 203 (1981), that had been incorporated into the Montana Criminal Jury Instructions. The District Court concluded that the proposed instruction was inconsistent with law and declined to give the instruction in favor of an instruction that set out the statutory language of 45-3-102. On appeal, Archambault asserted that the trial court erred by not giving the proposed instruction. The Supreme Court agreed that the trial court erred in concluding that the Graves instruction was inconsistent with law, but also held that giving the Graves instruction is not necessarily mandated. Pursuant to a trial court's broad discretion in formulating jury instructions and the overriding principle that jury instructions must fully and fairly instruct the jury regarding the applicable law, the jury instruction that set out the statutory language fully and fairly set out the requisite elements of justifiable use of force in a manner sufficient to guide the jury. St. v. Archambault, 2007 MT 26, 336 M 6, 152 P3d 698 (2007), following St. v. White, 202 M 491, 658 P2d 1111 (1983), and followed in St. v. Bieber, 2007 MT 262, 339 M 309, 170 P3d 444 (2007), and St. v. Henson, 2010 MT 136, 356 Mont. 458, 235 P.3d 1274. However, see also St. v. Stone, 266 M 345, 880 P2d 1296 (1994), and St. v. Claric, 271 M 141, 894 P2d 946 (1995), applying the Graves instruction.

Counsel Decision to Forego Certain Defense Considered Trial Strategy — Insufficient Record to Determine Effective Assistance of Counsel on Direct Appeal: On direct appeal, Hendricks contended that he was provided ineffective assistance of counsel in his assault trial because his attorney failed to raise the affirmative defense of justifiable use of force. However, in a disclosure statement filed prior to the omnibus hearing, Hendricks's counsel specifically noted that the defense of justifiable use of force would not be asserted. On the morning of trial, counsel stated that no jury instructions on the defense of justifiable use of force would be offered. Thus, the decision not to raise the defense was made consciously and was not the result of ignorance or neglect and was presumed to be sound trial strategy falling within the realm of reasonable professional conduct absent evidence to the contrary. Absent a sufficient record to address the issue of ineffective assistance, the direct appeal was dismissed, requiring Hendricks to raise the issue by a postconviction relief proceeding, if at all. The Supreme Court clarified that it will no longer use the approach in St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001), to determine effective assistance of counsel, but rather the procedure set out in St. v. Herrmann, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), and St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003). St. v. Hendricks, 2003 MT 223, 317 M 177, 75 P3d 1268 (2003), followed in St. v. Webster, 2005 MT 38, 326 M 112, 107 P3d 500 (2005), and St. v. Greene, 2015 MT 1, 378 Mont. 1, 340 P.3d 551.

Statute and Jury Instruction Upheld: Where the defendant fired a rifle through the door of his home and was later convicted of aggravated assault on two police officers, the District Court did not err in giving a jury instruction stating that the defendant had the burden of producing sufficient evidence under the affirmative defense of justifiable use of force to raise a reasonable doubt as to his guilt. In St. v. Graves, 191 M 81, 622 P2d 203 (1981), the court held that there is no constitutional prohibition against placing the burden of proof on the defendant, and the defendant in the case before the court failed to present any cases or coherent argument to the contrary. St. v. Warnick, 202 M 120, 656 P2d 190, 39 St. Rep. 2369 (1982).

Misstatement of Law Regarding Self-Defense in Jury Instruction: Although a jury instruction to the effect that absence of justifiable use of force is an element of the crime of deliberate homicide to be proven by the prosecutor is erroneous and the more correct statement of law which should have been phrased in the jury instruction is that justification for use of force is an affirmative defense that requires the defendant to produce sufficient evidence before justification for use of force is placed in issue, the District Court did not commit prejudicial error in giving the erroneous instruction since, viewing the instruction as a part of the whole body of instruction, the defendant was not limited from fairly presenting his theory of defense; nor was omission of defendant's proposed instruction prejudicial error since defendant's instruction was merely repetitive. St. v. Graves, 191 M 81, 622 P2d 203, 38 St. Rep. 9 (1981). J. Sheehy, specially concurring, sets out the elements, which should be contained in a jury instruction, to be considered by a jury in determining whether the use of force is justified. Additional instructions regarding justification in use of force are suggested. See also St. v. Enfinger, 222 M 438, 722 P2d 1170, 43 St. Rep. 1403 (1986).

Amendment of Information Because of Lack of Witnesses to Justify Lesser Offense — Not an Unconstitutional Shifting of Burden: Appealing her conviction for deliberate homicide and aggravated assault, the defendant claimed that the information, which first had charged her with mitigated deliberate homicide, was amended in violation of statute and both the state and federal constitutions. The allegation of error was rejected for three reasons. First, the appellant had relied on a case which construed the applicable statute, 46-11-403 (renumbered 46-11-205), before its 1977 amendment; the shootings had occurred in 1978. Second, the claim that the burden had been shifted unconstitutionally to the defendant to prove an element of mitigated deliberate homicide was untenable because one justification for the motion to amend the information was the fact that the defendant had failed to supply the State with the names of witnesses who would justify retaining the lesser offense. When it allows affirmative defenses at all, the State may regulate the burden of producing evidence and the burden of persuasion as long as it does not thereby shift to the defendant its own burden of proof as to each of the elements of the offense beyond a reasonable doubt. Third, the argument that the 1980 Cardwell decision should be applied retroactively was rejected. Cardwell sets out procedural safeguards of the defendant's constitutional rights when an information is amended. Although the statute on its face did not require leave of the trial court to file an amended information, such leave was obtained, thereby substantially complying with the procedural requirements of Cardwell. It was noted that the defendant had adequate notice and time to prepare her defense and that the State had the burden of proving the same elements under both homicide charges in any event. St. v. Sorenson, 190 M 155, 619 P2d 1185, 37 St. Rep. 1834 (1980).

Burden of Proof:

The defense of diminished capacity must also be proved by a preponderance of the evidence. St v. McKenzie, 186 M 481, 608 P2d 428 (1980). For full appellate history of McKenzie, see case note at 45-5-102, INFORMATION and INDICTMENT, *Felony Murder Alleged.*

The affirmative defense of insanity must be proved by a preponderance of the evidence in accordance with the statute which allowed the defense, 46-14-201 (since repealed) [renumbered 46-14-214, but see 1979 revision that abolished the defense]. St. v. McKenzie, 186 M 481, 608 P2d 428 (1980). For full appellate history of McKenzie, see case note at 45-5-102, INFORMATION and INDICTMENT, *Felony Murder Alleged.*

The defense of reasonable belief of age (affirmative defense to charge of sexual intercourse without consent of a minor) must be proved by defendant by a preponderance of the evidence and not merely to raise a reasonable doubt. St. v. Smith, 176 M 159, 576 P2d 1110 (1978).

The defense of justification (or compulsion) is an affirmative defense which must be proved by the defendant by a preponderance of the evidence. St. v. Stuit, 176 M 84, 576 P2d 264 (1978).

The burden that must be met by a defendant in presenting an affirmative defense varies according to the defense being raised. Although the burden of persuasion remains on the state, in order to avail himself of the affirmative defense of self-defense, the defendant has the burden of producing sufficient evidence on the issue to raise a reasonable doubt of his guilt. St. v. Grady, 166 M 168, 531 P2d 681 (1975).

When Defense Is Raised: Self-defense was held not to be placed at issue until raised by direct testimony of defendant during trial. St. v. Logan, 156 M 48, 473 P2d 833 (1970).

Sufficiency and Admissibility of Evidence: Statements and testimony indicating defendant's predisposition and other circumstances surrounding the use of force in self-defense are admissible and relevant in establishing the validity of such an affirmative defense. See People v. Sylvester, 70 Ill. App.2d 200, 217 N.E.2d 110, 111 (1966); People v. Herron, 125 Ill. App.2d 18, 260 N.E.2d 428, 430 (1970); People v. Honey, 69 Ill. App.2d 429, 217 N.E.2d 371, 373 (1966).

Law Review Articles

Lightning v. the Lightning Bug: A Problem of Statutory Interpretation in State v. Cooksey, Boland, 75 Mont. L. Rev. 149 (2014).

45-3-116. Use of force in defense of military equipment and information.

Compiler's Comments

Effective Date: This section is effective October 1, 2023.

CHAPTER 4
INCHOATE OFFENSES

Chapter Compiler's Comments

Annotator's Note — Source: The compiler's comments entitled "Annotator's Note" are taken from the Montana Criminal Code of 1973 Annotated (1980 rev. ed.) produced by the Montana Criminal Law Information Research Center (MONTCLIRC) and printed under cosponsorship of the State Bar of Montana. Minor revisions have been made to conform to the style and format of the annotations.

Part 1
Enumeration of Offenses and Extent of Liability

45-4-101. Solicitation.

Criminal Law Commission Comments

Source: Ill. C. C., 1961, Chapter 38, § 8-1.

Solicitation [was] not a separate statutory offense under the old code although R.C.M. 1947, section 94-204 provided that any person counseling, advising or encouraging children under fourteen years, lunatics, or idiots, to commit any offense shall be prosecuted and punished the same as if he had committed the offense. It seems desirable to include solicitation as an offense in the traditional triad of inchoate offenses as other states have done. In all cases the actor must have the requisite "purpose" of "promoting or facilitating" commission of an offense.

Subsection (2) provides the same maximum penalty for solicitation as may be imposed for the principal offense solicited.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Annotator's Note: The purpose of this section is to render criminal conduct evidencing a criminal design or purpose which falls short of either conspiracy or attempt. The significant change from the Illinois source is the substitution of "facilitates" for "requests" as an alternative element in the offense. The effect of this change would appear to be a broadening of the types of conduct which are included in the offense of solicitation. Solicitation remains distinct from attempt in that it punishes conduct which because of lack of proximity in time cannot be punished as an attempt. It is also distinct from conspiracy in that solicitation renders criminal both attempting to enlist coconspirators and an agreement to commit an offense even when no overt act has taken place. The offense of solicitation is complete when the commanding, encouraging, or facilitating the commission of the principal offense occurs, and the defendant can be convicted of solicitation even if the contemplated offense never occurs or his solicitation is rejected by the person solicited and the scheme goes no further. In fact, as a practical matter, the solicitation almost has to be unsuccessful if the defendant is to be convicted of solicitation, because, if the contemplated offense is carried out, the solicitor will probably be charged as a principal in the substantive offense under MCA, 45-2-302(3) (When Accountability Exists) and, if he is convicted of the substantive offense, Montana's double jeopardy statute, MCA, 46-11-502 [renumbered 46-11-410; see also 46-11-503, and 46-11-504], will generally bar an additional conviction for the solicitation to commit the substantive offense because it bars conviction for more than one offense arising out of the same transaction if one ". . . consists only of a conspiracy or other form of preparation to commit the other". It should also be noted that since this section completely defines the offense, the general definition of "solicitation" (§ 45-2-101) is inapplicable.

Case Notes

No Affirmative Defense of Renunciation to Charge of Solicitation: Lynch was charged with solicitation to commit deliberate homicide. At trial, Lynch sought to introduce a defense of renunciation or withdrawal to the charge, but the trial court denied the defense, and Lynch appealed. The Supreme Court affirmed. Lynch conceded that the Legislature has not codified renunciation as an affirmative defense to a solicitation charge, but contended that because the defense is allowed with respect to some other crimes, he should have been able to assert that defense. The Supreme Court declined to extend the renunciation defense to solicitation, noting that the fact that a renunciation defense is statutorily available for other possible charges is irrelevant. The state has broad discretion in making charging decisions when facts support more than one possible charge, and the trial court did not err in disallowing Lynch's renunciation defense in this case. St. v. Lynch, 2005 MT 337, 330 M 74, 125 P3d 1148 (2005), distinguishing St. v. Bullock, 272 M 361, 901 P2d 61 (1995).

Activities Forming Basis for Solicitation Charge Subject to More Than One Interpretation: Ray argued that he could not be charged with solicitation of sexual assault because the activities that were the basis for the charge were of a nonsexual nature. Ray was not charged with sexual assault because the actual assaults had occurred in Idaho. The Supreme Court held that although the giving of gifts to the victims without more was not culpable conduct, the conduct established Ray's mental state and purpose of promoting in Montana the commission of the offenses in Idaho. St. v. Ray, 267 M 128, 882 P2d 1013, 51 St. Rep. 968 (1994), following St. v. Bush, 195 M 475, 636 P2d 849 (1981).

Jury Instruction on Solicitation Properly Given: Ray argued that the trial court erred in its instruction to the jury regarding what constituted solicitation. The Supreme Court held that while the instruction in the first trial was incorrect because it was based on the general definition in 45-2-101, the instruction in the second trial was correct because it was based on the offense of solicitation set out in this section. St. v. Ray, 267 M 128, 882 P2d 1013, 51 St. Rep. 968 (1994).

Corroborative Circumstances of Intent Not Required to Prove Solicitation: This section does not require proof of circumstances strongly corroborative of specific intent to commit solicitation, but rather proof that the offense was committed purposely. A jury instruction that set out the definition of "purposely" adequately covered the law on solicitation and the requisite mental state. St. v. Brandon, 264 M 231, 870 P2d 734, 51 St. Rep. 244 (1994).

Solicitation of Incest: Having been charged with solicitation of incest, Sage contended that the crime of solicitation applies only when a person requests another to commit a crime and not when the person solicits a victim. However, under this section, the status of the person solicited is neither an element of nor a defense to the crime of solicitation. Sage completed the crime when he asked his daughter to aid him in performing incest. Sage's intent as solicitor was the basis of the crime. St. v. Sage, 255 M 227, 841 P2d 1142, 49 St. Rep. 978 (1992).

Notification of Authorities — No Accountability: A person who was solicited for participation in a crime and, upon learning of the specifics of the intended criminal act, notified authorities and prevented the crime from occurring was not accountable for any crime and was not an accomplice to the crime of solicitation. St. v. Morse, 229 M 222, 746 P2d 108, 44 St. Rep. 1919 (1987).

"Facilitates" Not Vague: This section's use of word "facilitates" is not unconstitutionally vague, and the section is definite and specific enough to give fair warning of the conduct prohibited. St. v. Bush, 195 M 475, 636 P2d 849, 38 St. Rep. 2045 (1981).

Jurisdiction Over Solicitation: In a trial for solicitation of another to possess dangerous drugs, trial court properly refused to exclude as irrelevant all evidence of events outside Montana. It also properly refused to grant motion to dismiss for lack of jurisdiction, a motion premised on the exclusion of evidence. Appellant solicited another person in Montana to commit, unknowingly and in another jurisdiction, the offense of possession of dangerous drugs by being an unwitting carrier from Peru to Los Angeles. St. v. Bush, 195 M 475, 636 P2d 849, 38 St. Rep. 2045 (1981).

Solicitee's Knowledge of Criminal Purpose: The essence of an offense under this section is solicitor's intent, not knowledge of solicitee, and the solicitee need not be aware of solicitor's criminal purpose for a criminal solicitation to occur; to rule otherwise would defeat this section's purpose of protecting citizens from victimization and from exposure to inducements to commit a crime. St. v. Bush, 195 M 475, 636 P2d 849, 38 St. Rep. 2045 (1981).

Conviction for Both Solicitation and Criminal Mischief Barred by Statute — Failure to Object When Error Occurred After Judgment: In a prosecution of the defendant for soliciting another to set fire to a mobile home and for felony criminal mischief, the District Court erred in convicting the defendant of both offenses when the solicitation constituted acts in preparation of the criminal mischief. Because the conviction and the error did not arise until after the District Court rendered a final judgment of conviction on both counts of the information, the failure of the defendant to object to the submission of both counts to the jury does not preclude the defendant from raising the issue on appeal. St. v. Mitchell, 192 M 16, 625 P2d 1155, 38 St. Rep. 487 (1981).

Venue: Where the acts constituting the crime of solicitation to commit perjury were committed in Missoula County but related to a pending criminal prosecution in Powell County, venue would properly lie in either county. However, since charges were initially brought in Powell County, a proper county, there was no basis for changing venue. St. v. Bretz, 169 M 505, 548 P2d 949 (1976).

Construction and Application: Under this section solicitation is a separate and distinct crime, punishable and chargeable as such. Thus, acquittal of charges of murder and attempted murder was ruled not to operate as a bar to later conviction under charges of solicitation. People v. Hairston, 46 Ill.2d 348, 263 N.E.2d 840 (1970), certiorari denied 402 US 972 (1971).

Double Jeopardy: Because solicitation is a separate offense, double jeopardy concepts cannot be employed to relieve a defendant who is acquitted on charges of a principal offense of consequences arising from his conviction of solicitation. People v. Hairston, 46 Ill.2d 348, 263 N.E.2d 840 (1970), certiorari denied 402 US 972 (1971). (Note, however, that Montana's double jeopardy statute on this point is more restrictive than federal constitutional requirements and would preclude prosecution for both solicitation and the principal offense; see 46-11-410. The defendant may be charged with both and convicted of either, but conviction of one requires discharge of the other.)

Presence on Scene:

Even though there was no evidence placing defendant at scene of crime, he could be held as an accomplice to larceny in view of possession of stolen property and other corroborating evidence. St. v. Gray, 152 M 145, 447 P2d 475 (1968).

One who advised and encouraged commission of a crime may be found guilty without having been present at the actual commission of the crime. St. v. Quinlan, 84 M 364, 275 P 750 (1929).

Felony-Murder Rule: Where defendant hired two men to set fire and burn his service station and during the course of the arson the two men were burned and subsequently died, the defendant was guilty of first-degree murder under the felony-murder rule since any death directly attributable to a plot to commit arson makes all the conspirators in the arson plot equally guilty of first-degree murder. St. v. Morran, 131 M 17, 306 P2d 679 (1957).

Larceny:

The fact that defendant may have been guilty of larceny by advising and encouraging the thief does not prevent him from being prosecuted instead for receiving the same stolen property. St. v. Webber, 112 M 284, 116 P2d 679 (1941).

Defendant who encourages and advises the crime of larceny is guilty as a principal, so that the testimony of the thief must be corroborated to convict for the related crime of receiving stolen property. St. v. Keithley, 83 M 177, 271 P 449 (1928).

Instructions to Jury:

Instructions substantially in the words of 94-204 and 94-6423, R.C.M. 1947 (since repealed), defining a principal and telling the jury that the distinction between a principal and an accessory had been abrogated by statute, were not improper as implying that a felony had been committed. St. v. Wiley, 53 M 383, 164 P 84 (1917).

In a prosecution for arson, where there was some testimony that defendant procured another to set the fire, the giving of instructions embodying the provisions of 94-204 and 94-6423, R.C.M. 1947 (since repealed), was proper, as was the refusal of others directing the jury to find for the defendant unless satisfied beyond a reasonable doubt that he was present personally and set the fire himself. St. v. Chevigny, 48 M 382, 138 P 257 (1914).

An instruction that a person who "advised or encouraged" another in the commission of a crime was to be considered a principal, instead of "advised and encouraged", the phrase used in 94-204, R.C.M. 1947 (replaced by this section), was not prejudicially erroneous, since the words "advised" and "encouraged" are synonymous in popular meaning. St. v. Allen, 34 M 403, 87 P 177 (1906).

45-4-102. Conspiracy.

Criminal Law Commission Comments

Source: Ill. C. C., 1961, Chapter 38, § 8-2; R.C.M. 1947, §§ 94-1101, 94-7211.

Section 94-4-102 [now MCA, 45-4-102] provides for several changes in the law of conspiracy in Montana.

The purpose element in conspiracy has often proved elusive and difficult to identify because it is easily confused with the purpose element involved in the principal offense which is the object of the conspiracy. However, the very nature of the offense requires a purpose separate and distinct from the purpose required in a prosecution for the principal offense which is the object of the conspiracy. Since an agreement (by words, acts or understanding) is required, there must be (1) a purpose to agree, and the agreement must be accomplished with (2) a purpose that the offense which is the object of the agreement be committed. Statutes in other jurisdictions have attempted to spell out in more detail, and in various terminology, the two-fold nature of the purpose required. The commission felt that if the inchoate nature of conspiracy is kept in mind, the provision as drafted should be sufficiently clear. In addition, since the object of the conspiracy has been limited to criminal activity, there seems to be no compelling reason to express a statutory requirement of "corrupt motive" or "evil purpose".

Currently, acquittal of all conspirators but one absolves that one, since, theoretically, there must be at least two guilty parties to a conspiracy. However, this rationale is rejected as being too technical and overlooking the realities of trials which involve differences in juries, contingent availability of witnesses, the varying ability of different prosecutors and defense attorneys, etc. If the defendant obtains a full and fair trial what happened to another defendant at another time and place in another trial before a different judge and jury should not be a bar to a conviction.

Subsection (1) provides a defense if the accused would not be guilty of an offense if the conduct which is the object of the conspiracy is performed. Subdivision (2)(e) goes further and says that it is not a defense for the accused to say that his coconspirator would not be guilty of an offense if the conduct which is the object of the conspiracy were to be performed. Subdivision (2)(e) intended to deny to an accused who has no legal incapacity or immunity in relation to the principal offense, any rights, benefits, advantages, or defenses which the law may have conferred upon a coconspirator. This probably involves no change in the general rule of law which denies to an accused the legal disabilities of an accomplice, but probably (in conjunction with subdivision (2)(d)) involves a change in the present law of conspiracy where there are only two conspirators and the coconspirator has been acquitted because he lacks the capacity, due to some legal disability, to commit conspiracy.

One other important change should be noted: under subsection (1) conspiracy is committed when (with the required purpose) there is an agreement to commit any offense; this eliminates the possible application of the so-called "Wharton Rule" in conspiracy, which says that if the object of the agreement is a crime which (by its very nature) requires two or more persons to commit it, then the agreement does not amount to conspiracy because no greater danger is presented by the plurality of actors in the conspiracy than would be presented to the community in the commission of the principal offense. The commission felt that the Wharton Rule fails to take into account the preventive aspect of prosecuting conspiracies, that is, to discourage the more dangerous criminal activity of several persons by punishing the preliminary agreement to engage in such activity. That the criminal activity is of such nature as to inevitably require more than one person in its accomplishment seems the more reason to abrogate the Wharton Rule.

The problem of the extent of the conspiracy, as to multiple parties, multiple objects, or duration of the agreement has been a constant source of litigation, especially in the federal courts. An immense variety of factual situations are possible in this area, each with its own special considerations. Attempts to cover one or more of the possible fact situations by statute merely leads to the necessity of trying to cover more, so that the statutory provisions become so detailed as to risk non-coverage of fact situations through exclusion.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This section is drawn almost verbatim from the Illinois statute defining conspiracy and represents an expansion of prior law to include combination for the commission of any offense. The purpose of this section is to render criminal any combination which has the purpose of committing an offense and which has proceeded so far that an action in furtherance of the commission of the offense has been taken by one member of the combination. Subsection (1) also eliminates the old rule which excepts from the conspiracy statutes crimes which by their very nature require more than one person for their commission. Subsection (2) retains the current rule that legal incapacity or other procedural bar to the prosecution of a coconspirator will not provide a defense (see St. v. Alton, 139 M 479, 365 P2d 527 (1961)) and eliminates the technical defense that requires the acquittal of a conspirator following a finding that his coconspirators are not guilty of conspiracy.

Case Notes

Calculation of Restitution Reversed and Remanded — No Joint and Several Liability for Restitution for 11-Day Vandalism Spree When Youth Participated Only 2 Days: A youth pleaded guilty to participating in 2 nights of an 11-day vandalism spree. The judge ordered that he was jointly and severally liable for the amount of damage caused throughout the entire spree, which exceeded $70,000. The youth argued he should be ordered to pay restitution for only the damages caused during the 2 days instead because the state did not establish his accountability for the vandalism that occurred during the other 9 days of the spree. The state argued it did not have to establish his accountability under the criminal mischief statutes for each day of the spree. The youth appealed to the Supreme Court, which agreed with the youth that the state was required to prove his accountability for the acts of others. The Court reversed the District Court's order of restitution and remanded for a recalculation of restitution for the 2 days on which the youth participated in the acts of vandalism. In re B.W., 2014 MT 27, 373 Mont. 409, 318 P.3d 682.

Sufficient Corroborative Evidence to Support Conspiracy Conviction: Marler was convicted of conspiracy to commit robbery. On appeal, Marler contended that there was insufficient corroborative evidence to support the conspiracy conviction. The Supreme Court disagreed. A person may not be found guilty solely from an accomplice's testimony unless that testimony is corroborated by other evidence that in itself and without the aid of the testimony of the one responsible or legally accountable for the same offense tends to connect the defendant with the commission of the offense. Pursuant to St. v. Burkhart, 2004 MT 372, 325 M 27, 103 P3d 1037 (2004), evidence may corroborate accomplice testimony sufficiently even though standing alone it fails to support a conviction or to make out a prima facie case against the defendant. Circumstantial evidence, disputed evidence, or evidence that is consistent with innocent conduct may suffice to corroborate accomplice testimony, but evidence fails to corroborate accomplice testimony sufficiently if it reveals nothing more than a crime's occurrence or the circumstances of the crime's commission. In this case, the state presented independent evidence tending to connect Marler with the conspiracy to commit robbery, including a map of the floor plan of the business to be robbed, testimony of Marler's attempts to recruit others in the robbery, the arrest of an armed conspirator outside the apartment where Marler was residing, cell phone images of the coconspirators holding handguns and displaying the same hand gestures, and testimony that Marler had plans to leave town but needed additional funds. When viewed in the light most favorable to the prosecution, the evidence was sufficient for a jury to conclude that Marler conspired to commit robbery, and the District Court's denial of Marler's motion for acquittal based on insufficient evidence was affirmed. St. v. Marler, 2008 MT 13, 341 M 120, 176 P3d 1010 (2008).

Sufficient Independent Evidence Corroborating Accomplice Testimony of Conspiracy to Commit Theft: Following conviction for conspiracy to commit felony theft, Black asserted that the testimony of several witnesses was not sufficiently corroborated. The Supreme Court disagreed. Corroborating evidence need not extend to every fact to which an accomplice testifies, nor is corroborating evidence insufficient just because it is circumstantial, disputed, or inconsistent with innocent conduct. Setting aside the accomplice testimony entirely, in this case, there was sufficient independent evidence from Black himself and from nonaccomplice witnesses to indicate Black's complicity in the theft. St. v. Black, 2003 MT 376, 319 M 154, 82 P3d 926 (2003), followed in St. v. Dewitz, 2009 MT 202, 351 M 182, 212 P3d 1040 (2009), regarding the test for sufficiency of corroborating evidence.

Accomplice Facing Charges Related to Different Count From Defendant — Corroboration of Testimony: Byers was charged with conspiracy to manufacture dangerous drugs based on the testimony of three accomplices. The testimony of two of the accomplices was inadmissible under 46-16-213, but testimony was also given by a third accomplice who was charged with complicity with Byers in a different crime. Byers contended that the testimony of the third accomplice was also inadmissible; however, because the third accomplice was facing charges related to acts with Byers on a different count, the corroborative testimony of the third accomplice was proper. St. v. Byers, 2003 MT 83, 315 M 89, 67 P3d 880 (2003).

Evidence Unrelated to Accomplice Testimony Sufficient to Corroborate Drug Lab Operation: Byers was charged with operating a methamphetamine laboratory and conspiracy to manufacture methamphetamine. Two accomplices testified against Byers in exchange for use immunity. Byers asserted that the accomplices' testimony was inadmissible pursuant to 46-16-213, but the Supreme Court disagreed. There was sufficient physical evidence of drug manufacturing to provide independent corroboration of the witnesses' testimony, unrelated to the accomplice testimony, so that a jury could reasonably infer that Byers was involved in the manufacture of methamphetamine. Byers' conviction was affirmed. St. v. Byers, 2003 MT 83, 315 M 89, 67 P3d 880 (2003).

Voluntary Act Precluding False Imprisonment Claim — Lack of Underlying Tort Precluding Civil Conspiracy Claim: A woman with breast cancer was advised by Hughes, a radiation oncologist, to undergo therapeutic radiology for the disease. Prior to radiation, an oncologist makes specific marks on the affected area to identify where to direct radiation beams. However, in addition to the marks directing radiation beams, Hughes drew a "smiley face" on the woman's breast by drawing two dime-sized "eyes" above the nipple of the breast and outlining the scar from the breast biopsy for the "mouth". The woman complained to hospital administration, and an ad hoc investigative committee recommended that Hughes receive a letter of reprimand, have a term of probation, have a chaperone while working, and be evaluated by the Montana Professional Assistance Program (MPAP). Hughes agreed to a medical, psychiatric, or chemical dependency evaluation and voluntarily enrolled in two such programs in Texas and Kansas. After release, Hughes signed an aftercare agreement. Hughes then brought suit against the individual members of the ad hoc committee and MPAP, alleging false imprisonment, civil conspiracy, breach of contract, and civil right violations related to the disciplinary actions. Summary judgment was granted to defendants in federal District Court on the civil rights claims, and the remaining charges were remanded to state District Court, where they were also summarily dismissed. Hughes appealed. The Supreme Court affirmed dismissal of the false imprisonment claim because Hughes voluntarily signed the treatment agreements and submitted to evaluation. Two elements of false imprisonment are the restraint of an individual against the individual's will and the unlawfulness of that restraint, but because no material fact existed as to the voluntariness of Hughes's action, the false imprisonment claim failed as a matter of law. Further, to sustain a civil conspiracy claim, plaintiff must allege a tort committed by one of the conspirators, but because the false imprisonment claim failed, there was no underlying tort action to form a basis for civil conspiracy, so that claim failed as well. Hughes v. Pullman, 2001 MT 216, 306 M 420, 36 P3d 339 (2001).

Sufficient Corroborating Evidence That Accomplice Removed Alcohol From Accident Scene to Constitute Conspiracy: In Fey's trial for negligent homicide, negligent vehicular assaults, conspiracy, misdemeanor DUI, and misdemeanor transactions with minors, there was sufficient corroborating evidence for an accomplice's testimony that he removed alcohol from a wrecked car on Fey's instruction. A jury could have reasonably inferred from the fact that Fey walked into a field to investigate an object "which caught his eye as it reflected light from the sun" that he was looking for the alcohol containers that the witness had removed from the car the night of the crash. The evidence clearly tended to connect Fey with the commission of conspiracy. St. v. Fey, 2000 MT 211, 301 M 28, 7 P3d 358, 57 St. Rep. 829 (2000), following St. v. Kemp, 182 M 383, 597 P2d 96 (1979).

Error to Refuse Instruction That One Cannot Conspire Solely With Government Agent: It is legally impossible for a person to conspire with an undercover government agent to commit a crime. There must be at least two nonagents conspiring between themselves and involved with the agent. It was error to refuse defendant's instruction to that effect. St. v. Shaw, 255 M 298, 843 P2d 316, 49 St. Rep. 1012 (1992), followed in St. v. Hatfield, 256 M 340, 846 P2d 1025, 50 St. Rep. 101 (1993).

Conspiracy to Commit Deliberate Homicide — Fictitious Victim — Distinction Between Factual and Legal Impossibility — Factual Impossibility No Defense: Defendant was charged with conspiracy to commit deliberate homicide when he accepted money to kill an individual who was fictitious. The Supreme Court held that the District Court erred in denying the state's motion to file an information directly against the defendant. Legal impossibility exists when the contemplated act, if committed, would not be an offense. Factual impossibility exists when the contemplated act is an offense, but it cannot be carried out due to facts unknown to the conspirators. Legal impossibility is a defense to conspiracy but factual impossibility is not. This is a case of factual impossibility. While the intended victim of the deliberate homicide was fictitious, there appears to be a basis for proving the elements of conspiracy. The fact that the homicide could not have been carried out is immaterial. St. v. Houchin, 235 M 179, 765 P2d 178, 45 St. Rep. 2290 (1988).

No Corporate Conspiracy in Reduction in Force: A coal company signed a long-term contract to provide coal to a utility group. The group later sued to permanently reduce the amount of coal it was required to accept, resulting in a reduction in force by the coal company. Coal miners who lost their jobs did not provide any evidence of a conspiracy between the company and the utility to deprive the miners of their jobs through filing of the lawsuit. McClain v. Nerco, Inc., 227 M 293, 738 P2d 1285, 44 St. Rep. 1094 (1987).

Warrantless Arrest — Evidence Obtained Pursuant to Arrest — Collective Police Information Considered — Exceptional Circumstances: On appeal from a conviction for conspiracy to sell dangerous drugs, the defendant attacked his arrest as being without probable cause and unlawfully warrantless. The Supreme Court found the arrest was based on probable cause and lawful. Therefore, the evidence seized after the arrest was admissible at trial. An officer could make an arrest without a warrant when he believed on reasonable grounds that the person had committed an offense and the existing circumstances required immediate arrest. "Reasonable grounds" to arrest is synonymous with "probable cause" to arrest. Probable cause may be found in a case such as this by evaluating the collective information of the police, not just that of the arresting officer. Here the court found more than the defendant's mere presence at the scene of the crime, and it found probable cause had existed. On the issue of the necessity of immediate arrest, the court compared the situation to the "exceptional circumstances" that allow police to enter a residence without a warrant to search and arrest. Considering the possibilities of the defendant's fleeing and the likelihood that the evidence of the buy, which easily could have been destroyed or disposed of, might be found on the defendant because he was present at delivery, the court held that the officers were reasonable in their belief that an immediate arrest was necessary. St. v. Davis, 190 M 285, 620 P2d 1209, 37 St. Rep. 1958 (1980).

Duration of Conspiracy: Conspiracy to rob was held still viable 1 week after the robbery occurred because evidence revealed the ongoing cooperation of the conspirators in an effort to accomplish their criminal goal in dividing up the proceeds and concealing the evidence of the crime. The transcript was, according to the court, replete with evidence of a conspiracy that extended for weeks after the statement incriminating defendant was made on the night of the crime by one of defendant's coconspirators. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343, 37 St. Rep. 194 (1980).

Omission to Take Action — Jury Instruction: The theory upon which this case was tried was that defendant or another coconspirator had done overt acts in furtherance of the crime. As the jury was instructed that the definition of "act" included omission only "where relevant", there was no error in an instruction which allowed the jury to find a conspiracy by proof of an omission as well as an overt act. St. v. Williams, 185 M 140, 604 P2d 1224 (1979).

Evidence Admitted Pertaining to Charge Later Dismissed — Jury Instructed to Disregard: Defendant was charged with deliberate homicide and with conspiracy to commit homicide. The conspiracy charge was dismissed at the close of the State's case. The District Court instructed the jury to consider only the evidence pertaining to the charge of deliberate homicide and to disregard evidence pertaining to the conspiracy charge. Such an instruction is presumed to cure any error which may have been committed by the introduction of evidence pertaining to the conspiracy charge. St. v. Freeman, 183 M 334, 599 P2d 368 (1979).

Venue: Where the acts constituting the crime of conspiracy to commit perjury were committed in Missoula County but were related to a pending criminal prosecution in Powell County, venue would properly lie in either county. However, since charges were initially brought in Powell County, a proper county, there was no basis for changing venue. St. v. Bretz, 169 M 505, 548 P2d 949 (1976).

Indictment and Information: An indictment for conspiracy need not allege all of the elements of the substantive offense which is the object of the conspiracy. People v. Williams, 52 Ill.2d 455, 288 N.E.2d 406 (1972). The indictment need only designate the felony intended to be committed by such description as will apprise the defendant of the exact charge upon which he will be tried. People v. Peppas, 24 Ill.2d 483, 182 N.E.2d 228 (1962). Accord, People v. Radford, 81 Ill. App.2d 417, 226 N.E.2d 472 (1967).

Persons Liable: Once a conspiracy is entered into, each coconspirator then becomes liable for the acts of his other coconspirators done in furtherance of the object of the conspiracy. People v. Olivier, 3 Ill. App.3d 872, 279 N.E.2d 363 (1972); People v. McGuire, 29 Ill. App.2d 117, 172 N.E.2d 523 (1961); People v. Kroll, 4 Ill. App.3d 203, 280 N.E.2d 528 (1972); People v. Hall, 38 Ill.2d 308, 231 N.E.2d 416 (1967).

Proof of Conspiracy: Direct evidence of an agreement between conspirators is unnecessary to prove a common design. The State need only show the conspirators pursued a course tending toward accomplishment of the object of the conspiracy. People v. Graham, 1 Ill. App.3d 749, 274 N.E.2d 370 (1971). The proof of acts in furtherance of a common design may be drawn from circumstances surrounding the commission of the act by the group and need not be supported by evidence of an express agreement between the parties. People v. Richardson, 132 Ill. App.2d 712, 270 N.E.2d 568 (1971); People v. Chandler, 78 Ill. App.2d 397, 223 N.E.2d 259 (1966); People v. Edwards, 74 Ill. App.2d 225, 219 N.E.2d 382 (1966). The state need prove only one overt act in carrying out a conspiracy to support a conviction of conspiracy. People v. Kroll, 4 Ill. App.3d 203, 280 N.E.2d 528 (1972). See also People v. Sarelli, 34 Ill. App.2d 380, 180 N.E.2d 722 (1962).

In General:

A person commits "conspiracy" when, with the intent that the principal offense be committed, he agrees with another to commit that offense and he or a coconspirator commits an act in furtherance of the conspiracy. People v. Hoffmann, 124 Ill. App.2d 192, 260 N.E.2d 351 (1970).

The crime of conspiracy does not require that the contemplated offense actually be completed, and since conspiracy is a separate and distinct crime, persons who conspire to commit unlawful acts may be convicted notwithstanding the fact that the contemplated offense was actually completed, since conspiracy to commit a crime does not merge into the principal crime itself. People v. DeStefano, 85 Ill. App.2d 274, 229 N.E.2d 325 (1967), certiorari denied 390 US 997 (1968); People v. Brouilette, 92 Ill. App.2d 168, 236 N.E.2d 12 (1968). See also People v. Hansen, 28 Ill.2d 322, 192 N.E.2d 359 (1963). However, under Montana's double jeopardy statute on this point, conviction for both the principal offense and the conspiracy to commit it is precluded. A defendant may be charged with both and convicted of either, but conviction of one requires discharge of the other. (See 46-11-410(2).)

Common design is the essence of a conspiracy, but it is not necessary to prove such design by direct evidence of an agreement between the coconspirators. The State need only show that conspirators pursued a course tending toward accomplishment of the offense upon which the complaint is based. People v. Perry, supra. See also People v. Gates, 29 Ill.2d 586, 195 N.E.2d 161 (1964); People v. Edwards, 74 Ill. App.2d 225, 219 N.E.2d 382 (1966).

"Conspiracy" has been defined as the confederacy of two or more persons to accomplish an unlawful purpose. People v. Brinn, 32 Ill.2d 232, 204 N.E.2d 724, certiorari denied 382 US 827 (1965).

To constitute conspiracy the State must show criminal intent between two or more persons to accomplish an unlawful result. Worden v. State Police Merit Bd., 30 Ill. App.2d 323, 174 N.E.2d 407 (1961).

Although intent to commit conspiracy is a matter of fact and cannot be implied as a matter of law, criminal intent may be shown by circumstantial evidence. People v. Perry, 23 Ill.2d 147, 177 N.E.2d 323 (1961), certiorari denied 369 US 868 (1962).

Admissibility and Sufficiency of Evidence: Because it is difficult to acquire direct evidence with regard to a conspiracy, it has been held that great latitude should be granted to the trial court in assessing the admissibility of circumstantial evidence when such evidence is offered to establish factors pointing towards involvement in a conspiratorial agreement. People v. Bravos, 114 Ill. App.2d 298, 252 N.E.2d 776 (1969), certiorari denied 397 US 919 (1970). Thus, it has been held that evidence taken from one coconspirator is admissible against his coconspirators. People v. Babitsch, 82 Ill. App.2d 299, 226 N.E.2d 469 (1967). Similarly, it is permissible to prove conspiracy by showing common actions of two defendants. People v. Savage, 84 Ill. App.2d 73, 228 N.E.2d 215 (1967). However, a conspiracy cannot be shown by evidence of a mere relationship or transaction between the parties. People v. Gates, 29 Ill.2d 586, 195 N.E.2d 161 (1964). And only such declarations as may fairly be said to be in furtherance of the conspiracy are admissible as declarations of the coconspirator. People v. Hal, 25 Ill.2d 577, 185 N.E.2d 680 (1962). See also People v. Olivier, 3 Ill. App.3d 872, 279 N.E.2d 363 (1972); People v. Trigg, 97 Ill. App.2d 291, 240 N.E.2d 130 (1968); People v. Edwards, 74 Ill. App.2d 225, 219 N.E.2d 382 (1966).

Limitations: Every act in furtherance of a conspiratorial agreement is a renewal of the conspiracy, and the Statute of Limitations begins to run from the date of the commission of the last overt act. People v. Isaacs, 37 Ill.2d 205, 226 N.E.2d 38 (1967).

Questions for Jury: Whether or not certain conduct constitutes a conspiracy is generally a question of fact for the jury to consider. People v. Gallegos, 80 Ill. App.2d 105, 224 N.E.2d 631 (1967). See also People v. Brinn, 32 Ill.2d 232, 204 N.E.2d 724, certiorari denied 382 US 827 (1965).

Degrees of Crime: Different conspirators could be convicted of different degrees of homicide arising out of the same act. St. v. Alton, 139 M 479, 365 P2d 527 (1961).

Responsibility of Conspirator: Prison inmate who took active part in inmate uprising, including taking of hostages and acting as spokesman for the inmates, could be held responsible for killing of guard during the course of the uprising, even though he was not present at the killing and even though the inmate who had done the shooting was dead. St. v. Alton, 139 M 479, 365 P2d 527 (1961).

Presence on Scene: Conspirator may be convicted of crime without having been present at the actual commission of a crime. St. v. Quinlan, 84 M 364, 275 P 750 (1929).

Evidence Against Coconspirator: After proof of a conspiracy, evidence of the acts or declarations of a conspirator relating to the object of the conspiracy may be admitted against a coconspirator. St. v. Dotson, 26 M 305, 67 P 938 (1902).

Allegations in Indictment: Under the former language of this section an indictment for a conspiracy to cheat and defraud a county had to allege the means by which the conspiracy was to be accomplished. An allegation that the defendants conspired "to cheat and defraud" was not sufficient. Territory v. Carland, 6 M 14, 9 P 578 (1886).

45-4-103. Attempt.

Criminal Law Commission Comments

Source: R.C.M. 1947, § 94-4710.

As under prior law, it is not necessary that the attempt fail in order to sustain a conviction under this section. It is important to note that the "double jeopardy" statute applies and the attempt is an "included offense" if the attempt is successful.

One charged with an attempt to commit a crime may properly be convicted even though the evidence shows that the crime was completed. (St. v. Benson, 91 M 21, 5 P2d 223 (1931).)

Subsection (1) requires a purpose to commit a specific offense and an act toward the commission of that offense.

Subsection (2) is intended to codify the general rule that a factual or legal impossibility (as distinguished from an inherent impossibility) is no defense to attempt. The phrase "misapprehension of the circumstances" is intended to include both factual and legal circumstances. An example of inherent impossibility would be an attempt to kill by witchcraft and is not intended to be excluded as a defense. However, factual impossibility (attempting to pick an empty pocket), or legal impossibility (attempting to receive stolen goods which are not stolen) would be no defense.

This attempt statute is designed to cover all special attempt provisions in the old code, such as "attempted arson," "attempted burglary," etc.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: The purpose of this section is to punish conduct which, while not representing a completed offense, is undertaken with the purpose of committing a specific offense. It should be noted, however, that in accordance with present law, even though the evidence shows the crime was completed, a conviction for attempt is proper (St. v. Benson, 91 M 21, 5 P2d 223 (1931)) and that attempt is an "included offense" for purposes of the "double jeopardy" statute.

To convict, there must be a showing of: (1) a purpose to commit a specific offense; and (2) any act toward the commission of that offense. The term "any act" was used to avoid the fine distinctions under former law between "acts of preparation" and "acts of perpetration" and simply provides that any act that showed definitely that the crime was going forward would be enough to prove attempt. In St. v. Radi, 168 M 320, 542 P2d 1206 (1975), the Montana court pointed out, without comment, that the charge of attempted burglary would lie where a person has done any act toward the commission of the burglary and the requisite specific purpose is also shown. But, in St. v. Ribera, 183 M 1, 597 P2d 1164 (1979), the court relied on St. v. Rains, 53 M 424, 164 P 540 (1917) as precedent and seemed to require a much more unequivocal and specific act, i.e., an overt act which reaches "far enough towards the accomplishment of the desired result to amount to the commencement of the consummation". Ribera, 597 P2d at 1170. So, although the original intent of the "any act" provision was to allow any act whatsoever toward the commission of the offense to be sufficient coupled with the criminal purpose, the court requires that act to be unequivocal, amounting to "some appreciable fragment of the crime". Ribera, 597 P2d at 1170.

Subsection (2) establishes the general rule that factual or legal impossibility provides no defense to attempt and supersedes the current Montana rule enunciated in St. v. Porter, 125 M 503, 242 P2d 503 (1952).

Subsection (4) continues present law and indicates that a complete and voluntary renunciation that avoids the commission of the offense will be a defense to attempt.

Case Notes

Attempted Deliberate Homicide — Announcement of Intention to Kill — Not Overt Act Toward Accomplishment: At trial for attempted deliberate homicide, evidence was introduced to show that after a defendant was kicked out of a bar, he got into a verbal altercation with the bar's owner and tried to antagonize him into a fight. The defendant then returned to his apartment across the street and placed a kitchen knife down his pants. The bar owner beckoned him back to speak with a police officer, and the defendant was placed under arrest, after which the knife was found and he stated that he was planning to stab the bar owner in the heart. However, this was insufficient evidence to convict the defendant because there was no overt act that reached far enough toward the accomplishment of attempting to kill the bar owner with the knife. Even if he consistently announced his intention to kill the bar owner, the defendant merely possessed a knife but took no steps to actually use it. Therefore, the conviction was reversed and remanded for dismissal with prejudice. St. v. Boyd, 2021 MT 323, 407 Mont. 1, 501 P.3d 409.

Conflicting Facts — Entrapment Question Properly Submitted to Jury: The District Court did not err in denying the defendant's motion to dismiss for entrapment as a matter of law on the charge of felony attempted prostitution with a minor, in violation of 45-4-103 and 45-5-601. The defendant argued that the task force entrapped him into attempted prostitution with a minor by inducing him into replying to an ad on Backpage.com with a seductive photo, luring him to a motel room, and cajoling him into retrieving money from an ATM to pay for sex. However, there were several affirmative decisions from which a reasonable jury could conclude that the idea to engage in the criminal behavior originated in the defendant's mind. After reading the advertisement, the defendant dialed the contact information, learned that the prospective sex workers were minors, and arranged a meeting at a motel. In the motel room, the defendant proceeded to negotiate for sex with a 15-year-old girl. After indicating that he did not bring cash with him, the defendant retrieved cash from an ATM, returned to the room, and paid the undercover officer so he could have sex with a minor. Given these facts, the defendant's entrapment defense would have been a tough sell to a jury, much less warranting dismissal as a matter of law. Because conflicting facts existed as to whether the defendant had the requisite intent to commit the criminal act, the District Court correctly denied the motion and concluded the issue of entrapment must be submitted to a jury. St. v. Lindquist, 2018 MT 38, 390 Mont. 329, 413 P.3d 455.

Sufficient Evidence for Conviction for Attempted Sexual Abuse of Children — Child Pornography: The defendant was charged with four counts of sexual abuse of children and five counts of attempting sexual abuse of children for possessing and attempting to possess child pornography. Although the jury deadlocked on the counts of actual abuse and the state dismissed those, the defendant was found guilty on two counts of attempted abuse. On appeal, the defendant argued that there was insufficient evidence to support his convictions because the evidence showed only that he had entered words into a search engine that could have located child pornography. The state countered that the fact the defendant had actually downloaded 11 pictures of young girls in sexually provocative poses provided sufficient evidence to support the attempt convictions. The Supreme Court affirmed, ruling that the state had provided sufficient evidence for a jury to find that the defendant had committed an overt act that satisfied the elements of 45-4-103. St. v. Colburn, 2016 MT 246, 385 Mont. 100, 386 P.3d 561.

Lesser-Included Offense Jury Instruction — Insufficient Evidence: The defendant was arrested after throwing exploding pipe bombs at police officers during a prolonged vehicle chase and was charged with and convicted of attempted deliberate homicide. On appeal, the defendant argued that the District Court erred in refusing to provide a jury instruction on misdemeanor assault as a lesser-included offense because the pipe bombs he used could have reasonably caused only bodily injury as opposed to serious bodily injury. The Supreme Court affirmed, holding that a trial court need not instruct a jury on misdemeanor assault if the evidence shows that the only type of injury that would be feared is serious bodily injury. St. v. Stewart, 2016 MT 1, 382 Mont. 57, 363 P.3d 1140.

Conviction of Incest and Attempted Incest Upheld — Crimes Arising From Separate and Distinct Transactions: After a jury found him guilty of both incest and attempted incest, the defendant moved for a new trial on multiple grounds, including an allegation that he was subjected to double jeopardy. The defendant argued that both offenses occurred on the same day during a hunting trip, but the Supreme Court determined the convictions were based on two separate and distinct transactions. St. v. Geren, 2012 MT 307, 367 Mont. 437, 291 P.3d 1144, citing St. v. Williams, 2010 MT 58, 355 Mont. 354, 228 P.3d 1127.

Attempted Sexual Intercourse Without Consent — Evidence of Conversations Leading up to Violation Properly Excluded — Photos of Other Women Sent by Victim to Defendant Irrelevant and Prejudicial: After the defendant was convicted of attempted sexual intercourse without consent, he claimed that his due process rights were violated based on the District Court's exclusion of evidence that included alleged sexual conversations between the defendant and the victim in the days leading up to the violation and photos of semiclothed women that were allegedly sent from the victim's cell phone to the defendant. The Supreme Court determined that the rape shield law exception in 45-5-511 does not extend to alleged conversations leading up to the date of the violation. Moreover, the Supreme Court held that the exclusions were proper on the basis that the alleged conversations and photos were irrelevant or more prejudicial than probative under Rules 401 through 403, M.R.Ev. (Title 26, ch. 10). The District Court struck the appropriate balance between the defendant's right to develop his case and the rules of evidence. St. v. Bishop, 2012 MT 259, 367 Mont. 10, 291 P.3d 538.

Sufficient Evidence of Attempted Sexual Intercourse Without Consent: The Supreme Court upheld the defendant's conviction based upon his actions in entering the victim's home uninvited and touching her and attempting to remove her clothing before she was able to thwart the defendant's attempts to have intercourse with her. State v. Gunderson, 2010 MT 166, 357 Mont. 142, 237 P.3d 74.

Acquittal of Sexual Intercourse Without Consent Not Requiring Dismissal of Charge of Attempted Evidence Tampering: Scheffer was charged with sexual intercourse without consent and with attempting to tamper with physical evidence related to the sexual intercourse without consent charge. Scheffer was acquitted of the sexual intercourse without consent charge but convicted of attempted evidence tampering. On appeal, Scheffer contended that the attempted evidence tampering charge should be vacated because it was irrationally inconsistent with acquittal of the sexual intercourse without consent charge, inasmuch as acquittal of sexual intercourse without consent meant that the alleged rape never occurred. The Supreme Court disagreed. Even if an actual rape never occurred, it was not a practical impossibility for Scheffer to attempt to tamper with evidence related to the events and acts in question. Scheffer's conviction of attempting to alter, destroy, conceal, or remove physical evidence related to the pending official proceeding or investigation into sexual intercourse without consent was not irrationally inconsistent with the ultimate acquittal of the underlying charge. The conviction for attempted evidence tampering was affirmed. St. v. Scheffer, 2010 MT 73, 355 Mont. 523, 230 P.3d 462.

Attempted Tampering With Physical Evidence — Amendment of Information to Conform Charge to Evidence Not Error: When Scheffer was interrogated for possible sexual intercourse without consent, officers requested a DNA sample from Scheffer's fingers. Scheffer agreed to give a sample, but when officers left the room to get the sample kit, Scheffer put his fingers in his mouth in an attempt to destroy DNA evidence on his fingers. The DNA sample was taken anyway, and Scheffer was charged with tampering with or fabricating physical evidence. When the lab returned the sample, it indicated Scheffer's victim's DNA, so the information was amended to attempted tampering with or fabricating physical evidence. Scheffer's motion to dismiss the amended information was denied, and the Supreme Court affirmed. The amendment was one of form rather than substance, because no additional or different offense was charged, the elements of the crime and the required proof remained the same, and Scheffer was informed of the charges. Scheffer's rights were not prejudiced, and the trial court did not abuse its discretion by denying Scheffer's motion to dismiss the amended information. St. v. Scheffer, 2010 MT 73, 355 Mont. 523, 230 P.3d 462.

Sufficient Evidence of Deliberate Homicide and Attempted Deliberate Homicide to Support Conviction: Following the killing of one deputy and the wounding of another deputy during an altercation in the dark with Jackson, a jury convicted Jackson of deliberate homicide and attempted deliberate homicide. Jackson appealed on grounds that the evidence was mostly circumstantial and insufficient to support the conviction, arguing that the jury had adopted an inherently impossible interpretation of the evidence. The Supreme Court noted that the state's case was not entirely circumstantial and that the direct evidence of the wounded officer confirmed that Jackson was the shooter, even though the officer did not actually see Jackson pull the trigger. The court also found that to conclude that the case rested solely on the officer's testimony would be to ignore the testimony of 53 witnesses and more than 240 items of physical evidence. Any rational trier of fact could have found that the circumstantial evidence was consistent with the officer's testimony, and the physical evidence and crime scene reconstruction also corroborated the officer's description of events. Thus, the jury's verdict was not inherently impossible, and there was sufficient evidence for the jury to find the essential elements of both deliberate homicide and attempted deliberate homicide beyond a reasonable doubt. Jackson's conviction was affirmed. St. v. Jackson, 2009 MT 427, 354 M 63, 221 P3d 1213 (2009).

Actual Sexual Contact Between Children Not Essential Element of Attempted Sexual Abuse of Children: At Gaither's trial for felony attempted sexual abuse of children, Gaither contended that the charge should be dismissed because there was no evidence that sexual contact or activity actually occurred between children that Gaither was attempting to videotape having sex. The District Court declined to dismiss the charge or to instruct the jury that contact was an essential element of the crime. Gaither appealed, but the Supreme Court affirmed. Actual sexual contact or activity between alleged victims is not an essential element of the offense of attempted sexual abuse of children. The attempt statute does not require that the defendant actually completed the alleged crime, only that the defendant intended that the conduct occur and took steps toward its act or commission. Therefore, the District Court did not err in refusing to dismiss the charge or abuse its discretion in declining to instruct the jury that actual contact was an element of the crime. St. v. Gaither, 2009 MT 391, 353 M 344, 220 P3d 640 (2009), distinguishing St. v. Fuller, 266 M 420, 880 P2d 1340, 51 St. Rep. 890 (1994).

No Error in Admitting Evidence of Past Deviant Sexual Acts as Grooming for Future Sexual Abuse: At Marshall's trial for attempted sexual abuse of children, the trial court admitted evidence of Marshall's prior deviant sexual acts and comments over Marshall's objection that the prior acts were too spread out to constitute the same transaction and because the requirements of Rule 404(b), M.R.Ev. (Title 26, ch. 10), were not met. The Supreme Court held that the evidence was admissible as grooming, defined as the process of cultivating trust with a victim and gradually introducing sexual behaviors until reaching the point at which it is possible to perpetrate a sex crime against the victim. Thus, even though Marshall's prior acts may have been remote in time, grooming by definition must occur over a period of time, so the acts were inextricably linked to the charged offense. St. v. Marshall, 2007 MT 198, 338 M 395, 165 P3d 1129 (2007), followed in St. v. Bieber, 2007 MT 262, 339 M 309, 170 P3d 444 (2007), to the extent that evidence of defendant's legal acts was inextricably linked to and explanatory of the charged offense and therefore admissible, notwithstanding the rules related to admissibility of evidence of other acts, and in St. v. Gaither, 2009 MT 391, 353 M 344, 220 P3d 640 (2009). See also St. v. Buck, 2006 MT 81, 331 M 517, 134 P3d 53 (2006).

Sufficient Evidence of Attempted Sexual Abuse of Children — Grooming: Marshall contended that the state did not present sufficient evidence to prove attempted sexual abuse of children because Marshall did not take a material step to engage a child in sexual conduct or to prove that Marshall's specific purpose was to employ a child in sexual conduct. The Supreme Court disagreed with both arguments. Marshall engaged in a series of activities viewed as grooming the victim for future sexual contact, and a rational trier of fact could have found beyond a reasonable doubt that Marshall took a material step toward committing the crime. Also, if the child victim had taken Marshall's offer of money to remove her clothes for him, the action would have flouted community standards, and a jury could therefore have found beyond a reasonable doubt that Marshall sought to employ the child in the sexual conduct of a lewd exhibition of her intimate parts. The state's evidence was sufficient, and the conviction was affirmed. St. v. Marshall, 2007 MT 198, 338 M 395, 165 P3d 1129 (2007).

Sufficient Evidence of Attempted Robbery — Directed Verdict Properly Denied: At the conclusion of testimony in his attempted robbery trial, after his witnesses presented testimony corroborating Ferguson's claim, Ferguson moved for a directed verdict on grounds of insufficient evidence that Ferguson planned the robbery and was aware that it would occur. The trial court denied the motion, and the Supreme Court affirmed. Ferguson's witnesses' testimony was conflicting and did in fact indicate Ferguson's involvement at some level in the crime. Viewed in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. A directed verdict is appropriate only when there is no evidence upon which a jury could base a guilty verdict, so denial of Ferguson's motion was not an abuse of the trial court's discretion. St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005).

Use of Weapon by Person in Group Robbery but No Evidence That Defendant Used Weapon — Sentence as Violent Offender Reversed: Ferguson was one of a group of persons that attempted a robbery. It was uncontested that someone in the group brandished a knife, but testimony was conflicting whether it was Ferguson. Nevertheless, the trial court enhanced Ferguson's sentence because he was part of a crime of violence when a knife was used. However, the mere finding that someone in the group used a knife did not rise to the level of a finding that Ferguson used a knife. Thus, the Supreme Court reversed that part of Ferguson's sentence and remanded for sentencing Ferguson as a nonviolent offender. St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005).

Sufficient Evidence to Sustain Convictions of Felony Assault on Peace Officer and Felony Attempted Assault on Peace Officer: During an altercation at a detention center following Pittman's arrest, Pittman threw a chair at one officer, breaking his finger, and spit in another officer's face and attempted to bite her, but caused no physical injury. This evidence, corroborated by a videotape of the incident, was sufficient to sustain Pittman's conviction of the charges of felony assault on a peace officer and felony attempted assault on a peace officer. St. v. Pittman, 2005 MT 70, 326 M 324, 109 P3d 237 (2005).

Sufficient Evidence of Attempted Obstruction of Peace Officer — Jury Properly Instructed Regarding Mental Standards of Offense: When she saw heavily armed officers approaching a neighbor's residence, Baker called the neighbor and left a recorded message that it would be in the neighbor's interests to peek out the window. The message was subsequently confiscated, and Baker was charged with and convicted of attempted obstruction of a police officer. On appeal, Baker challenged the use of evidence regarding the neighbor's history and arrest, the purpose and use of the high-risk unit in arresting the neighbor, and an officer's outrage at Baker's interference with the police, contending that the evidence was irrelevant and unfairly prejudicial.

The Supreme Court disagreed. Under the transaction rule set out in St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371 (1999), the trial court did not err in allowing the evidence because it enabled the jury to understand the circumstances surrounding the police activity and how Baker's interference could have affected the outcome. Baker also contested the jury instructions. Under 45-7-302, a person obstructs an officer when the person knowingly hinders the enforcement of the criminal law, so for a person to commit the offense of attempted obstruction, the person need only perform any act toward the commission of obstruction while aware of the fact that the person is performing the act. The instructions to the jury contained an explanation of the "knowingly" standard and multiple instructions on Baker's purpose for making the call and thus were a fair and full instruction on the law. The conviction was affirmed. St. v. Baker, 2004 MT 393, 325 M 229, 104 P3d 491 (2004).

Assault on Peace Officer Not Lesser Included Offense of Attempted Deliberate Homicide: Assault on a peace officer requires proof of an additional fact not necessary for attempted deliberate homicide, namely that the victim is a peace officer. Thus, assault on a peace officer is not a lesser included offense of attempted deliberate homicide. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001), distinguishing St. v. Castle, 285 M 363, 948 P2d 688 (1997).

No Error in Refusing Instruction on Mitigated Deliberate Homicide Absent Evidence of Extreme Emotional Distress: Martin contended that during his attempted deliberate homicide trial, the trial court erred in not giving an instruction on mitigated deliberate homicide, relying on St. v. Buckley, 171 M 238, 557 P2d 283 (1976), for the proposition that the instruction is required if there is any evidence of mitigation. The evidence Martin offered in support of the contention that he was under extreme emotional distress when he shot a pursuing police officer included the surprised look on his face after the shooting, coupled with his homelessness, unemployment, and pregnant girlfriend. The trial court concluded, and the Supreme Court agreed, that Martin's reliance on Buckley was misplaced and that Martin's evidence did not rise to the level of extreme emotional or mental distress. The evidence must indicate provocation of some sort in the form of a reasonable excuse or explanation. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Sufficient Evidence to Support Attempted Homicide Verdict — State of Mind: Martin was convicted of attempted deliberate homicide after shooting a police officer who was in pursuit following Martin's attempt to cash a forged check. Martin contended that the evidence was insufficient to prove that he acted with the purpose of causing the officer's death. Martin argued that he only intended to scare the officer and that if he had intended to kill the officer, he would not have looked surprised or confused after the shooting, as some witnesses testified. However, other witnesses testified that Martin appeared calm during the chase and even slowed before turning to shoot. Another witness testified that Martin always carried a gun and had boasted that he would shoot anyone who got in his way, "even a cop". In deference to the jury's resolution of the conflicting evidence, the Supreme Court affirmed, concluding that a rational trier of fact could have found the essential elements of attempted deliberate homicide beyond a reasonable doubt. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Failure to Instruct on Felony Assault (now Assault With a Weapon) Not Erroneous: Schmalz pleaded guilty to aggravated assault against his father and was convicted by jury of attempted deliberate homicide of his mother. At the close of evidence, the District Court refused Schmalz's request for a jury instruction on a lesser included offense of felony assault (now assault with a weapon) and instead instructed the jury on the lesser included offense of aggravated assault, reasoning that his mother suffered serious bodily injury. Schmalz pointed out that his mother testified that Schmalz had no intent to shoot her at all, raising the question of whether Schmalz possessed the necessary state of mind to be convicted of attempted deliberate homicide. However, an instruction on a lesser included offense of assault has no support in the evidence and is not necessary when the defense's evidence, if believed, would result in an acquittal. If the jury believed the testimony upon which Schmalz relied, an instruction on the lesser included offense would have had no support in the evidence because the necessary intent would be lacking; therefore, the District Court did not err in refusing the request for an instruction on felony assault (now assault with a weapon). St. v. Schmalz, 1998 MT 210, 290 M 420, 964 P2d 763, 55 St. Rep. 889 (1998), following St. v. Sellner, 286 M 397, 951 P2d 996, 54 St. Rep. 1464 (1997), and St. v. Howell, 1998 MT 20, 954 P2d 1102, 55 St. Rep. 72 (1998).

Defense of Abandonment Inapplicable When Criminal Elements Already Accomplished: Defendant was convicted of tampering with a witness. She contended that the crime is an attempt crime and that under this section, she could not be liable if she abandoned her criminal effort. However, defendant was not charged with attempted tampering with a witness; therefore, the statutory defense to attempt would by its own terms be inapplicable to the charge of a completed offense. When the essential elements of a criminal enterprise have already been accomplished, the defense of abandonment is not applicable. St. v. Williams-Rusch, 279 M 437, 928 P2d 169, 53 St. Rep. 1224 (1996).

Attempted Sexual Assault Conviction Reversed Absent Showing of Intended Contact: Fuller followed three elementary school girls in his vehicle, making comments of a sexual nature. He was convicted of three counts of attempted sexual assault. On appeal, the Supreme Court noted the lack of any testimony that Fuller ever stopped the car, opened his door, or reached out for the girls in any way. A necessary element of the underlying offense of sexual assault requires that a person knowingly subject another to sexual contact without consent. Attempted sexual contact requires proof that the defendant, with the purpose of committing the underlying offense, took any action toward commission of the offense. Because the evidence did not show beyond a reasonable doubt that Fuller intended to actually touch the victims, the convictions were reversed and Fuller was acquitted of all charges. St. v. Fuller, 266 M 420, 880 P2d 1340, 51 St. Rep. 890 (1994).

Completed Underlying Felony Not Required for Felony-Murder Rule to Apply — Accountability: A conviction under the felony-murder rule requires that the evidence support a finding as to each element of deliberate homicide, including the underlying offense, not that there be a conviction for a completed felony. A completed attempt or completed felony is not required in order for the felony-murder rule to apply. As set out in St. v. Fish, 190 M 461, 621 P2d 1072 (1980), accountability for the deliberate homicide means that the defendant played an active part in facilitating the commission of the underlying offense. St. v. Turner, 265 M 337, 877 P2d 978, 51 St. Rep. 467 (1994).

Abandonment of Attempt Not Possible — Substantial Harm or Unanticipated Difficulties: Mahoney moved to have his guilty plea for attempted homicide and attempted rape withdrawn on the basis that after stabbing the victim 12 times, disrobing her, and attempting to penetrate her, he ceased his actions on seeing her profuse bleeding and called the police. In a case of first impression, the Supreme Court adopted the Michigan view that the defense of abandonment of attempt is not available to a defendant when substantial harm has been inflicted or when the abandonment is due to unanticipated difficulties, resistance, or circumstances that increase the probability of detention or apprehension. St. v. Mahoney, 264 M 89, 870 P2d 65, 51 St. Rep. 160 (1994).

Knowing, Purposeful Act Not Precluded by Psychotic State: Charges of attempted deliberate homicide and aggravated burglary both require proof of conduct committed purposely and knowingly. Cowan conceded that the alleged conduct occurred but contended that he did not have the requisite state of mind during the conduct because he had suffered for years from a serious mental disorder. However, the issue before the trial court was not whether Cowan was in a psychotic state, but whether he acted purposely and knowingly. The existence of a mental disease or defect does not necessarily preclude a person from acting purposely and knowingly. Although the testimony of all medical experts was consistent as to the presence of a mental defect, there was not a consensus that Cowan was suffering from an acute psychotic episode at the time of the incident. A rational trier of fact could have found beyond a reasonable doubt that Cowan possessed the requisite mental state to be convicted of the crimes. St. v. Cowan, 260 M 510, 861 P2d 884, 50 St. Rep. 1153 (1993).

Reference in Information to Particular Item Unnecessary to Set Out Charge of Attempted Theft: Defendant asserted that the District Court improperly admitted testimony regarding other items visible in a vehicle when defendant broke a window, seeming to argue that he was surprised by reference to other articles he may have been attempting to steal. However, an information need not have referred to any particular item in the vehicle to properly set forth a charge of attempted theft. St. v. Johnstone, 244 M 450, 798 P2d 978, 47 St. Rep. 1715 (1990).

Theft When No Money on Premises: The defendant argued that he could not be tried for theft because there was no money on the premises of the building he had entered. The Supreme Court held that his conduct, although based on circumstantial evidence, was sufficient for the lower court to infer that the defendant had acted toward the commission of a theft. St. v. Boese, 244 M 122, 795 P2d 978, 47 St. Rep. 1442 (1990).

False Representation of Sale of Dangerous Drug — Attempted Felony Theft by Deception Upheld: Where the defendant was arrested after selling a substance, represented to be cocaine, to an undercover agent and was charged with attempt to commit felony theft from the agent by deception when the substance was subsequently discovered to be a prescription drug called lidocaine, the District Court did not err in convicting the defendant of attempted felony theft. The defendant's argument that the agent received a fair price for the prescription drug is not persuasive, as defendant represented the drug to be something that it was not, i.e., cocaine.

The District Court therefore properly refused the instructions requested by the defendant. St. v. Starr, 204 M 210, 664 P2d 893, 40 St. Rep. 796 (1983).

Attempted Negligent Arson Nonexistent Crime: Hembd was convicted of "attempted misdemeanor negligent arson". The attempt statute requires "a purpose" to commit an offense. To purposely attempt to be negligent is a contradiction in terms. The Supreme Court concluded that attempted negligent arson is a nonexistent crime. Hembd's conviction was reversed with instructions to dismiss the case. St. v. Hembd, 197 M 438, 643 P2d 567, 39 St. Rep. 653 (1982).

Accountability — Proof of Overt Act Required: Fish had an argument with Miller at the bar where Miller worked over money Miller owed Fish. A fight ensued, which was broken up by patrons. Fish left saying he would settle with Miller. Fish recruited some friends and went to Miller's trailer park. Miller had already arrived and had friends with him. Fish, upon discovering that Miller was at home, began knocking and pounding on the door. Fish's friends, Hubbard and Lodge, were with him. Lodge began kicking the door. Miller got a gun and shot through the door, killing Lodge. Hubbard got in his truck, and Miller put the gun through the truck window. Hubbard got the gun from Miller, who ran away from the truck. Hubbard shot and killed Miller. Fish was convicted of attempted burglary, and Hubbard was convicted of mitigated deliberate homicide. Fish contended the facts did not support his conviction. To support an attempted burglary charge it is essential that the prosecution establish, with substantial credible evidence and beyond a reasonable doubt, that the defendant attempted to enter an occupied structure with the purpose to commit an offense therein. It is well established that an attempt must consist of more than mere preparation and that there must be some overt act committed in furtherance of the offense charged. No evidence was presented other than that Fish was knocking and pounding on the door. Based on a review of all evidence in a light most favorable to the State, the Supreme Court was unable to find that Fish's conduct constituted an overt act that could be construed as an attempt to enter the trailer. St. v. Fish, 190 M 461, 621 P2d 1072, 37 St. Rep. 2065 (1980).

Proof of Elements of Crime — Sandstrom-Type Jury Instruction: Defendant, convicted of attempted deliberate homicide and aggravated burglary, appealed claiming error in the jury instruction stating that "you may infer that the attempted homicide was committed knowingly or purposely" under certain circumstances. Because the instruction did not apply to the burglary charge, that conviction stood. As to the homicide charge, the Supreme Court said that the instruction in question must be examined in the context of the other instructions given, as the court had decided previously that an identical instruction was not error in the context of the other instructions given. In finding the instruction in question here not error, the court contrasted the Sandstrom instruction, a presumption mandatory by its very terms which allowed the jury no discretion, with the instruction here in which the jury was told it "may infer" an element of the crime, namely, that the attempted homicide was committed knowingly or purposely. The latter instruction referred to an inference of fact and was, by its express terms, permissive. The language did not involve either a conclusive or burden-shifting presumption, nor did the instruction have the effect of allocating to the defendant some part of the burden of proof that properly rested on the State throughout the trial. This was made clear by the other instructions given by the trial court. It was not necessary for the jury to be instructed that they need not make the inference because the terms of the instructions made clear the effect and operation of the inference. Further, the operation and effect of the inference were clearly explained to the jury. St. v. Sheriff, 188 M 26, 610 P2d 1157 (1980).

Constitutionality of Statute — Standing to Challenge: In a prosecution for attempted deliberate homicide, the court did not err in denying defendant's motion to strike the information filed against the defendant, which motion alleged the unconstitutionality of the death penalty. The defendant was neither convicted of attempted deliberate homicide, the crime for which he could have been sentenced to death, nor was he in fact sentenced to death. In St. v. Johnson, 75 M 240, 243 P 1073 (1926), it was held that a defendant cannot question the provisions of an act which do not apply to his case. This case is controlling here. St. v. Kirkland, 184 M 229, 602 P2d 586 (1979).

Motion to Strike Information for Lack of Specificity: In prosecution for attempted deliberate homicide, the court did not err in denying defendant's motion to strike the information for lack of specificity of the applicable statutes. The motion was properly denied in that it was not made before the defendant's plea was entered, and the information was sufficiently clear even though it cited only the attempt statute, as it contained an allegation that the defendant attempted deliberate homicide. St. v. Kirkland, 184 M 229, 602 P2d 586 (1979).

In General: To amount to an attempt, an overt act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation, there must be at least some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter. St. v. Ribera, 183 M 1, 597 P2d 1164 (1979).

Sufficiency of Evidence: The Supreme Court held the defendant's extraordinary side trip to city, together with acts of approaching students and making verbal offers to sell drugs, sufficient to constitute the crime of attempted sale of dangerous drugs (now criminal distribution of dangerous drugs). St. v. Ribera, 183 M 1, 597 P2d 1164 (1979).

Credibility of Witnesses: The jury is to be the sole judge of both the credibility of witnesses and the weight to be given their testimony. St. v. Azure, 181 M 47, 591 P2d 1125 (1979).

Establishing Intent: Oral testimony describing a severe wound to the heart is relevant and probative to establishing an intent to kill, an element of the crime of attempted deliberate homicide. St. v. Azure, 181 M 47, 591 P2d 1125 (1979).

Standing to Challenge Constitutionality — Attempt Statute: The defendant had no standing to challenge the constitutionality of the attempt statute where he questioned provisions of the statute that were not applied to him. One who is neither injured nor jeopardized by the operation of a statute cannot challenge its constitutionality. St. v. Azure, 181 M 47, 591 P2d 1125 (1979).

Substantial Evidence of Attempted Robbery: The fact that the assailant asked for the combination of the safe supports the inference that he intended to commit theft. The fact that he wielded a knife establishes that he knowingly or purposely placed his victim in fear of immediate bodily injury. In short, there was substantial evidence of attempted robbery. St. v. Pendergrass, 179 M 106, 586 P2d 691 (1978).

Charge as a Matter of Prosecutor's Discretion: When the facts of a case support possible charges of both aggravated assault and attempted deliberate homicide, the crime to be charged is a matter of prosecutorial discretion, which will not be interfered with if different proof is required under each statute and there is no clear and manifest legislative intent to the contrary. St. v. Booke, 178 M 225, 583 P2d 405 (1978). See also St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994).

Standing to Challenge Constitutionality of Statute — Death Penalty: One who is neither injured nor jeopardized by the operation of a statute cannot challenge its constitutionality. Since the prosecutor did not ask for the death penalty, the defendant had no standing to contend that the statute is unconstitutional. St. v. Booke, 178 M 225, 583 P2d 405 (1978).

Burden of Proving Defense: The court did not err in instructing the jury that defendant had the burden of proving the defense of reasonable belief of age by a preponderance of the evidence. St. v. Smith, 176 M 159, 576 P2d 1110 (1978).

Misuse of Plea Bargaining Process and Habitual Criminal Statute: Without declaring the plea bargaining process constitutionally infirm or the habitual criminal statute unconstitutional on its face, the Supreme Court held that defendant was denied due process under federal and state provisions when he realistically was sentenced to 10 years for attempted burglary and 40 years for refusing to plead guilty and insisting upon a jury trial. St. v. Sather, 172 M 428, 564 P2d 1306 (1977).

Juveniles: Attempt is not an offense which can be transferred from juvenile court to adult criminal court. In re Stapelkempr, 172 M 192, 562 P2d 815 (1977).

Voluntary Abandonment — Misapprehension of Circumstances: Evidence that participants were never seen attempting to enter a store or that the store was never entered and that participants were apprehended two blocks away does not prevent a jury from reasonably concluding that the burglary was terminated because the participants found their efforts to be futile or for any number of reasons other than voluntary abandonment. St. v. Radi, 176 M 451, 542 P2d 1206 (1975).

Completed Crime: One charged with an attempt to commit a crime could properly be convicted even though the evidence showed that the crime had been completed. St. v. Benson, 91 M 21, 5 P2d 223 (1931).

Intent: Testimony that defendant, 6 days before, had solicited witness to join in a holdup but without naming a specific victim was insufficient to establish intent to rob when defendant committed a battery in a crowded bar but then did not do anything else toward the commission of a robbery. St. v. Hanson, 49 M 361, 141 P 669 (1914).

Punishment:

Since the court could have sentenced the defendant, if guilty of the infamous crime against nature, to term of 30 years, it could fix one-half that term upon conviction for attempt. St. v. Stone, 40 M 88, 105 P 89 (1909).

Where the evidence was not before the appellate court, it was presumed that the trial court properly fixed the punishment on a conviction for attempt to commit burglary. St. v. Mish, 36 M 168, 92 P 459 (1907).

CHAPTER 5
OFFENSES AGAINST THE PERSON

Chapter Compiler's Comments

Annotator's Note — Source: The compiler's comments entitled "Annotator's Note" are taken from the Montana Criminal Code of 1973 Annotated (1980 rev. ed.) produced by the Montana Criminal Law Information Research Center (MONTCLIRC) and printed under cosponsorship of the State Bar of Montana. Minor revisions have been made to conform to the style and format of the annotations.

Part 1
Homicide

Part Law Review Articles

In Re Ests. of Swansons: The Slayer Statute and the Impact of a Guilty Plea on Collateral Estoppel in Montana, Arant, 71 Mont. L. Rev. 217 (2010).

Two Crimes for the Price of One: Reshaping Felony Homicide in State v. Russell, Henkel, 71 Mont. L. Rev. 205 (2010).

45-5-102. Deliberate homicide.

Criminal Law Commission Comments

Source: New.

Section 94-5-102 [now 45-5-102] relates only to conduct which is done deliberately; that is, purposely or knowingly. The enumerated offenses in subsection (b) broaden the old law dealing with felony-murders, R.C.M. 1947, section 94-2503, to include any felony which involves force or violence against an individual. Since such offenses are usually coincident with an extremely high homicidal risk, a homicide which occurs during their commission can be considered a deliberate homicide. The section is intended to encompass most homicides traditionally designated as second-degree murder. Subsection (2) changes the punishment, providing that a person "shall be punished by death . . . or by imprisonment . . . for any term not to exceed one hundred (100) years," thus seeking to expand the sentencing latitude of the judge.

Compiler's Comments

2013 Amendment: Chapter 271 inserted (1)(c) regarding the death of a fetus; and made minor changes in style. Amendment effective October 1, 2013.

Severability: Section 6, Ch. 271, L. 2013, was a severability clause.

1999 Amendments — Composite Section: Chapter 432 in (1)(b) substituted "assault with a weapon" for "felony assault". Amendment effective October 1, 1999.

Chapter 523 in (2) after "46-18-310" inserted "unless the person is less than 18 years of age at the time of the commission of the offense"; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 482 in (2) in version effective July 1, 1997, near end, inserted reference to 46-18-219; and made minor changes in style.

Coordination Instruction — Effective Dates: Section 21, Ch. 482, L. 1995, provided: "(1) If House Bill No. 357 and [this act] [Senate Bill No. 66] are both passed and approved:

(a) [sections 1 through 18] of [this act] are effective July 1, 1997; and

(b) the sentencing commission shall include recommendations for implementing the public policy contained in [sections 1 through 18] of [this act].

(2) [Sections 19, 20, and this section] [enacted as codification and coordination instructions] are effective July 1, 1995.

(3) If House Bill No. 357 is not passed and approved, then this section is void." House Bill No. 357 was approved March 31, 1995, as Ch. 306, L. 1995. Therefore, the amendments to 45-5-102, enacted as sec. 2 of Senate Bill No. 66, are effective July 1, 1997.

1987 Amendments: Chapter 322 in (2), after "death", deleted "or life imprisonment" and after "46-18-310" inserted "by life imprisonment".

Chapter 610 at beginning of (1) substituted "A person commits the offense of" for "Except as provided in 45-5-103(1), criminal homicide constitutes"; and substituted (1)(a), concerning required mental state for deliberate homicide, and (1)(b), listing underlying felonies for which a person may be charged with deliberate homicide, for former text that read: "(a) it is committed purposely or knowingly; or

(b) it is committed while the offender is engaged in or is an accomplice in the commission of, an attempt to commit, or flight after committing or attempting to commit robbery, sexual intercourse without consent, arson, burglary, kidnapping, felonious escape, or any other felony which involves the use or threat of physical force or violence against any individual".

Annotator's Note: This section on deliberate homicide encompasses the former offenses of first-degree and second-degree murder. Under former law, murder was defined as the unlawful killing of a human being with malice aforethought. First-degree murder required the element of premeditation; while second-degree murder was any other type of murder without premeditation. The new criminal code eliminates all references to malice, employing instead the more precisely defined mental states of "knowingly" and "purposely". "Purposely", as defined in MCA, 45-2-101, is the most culpable mental state and implies an objective or design to engage in certain conduct, although not particularly toward some ultimate result. "Knowingly", (MCA, 45-2-101), refers to a state of mind in which a person acts, while not toward a certain objective, at least with full knowledge of relevant facts and circumstances. Together, these terms replace the concepts of malice and intent. Premeditation, the distinguishing factor between first-degree and second-degree murder, has presented a continuing definitional problem for the courts. Many states require that the offender have had some time to think and reflect about the nature of his forthcoming act before premeditation can be said to have occurred. Montana, in St. v. Palen, 119 M 600, 17 P2d 862 (1947), held that premeditation and deliberation can be formed in an instant; thus, in effect, eliminating the traditional distinction between first-degree and second-degree murder. See 12 Mont. L. Rev. 72 (1951). Under the new criminal code, premeditation is no longer an element of homicide, nor is there any delineation between degrees of murder. Subsection (1)(b) of this section sets forth the felony-murder rule that broadens that rule (see R.C.M. 1947, § 94-2503, repealed, sec. 32, Ch. 513, L. 1973) by including within those acts in which deliberation is presumed all forcible felonies not specifically enumerated. Attention is directed toward the definition of "felony" in MCA, 45-2-101, which allows classification of offenses by potential sentence for trial purposes. This section was amended twice in 1977, once by Chapter 338 and once by Chapter 584. The first amendment substituted "death or life imprisonment as provided in section 95-2206.6 through section 95-2206.15" in subsection (2) for "death as provided in section 94-5-105". These procedures are an effort to satisfy both the electorate of Montana who voted to retain the death penalty and the most recent decisions of the United States Supreme Court on that subject. The second amendment substituted "for a term of not less than 2 years or more than 100 years except as provided in section 95-2206.18" at the end of subsection (2) for "for any term not to exceed one hundred (100) years" enacting a minimum mandatory sentence of not less than 2 years. The 1979 amendment raised the mandatory minimum sentence from 2 to 10 years.

Saving Clause: Section 4, Ch. 322, L. 1979, provided: "This act applies only to offenses committed after the effective date of this act". The effective date was July 1, 1979.

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GENERAL

Attempted Deliberate Homicide — Announcement of Intention to Kill — Not Overt Act Toward Accomplishment: At trial for attempted deliberate homicide, evidence was introduced to show that after a defendant was kicked out of a bar, he got into a verbal altercation with the bar's owner and tried to antagonize him into a fight. The defendant then returned to his apartment across the street and placed a kitchen knife down his pants. The bar owner beckoned him back to speak with a police officer, and the defendant was placed under arrest, after which the knife was found and he stated that he was planning to stab the bar owner in the heart. However, this was insufficient evidence to convict the defendant because there was no overt act that reached far enough toward the accomplishment of attempting to kill the bar owner with the knife. Even if he consistently announced his intention to kill the bar owner, the defendant merely possessed a knife but took no steps to actually use it. Therefore, the conviction was reversed and remanded for dismissal with prejudice. St. v. Boyd, 2021 MT 323, 407 Mont. 1, 501 P.3d 409.

Numerous Erroneous Rulings Amounting to Cumulative Error — Reversal Required: The defendant appealed his conviction for deliberate homicide, arguing that the District Court had made several erroneous rulings that required a new trial: (1) excluding as hearsay statements the victim had made to the defendant, which the defendant asserted showed his state of mind and the victim's and were relevant to his defense of justifiable use of force, and (2) preventing the defendant from impeaching the state's expert witness with evidence that the expert witness had mishandled other autopsies and testified falsely in other cases. On appeal, the Supreme Court reversed and remanded for a new trial, concluding that the District Court had erred in excluding the victim's statements and preventing the defendant from impeaching the state's expert witness and that, although the errors might not individually warrant reversal, the cumulative effect prejudiced the defendant's ability to present his justifiable use of force defense and denied him a fair trial. St. v. Cunningham, 2018 MT 56, 390 Mont. 408, 414 P.3d 289.

No Ineffective Assistance of Counsel for Failure to Object to Gun Powder Residue Evidence Given Defendant's Admission That He Fired Weapon: Roedel asserted that his counsel provided ineffective assistance by failing to object to the state's expert's testimony implying that Roedel had fired the weapon based on gun powder residue evidence found on both Roedel and the victim, even though the evidence was inconclusive. The Supreme Court noted that Roedel admitted firing the weapon, so no reason existed for counsel to object to the testimony to prevent the jury from hearing the alleged implication that Roedel fired the weapon. Counsel provided assistance that met an objectively reasonable standard, and Roedel's ineffective assistance claim failed. St. v. Roedel, 2007 MT 291, 339 M 489, 171 P3d 694 (2007).

Proper Consideration of Conflicting Evidence in Assigning Youth Deliberate Homicide Case to District Court: The District Court determined that it, rather than Youth Court, was the proper venue for prosecution of a deliberate homicide case against Whiteman, a juvenile. Whiteman appealed on grounds that the District Court contemplated only selective factual allegations proposed by the state and adopted verbatim. The Supreme Court disagreed. The District Court made comprehensive findings of fact that intimately detailed testimony offered at trial and were not subject to being overturned simply because the District Court relied on proposed findings and conclusions submitted by counsel. Whiteman's contention that the District Court erred in determining that the nature of the offense warranted prosecution in District Court also failed. Substantial credible evidence, even though conflicting, supported findings that probable cause existed for a deliberate homicide charge and prosecution in District Court. Despite testimony from three of Whiteman's teachers and a psychologist that Whiteman was intelligent, respectful, and just needed more structure, the District Court did not err in finding that a Youth Court proceeding and disposition would not serve the interests of the community or promote Whiteman's rehabilitation. Prosecution of the deliberate homicide in District Court was affirmed. St. v. Whiteman, 2005 MT 15, 325 M 358, 106 P3d 543 (2005). See also St. v. Smith, 261 M 419, 863 P2d 1000 (1993), and St. v. Spina, 1999 MT 113, 294 M 367, 982 P2d 421 (1999).

Standard of Review: The Supreme Court will not set aside a deliberate homicide conviction if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993).

No Implied Repeal of Attempted Deliberate Homicide Law by Enactment of Criminal Endangerment Statute: Criminal endangerment is clearly distinguishable from attempted deliberate homicide because the purpose of the behavior itself is different even if the result of the behavior is the same. Therefore, the Legislature did not impliedly repeal the offense of attempted deliberate homicide by enacting the offense of criminal endangerment. St. v. Clawson, 239 M 413, 781 P2d 267, 46 St. Rep. 1792 (1989).

Transfer of Youth to District Court for Homicide Prosecution — Age of Youth Determines Whether Hearing Necessary: For a youth between 12 years and 16 years of age charged with homicide, a hearing may be held to determine whether prosecution should be transferred to District Court. For youth 16 years old or older, no hearing is authorized, and the youth must be transferred to District Court upon a motion by the County Attorney. In re Wood, 236 M 118, 768 P2d 1370, 46 St. Rep. 228 (1989).

Conspiracy to Commit Deliberate Homicide — Fictitious Victim — Distinction Between Factual and Legal Impossibility — Factual Impossibility No Defense: Defendant was charged with conspiracy to commit deliberate homicide when he accepted money to kill an individual who was fictitious. The Supreme Court held that the District Court erred in denying the state's motion to file an information directly against the defendant. Legal impossibility exists when the contemplated act, if committed, would not be an offense. Factual impossibility exists when the contemplated act is an offense, but it cannot be carried out due to facts unknown to the conspirators. Legal impossibility is a defense to conspiracy but factual impossibility is not. This is a case of factual impossibility. While the intended victim of the deliberate homicide was fictitious, there appears to be a basis for proving the elements of conspiracy. The fact that the homicide could not have been carried out is immaterial. St. v. Houchin, 235 M 179, 765 P2d 178, 45 St. Rep. 2290 (1988).

Substantial Credible Evidence: Appellant contended the guilty verdict was not supported by sufficient evidence. Seven witnesses saw appellant in the bar with a knife in his hand. Many witnesses heard appellant making threats. Three witnesses saw appellant hit decedent. Immediately after being hit, decedent fell to the floor and was found to have been stabbed. Appellant ran from the bar and put something in his pocket. Blood stains were found on appellant's clothes. A serologist testified the blood could have come from the decedent. The court said, "substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". There was substantial evidence to find appellant guilty of deliberate homicide. St. v. Spurlock, 225 M 238, 731 P2d 1315, 44 St. Rep. 200 (1987).

Change of Venue — Grounds for Denial — Trial Court's Discretion: The defendant in a deliberate homicide case had moved for a change of venue based on allegedly inflammatory pretrial publicity and general bias against him in the county where the victim was killed. The Supreme Court held that a motion for a change of venue is addressed to the discretion of the trial court, and a denial is not reversible error in the absence of an abuse of discretion by the trial court. The Supreme Court also looked at the indicia of a denial of a fair trial resulting from prejudicial publicity (i.e., arousal of feelings of the community, threat to personal safety of the defendant, established opinion of members of the community as to the guilt of the accused, news articles beyond the objectivity of news printing and dissemination, and difficulty or failure in securing a fair and impartial jury from the community in which the news articles appeared). Having applied these indicators to the defendant's case and having considered the allegedly inflammatory news articles and broadcasts and the voir dire examination of prospective jurors, the Supreme Court found no abuse of discretion in the denial of the motion for a change of venue. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Defendant's Challenge of Jurors — Discretion of Judge in Ruling on Challenges: The defendant in a deliberate homicide case appealed his conviction in part on the basis that the trial court erred in denying his challenge to the jury panel as a whole and to one juror in particular. While noting that the right to a trial by an impartial jury is an unqualified one, the Supreme Court said that the pertinent inquiry was whether or not the jury empaneled was able to render an impartial judgment based solely upon the evidence presented at trial. Considering that each juror gave an assurance of impartiality and that the trial judge made cautionary remarks to the jury that they had a duty to lay aside their opinions and impressions, the Supreme Court held that under the circumstances the trial judge did not abuse his discretion by denying the defendant's challenge to the jury panel. With respect to the individual juror, the court noted that the judge had questioned the juror and that she had made it clear that she could put her emotions aside and judge the defendant fairly and solely upon the evidence presented at the trial. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

CONSTITUTIONAL ISSUES

Counsel Not Ineffective in Failing to Object to Defendant's Statements Recorded in Interrogation Room Without Defendant's Knowledge Absent Expectation of Privacy: While being held in a police interrogation room alone, Meredith made incriminating statements that were recorded without his knowledge and subsequently admitted into evidence during Meredith's homicide trial. Meredith contended that he received ineffective assistance of counsel when his attorney failed to object to admission of the statements at trial. The Supreme Court disagreed. Although Meredith may have had an expectation of privacy in the statements, that expectation was not one that society would recognize as objectively reasonable, nor would Meredith have made the statements if he wished to preserve his privacy. Therefore, no unlawful search occurred, and counsel's failure to object was not short of the range of conduct reasonably demanded by the constitutional right to effective assistance. Additionally, Meredith failed to demonstrate that, even if counsel's conduct could be considered deficient, the result of the proceeding would have been different without admission of the incriminating statements. Meredith's ineffective assistance claim based on admission of the incriminating statements was denied. St. v. Meredith, 2010 MT 27, 355 Mont. 148, 226 P.3d 571, distinguishing St. v. Goetz, 2008 MT 296, 345 Mont. 421, 191 P.3d 489.

State Deliberate Homicide Prosecution Not Barred by Federal Conviction for Firearm Possession: Gazda, a felon, was charged in federal court with unlawful possession of a firearm and ammunition. Prior to the federal trial, Gazda was charged in Montana with deliberate homicide. Following the federal conviction, Gazda moved to dismiss the state charge, arguing that he was placed twice in jeopardy because the prosecution had presented evidence in the federal case that he had committed the homicide. To determine if the subsequent prosecution was barred under 46-11-504, the Supreme Court applied the three-part test in St. v. Tadewaldt, 277 M 261, 922 P2d 463 (1996), which sets out that subsequent prosecution is barred if: (1) a defendant's conduct constitutes an offense within the jurisdiction of the court in which the first prosecution occurred and within the jurisdiction of the court in which the subsequent prosecution is pursued; (2) the first prosecution results in acquittal or conviction; and (3) the subsequent prosecution is based on an offense arising out of the same transaction. The District Court found that the first and third factors were not met, and the Supreme Court agreed. The concurrent jurisdiction factor failed because the state and federal courts lacked authority to prosecute equivalent offenses based on the same underlying conduct. The same transaction factor failed because the conduct to support the criminal objective of the state deliberate homicide charge was distinct from the federal weapons charge. Thus, double jeopardy did not bar the subsequent state prosecution. St. v. Gazda, 2003 MT 350, 318 M 516, 82 P3d 20 (2003).

Justifiable Preindictment Delay Not Prejudicial to Defendant's Due Process Rights: DuBray was charged with a deliberate homicide committed over 10 years earlier and later appealed the denial of his motion to dismiss on grounds that preindictment delay violated his due process rights. The Supreme Court applied the two-step process in St. v. Taylor, 1998 MT 121, 289 M 63, 960 P2d 773 (1998), which required first that DuBray show actual and substantial prejudice from the delay and, if so, a consideration of the reasons for the delay and the length of the delay. Under Taylor, preindictment delay leads to a violation of due process rights if it can be said that requiring a defendant to stand trial violates those fundamental concepts of justice that lie at the base of civil and political institutions and that define the community sense of fair play and decency. The Supreme Court distinguished Taylor because in that case, the state had a known suspect yet inexplicably failed to investigate and file charges in a timely manner, while here, investigators were not made aware of DuBray's involvement until shortly before he was charged. Thus, after weighing any prejudice suffered by DuBray, such as potential failure of witnesses' memories, against the reasons for the delay and the length of the delay, the Supreme Court concluded that DuBray's due process rights were not prejudiced by the lengthy preindictment delay. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003).

Claim That Guilty Plea to Deliberate Homicide Influenced by Alleged Ineffective Assistance of Counsel — Conviction Affirmed: Thee was convicted of deliberate homicide and sentenced to 100 years in prison. In a petition for postconviction relief, Thee contended that he was denied effective assistance of counsel prior to and during a change of plea hearing when defense counsel: (1) induced Thee to plead guilty by threatening Thee that he was going to die unless he pleaded guilty; (2) failed to address the alleged violent treatment that Thee received from inmates and guards during Thee's incarceration in the county jail; (3) failed to seek suppression of statements that Thee made during police interrogation that allegedly violated Thee's Miranda rights; (4) failed to have Thee's mental or emotional stress at the time of the homicide evaluated by a qualified mental health examiner to prove circumstances that could be used to mitigate the deliberate homicide charge; and (5) failed to inform Thee of a possibility of seeking conviction on a lesser included offense. The Supreme Court examined each claim in light of the Strickland test for ineffective assistance of counsel. First, defense counsel has a duty to inform a client of the elements of an offense, the possible punishment, and the advisability of a plea agreement. Discussion of a death penalty between an attorney and client in a capital case may well invoke extreme anxiety, but nevertheless relates directly, albeit painfully, to the genuine circumstances of the client. Counsel's reported statements to Thee regarding the possibility of a death sentence were within the wide range of reasonable and sound professional assistance of a competent attorney counseling a client facing capital punishment. Second, counsel investigated Thee's allegations of violence in the county jail, prepared a report of the findings, discussed the findings with Thee, and brought the matter to the attention of the appropriate authorities. Counsel's actions stemmed from informed professional deliberation rather than neglect or ignorance, and precluded a finding of deficient performance for failure to investigate Thee's allegations of physical assault. Third, counsel investigated all statements made by Thee to police investigators, conferred with Thee, and researched the legal bases for possible suppression of certain statements. Counsel's strategic choices made after thorough investigation of the law and facts relevant to plausible options were virtually unchallengable, and the fact that counsel reached a legal conclusion on an evidentiary challenge contrary to Thee's hopes provided no ground for finding deficient attorney performance. Fourth, despite Thee's claim to the contrary, counsel did seek and obtain a court-ordered mental health evaluation for Thee, and took the unequivocal findings from the evaluation into account when advising Thee to accept the plea agreement. Finally, counsel had no duty to inform Thee about the possibility of a lesser included offense, because neither mitigated deliberate homicide nor negligent homicide is an included offense of deliberate homicide, so the possibility of conviction on a lesser included offense did not legally exist. The trial court's denial of Thee's petition for postconviction relief was affirmed. St. v. Thee, 2001 MT 294, 307 M 450, 37 P3d 741 (2001).

Deliberate Homicide by Intoxicated Defendant — Evidence of Intoxication Properly Excluded on Issue of Intent: Egelhoff was found heavily intoxicated in an automobile in which his two companions lay, shot in their heads by a revolver similar to Egelhoff's. Egelhoff's revolver had been fired twice, and he had gunpowder residue on his hands. The Montana Supreme Court held that a jury instruction and part of 45-2-203 providing that "an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense" violated Egelhoff's right to due process of law. The Montana Supreme Court overruled any portion of St. v. Byers, 261 M 17, 861 P2d 860 (1993), holding to the contrary and, citing Teague v. Lane, 489 US 288 (1989), applied its decision to cases pending upon direct review but not to cases pending upon collateral review. St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995). On the state's writ of certiorari to the United States Supreme Court, the court reversed, holding that the due process of law clause of the United States Constitution was not violated by the instruction and 45-2-203. Mont. v. Egelhoff, 518 US 37, 135 L Ed 2d 361, 116 S Ct 2013 (1996), followed in St. v. McCaslin, 2004 MT 212, 322 M 350, 96 P3d 722 (2004). See also St. v. Myran, 2012 MT 252, 366 Mont. 532, 289 P.3d 118.

Scienter Element Not Unconstitutionally Vague: In appealing his conviction of deliberate homicide, the defendant argued that due process requires that the conviction be based on an information that charges, and instructions to the jury that require, a finding that the defendant possessed the specific mental state to kill the victim; in other words, that the element of mens rea is constitutionally required. The defendant contended that the statutory element of purposely or knowingly does not satisfy this requirement. The Supreme Court held that the scienter element of 45-5-102 defines the crime of deliberate homicide with sufficient specificity to obviate any claim of unconstitutional vagueness. St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985).

Failure to Seek Jury Instruction on Lesser Included Offense — Ineffective Assistance of Counsel: Counsel for a defendant charged with deliberate homicide failed to offer an instruction on negligent homicide and objected to an instruction on mitigated deliberate homicide. Because the decision not to seek jury instruction on lesser included offenses was reasoned and tactical, it did not amount to a denial of effective assistance of counsel as guaranteed by the 6th amendment to the United States Constitution (similar to Art. II, sec. 24, Mont. Const.). Bashor v. Risley, 539 F. Supp. 259, 39 St. Rep. 960 (D.C. Mont. 1982), followed in St. v. Leyba, 276 M 45, 915 P2d 794, 53 St. Rep. 7 (1996).

Death Penalty Not Disproportionate to Crime: When a life has been taken by an offender, it cannot be said that the punishment of death is invariably disproportionate to the crime. McKenzie v. Osborne (IV), 195 M 26, 640 P2d 368, 38 St. Rep. 1745 (1981); affirmed, McKenzie v. Risley, 801 F2d 1519 (9th Cir. 1986); rehearing en banc granted, McKenzie v. Risley, 815 F2d 1323 (9th Cir. 1986); denial of habeas corpus affirmed, McKenzie v. Risley, 842 F2d 1525 (9th Cir. 1988). McKenzie v. Osborne is followed in St. v. Keith, 231 M 214, 754 P2d 474, 45 St. Rep. 556 (1988).

Jury Instructions on Diminished Capacity — Defense — Constitutionality — Burden of Proof on Defendant: Under 46-14-201 (renumbered 46-14-214) (prior to the 1979 amendment), the State required the defendant to prove his legal insanity. Defendant objected, however, to the jury instruction on mental disease or defect (diminished capacity), saying it unconstitutionally shifted the burden to him to disprove intent, an essential element of the crime charged. Because psychiatric evaluation as to subtle gradations of mental impairment is highly subjective and not within the common experience of the layman juror, the State may in fairness require a defendant to convince the jury of his diminished capacity by a preponderance of the evidence. The State meticulously proved the facts constituting the deliberate homicide and aggravated kidnapping crimes beyond any reasonable doubt, based on all the evidence, including the evidence of defendant's alleged mental disease or defect. The State could then refuse constitutionally to sustain the affirmative defense of diminished capacity unless the defendant proved that defense by a preponderance of the evidence. The instructions here required defendant to establish his diminished capacity by raising a reasonable doubt, rather than by proof by a preponderance of the evidence. They posited a more liberal burden of proof than that to which the defendant was entitled. The instructions were, therefore, constitutional. St. v. McKenzie (III), 186 M 481, 608 P2d 428 (1980); certiorari denied, McKenzie v. Mont., 449 US 1050, 101 S Ct 626 (1980); petition for habeas corpus denied, McKenzie v. Osborne (IV), 195 M 26, 640 P2d 368 (1981); affirmed, McKenzie v. Risley, 801 F2d 1519 (9th Cir. 1986); rehearing en banc granted, McKenzie v. Risley, 815 F2d 1323 (9th Cir. 1986); denial of habeas corpus affirmed, McKenzie v. Risley, 842 F2d 1525 (9th Cir. 1988).

Constitutionality of Former Death Sentence Statute: Section 94-5-105, R.C.M. 1947 (now repealed), which provided a procedure for the imposition of a sentence of death for a conviction of deliberate homicide, was constitutional on its face. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343 (1980).

Double Jeopardy: The offenses of deliberate homicide and aggravated kidnapping are separate and distinct offenses in our codes, and each requires proof of elements the other does not. Therefore, a defendant may be convicted and sentenced for both deliberate homicide and aggravated kidnapping without violating the double jeopardy prohibition even though the counts arose from the same conduct or episode. Because each offense requires proof of elements which the other does not, aggravated kidnapping is not a lesser included offense and defendant's double jeopardy claim must fail on this point as well. St. v. Coleman, 185 M 299, 605 P2d 1000 (1979), affirmed in St. v. Coleman, 249 M 128, 814 P2d 48, 48 St. Rep. 610 (1991). For full appellate history of Coleman, see case note at 45-2-101, SERIOUS BODILY INJURY, *Evidence*.

Standing to Challenge: In a prosecution for attempted deliberate homicide, the court did not err in denying defendant's motion to strike the information filed against the defendant, which motion alleged the unconstitutionality of the death penalty. The defendant was neither convicted of attempted deliberate homicide, the crime for which he could have been sentenced to death, nor was he in fact sentenced to death. In St. v. Johnson, 75 M 240, 243 P 1073 (1926), it was held that a defendant cannot question the provisions of an act which do not apply to his case. This case is controlling here. St. v. Kirkland, 184 M 229, 602 P2d 586 (1979).

Burden of Proof of Mental Disease or Defect: On remand from the U.S. Supreme Court to decide the issue of whether the trial court's instruction on mental disease or defect unconstitutionally shifted the burden of proof of state of mind to defendant, the Supreme Court concluded that not only did the instructions not shift to defendant the burden of disproving any element of the offenses charged but the instructions, when read together, also required defendant to establish his diminished capacity merely by raising a reasonable doubt, rather than proof by a preponderance of the evidence. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978). For full appellate history of McKenzie, see case note at 45-5-102, INFORMATION and INDICTMENT, *Felony Murder Alleged*.

Standards for Determination: Because it permits imposition of the death penalty only for a narrowly defined class of murders and kidnappings and permits the sentencing judge to consider mitigating circumstances before imposition of sentence, and because any case in which the death penalty is imposed is appealable to the Supreme Court or the sentence review division (section 95-2501, et seq., R.C.M. 1947, now § 46-18-901, et seq.), this section is constitutional under the standards of Jurek v. Texas, 428 US 262 (1976). St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976). For full appellate history of McKenzie, see case note at 45-5-102, INFORMATION and INDICTMENT, *Felony Murder Alleged*.

FELONY-MURDER RULE

Assault on Minor Sufficient as Felony-Murder Predicate Offense: The defendant was charged with felony murder under 45-5-102 for pushing a 3-year-old into a wall, an injury from which she was later declared brain dead. Assault on a minor, the predicate offense prosecutors alleged when charging the defendant with felony murder, incorporates misdemeanor assault elements. Because the incorporated elements could not support a felony-murder charge, the defendant argued that, likewise, assault on a minor could not support a felony-murder charge and the charges should be dismissed. However, assault on a minor includes additional provisions concerning the age of the individuals involved and a penalty of up to 5 years in a state prison. The Supreme Court held that since the Legislature enhanced the penalty for assault on a minor, the offense is a felony. In addition, the defendant's assault on the child used physical force or violence, qualifying it as a forcible felony. St. v. Hicks, 2013 MT 50, 369 Mont. 165, 296 P.3d 1149.

Life Sentence Under Felony-Murder Rule Not Considered Cruel and Unusual Punishment: Although his accomplice admitted committing the murder, Rickman was involved, pleaded guilty, and was convicted of deliberate homicide under the felony-murder rule. Rickman was sentenced to life with no parole eligibility for 55 years and appealed on grounds that the sentence was cruel and unusual punishment because the sentence was the same as the sentence of his accomplice who actually committed the murder, even though Rickman was less culpable. Deferring a detailed proportionality analysis to the Sentence Review Board, the Supreme Court nevertheless considered whether Rickman's sentence violated the prohibition against cruel and unusual punishment and decided in the negative. Given the horrific and random nature of the crime and Rickman's significant role in it, the sentence was not so disproportionate as to shock the conscience, and when combined with Rickman's substantial criminal history and a higher-than-average statistical risk that Rickman would reoffend, the sentence was not considered cruel and unusual and was affirmed. St. v. Rickman, 2008 MT 142, 343 M 120, 183 P3d 49 (2008).

Felony-Murder Rule Not Violation of Due Process — Underlying Felony Need Not Be Independent of Homicide: Burkhart was charged in the death of the victim whom Burkhart struck once in the head with a ball-peen hammer and then chased after him and struck him several more times, resulting in the victim's death. Burkhart was convicted of deliberate homicide under the felony-murder rule. The predicate offense underlying the felony-murder charge was felonious assault with a weapon. Burkhart argued that the state abridged his due process rights because the predicate offense was not independent of the homicide, that the charge precludes him from raising certain defenses and lesser included offenses available under the deliberate homicide statute, and that the state was relieved from having to prove a specific mental state for homicide. The Supreme Court held that Montana's felony-murder rule is not unconstitutional and that the underlying offense need not be independent of the homicide. Because the felony-murder rule does not in fact raise a presumption of the existence of an element of the crime, it does not violate the due process clause. St. v. Burkhart, 2004 MT 372, 325 M 27, 103 P3d 1037 (2004).

Murder During Burglary With Intent to Riot — Felony-Murder Rule Applicable: An inmate who knowingly entered a cell block at the state prison with the intent to participate in a riot committed the offense of burglary with intent to riot. Within the course of the riot, five protective custody inmates were murdered. Therefore, a causal connection existed between the commission of the underlying burglary offense and the murders, and it was proper for the trial court to deny dismissal of felony-murder charges against the inmate. St. v. Cox, 266 M 110, 879 P2d 662, 51 St. Rep. 680 (1994).

Completed Underlying Felony Not Required for Felony-Murder Rule to Apply — Accountability: A conviction under the felony-murder rule requires that the evidence support a finding as to each element of deliberate homicide, including the underlying offense, not that there be a conviction for a completed felony. A completed attempt or completed felony is not required in order for the felony-murder rule to apply. As set out in St. v. Fish, 190 M 461, 621 P2d 1072 (1980), accountability for the deliberate homicide means that the defendant played an active part in facilitating the commission of the underlying offense. St. v. Turner, 265 M 337, 877 P2d 978, 51 St. Rep. 467 (1994).

Felony-Murder Statute as Supplying Causal Connection Element: Turner facilitated a burglary during a riot at the state prison by feloniously propping open an entrance gate, which conduct subsequently contributed to the deaths of several inmates. Turner contended that the state failed to establish a causal connection between the felonious act and the deaths. However, the felony-murder rule itself supplies the causal connection element by requiring that the death occur "in the course of the forcible felony or flight thereafter". St. v. Turner, 265 M 337, 877 P2d 978, 51 St. Rep. 467 (1994).

Deliberate Homicide Through Accountability: Appellant, charged with deliberate homicide through accountability, argued that the record did not contain sufficient evidence to prove that he actually shot and killed the victim. However, under the felony-murder rule, conviction was warranted when evidence overwhelmingly indicated appellant either did the shooting or aided or abetted another in doing so. St. v. Duncan, 247 M 232, 805 P2d 1387, 48 St. Rep. 176 (1991).

Alibi Defense Unavailable Under Felony-Murder Rule: Defendant convicted of deliberate homicide contended he was entitled to an alibi instruction because he was in a bar when the homicide occurred outside. This is a misapplication of the alibi defense because even though defendant was not present at the scene of the homicide, evidence existed to connect him to the offense under the felony-murder rule and through accountability principles. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Presence of Intent to Kill Not Bar to Felony-Murder Conviction: The defendant and his companions picked the victim up in Montana and subsequently beat and robbed him before transporting him to Wyoming, where they killed him. The defendant was convicted of felony murder and argued that Montana did not have jurisdiction to try him for the crime. The defendant argued that he could not be tried for felony murder in Montana because the killing was not causally connected to the aggravated kidnapping in that he did not originally intend to kill the victim. The defendant contended that the decision to kill the victim occurred in Wyoming and therefore Wyoming had jurisdiction over the deliberate homicide. The Supreme Court held that the felony-murder rule eliminated the state's burden to prove intent and that the presence of intent did not mean that the defendant could not be convicted on that particular crime. St. v. Kills On Top, 241 M 378, 787 P2d 336, 47 St. Rep. 366 (1990).

Constitutionality of Transferred Intent Inherent in Rule: Defendant claimed that subsection (1)(b) of this section is unconstitutional on its face because it fails to require the state to prove a specific mental state and instead substitutes a requirement of proof of the commission of or attempt to commit a felony. The court stated that this contention was addressed in St. v. Sunday, 187 M 292, 609 P2d 1188 (1980), and that case's conclusion, which was contrary to defendant's claim, was expounded on in St. v. Weinberger, 204 M 278, 671 P2d 567, 40 St. Rep. 1539 (1983). The court went on to state that certain acts regarded as peculiarly dangerous create a reasonable risk of death, and thus a person who initiates one of those acts is also responsible for a death arising from the act. Under the felony-murder rule, the state has not been relieved of the burden of proving an element of a crime. Rather, the method of proving one of the elements has been changed. The state may substitute proof of the mental state required to commit the underlying felony for proof of the mental state necessary to commit a homicide. The state retains the burden of proving all the elements of the crime. The statute is constitutional. St. v. Nichols, 225 M 438, 734 P2d 170, 44 St. Rep. 382 (1987).

Felony-Murder Rule — Double Jeopardy — No Merger With Underlying Felony: In a case where the defendant was convicted of felony murder, aggravated kidnapping, and robbery, the Supreme Court found that it was not the intent of the Legislature to merge the three offenses for the purposes of punishment and that the defendant had therefore not been convicted in violation of the Double Jeopardy Clause. The Supreme Court based its holding, first, upon the fact that different facts of the case supported each different conviction for each offense and, second, upon finding that the history and purpose of the felony homicide law showed that it could not have been intended to have been merged and, third, upon the findings of the Criminal Law Commission upon which the Legislature relied in enacting the felony-murder rule. St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981), followed in St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Causal Connection Required: For the felony-murder rule to apply a causal connection between the felonious act and the death must be present. State ex rel. Murphy v. McKinnon, 171 M 120, 556 P2d 906 (1976).

Homicide During Kidnapping: Under the felony-murder rule, both parties were guilty of murder in first degree where evidence clearly showed that both had kidnapped and robbed victim but did not clearly show which of two had shot and killed victim. St. v. Corliss, 150 M 40, 430 P2d 632 (1967), certiorari denied 390 US 961 (1968).

Homicide During Robbery:

An information reciting commission of robbery and alleging that, in perpetration of robbery, defendant killed deceased, charged murder in the first degree rather than two separate and distinct crimes of robbery and premeditated murder. In re Petition of Dixson, 149 M 412, 430 P2d 642 (1967), certiorari denied 390 US 907 (1968).

All who participated in a robbery or an attempted robbery during which a homicide was committed were guilty of murder in the first degree, irrespective of which one of the participants fired the fatal shot. St. v. Miller, 91 M 596, 9 P2d 474 (1932).

Killing of a pursuer by bank robbers after a 30-mile continuous and uninterrupted pursuit was first-degree murder within the felony-murder rule. St. v. Jackson, 71 M 421, 230 P 370 (1924).

Evidence showing homicide in the course of a robbery could be introduced under an information charging willful, deliberate, unlawful, felonious, and premeditated killing with malice aforethought. St. v. Bolton, 65 M 74, 212 P 504 (1922).

Homicide committed in the perpetration of or an attempt to perpetrate robbery was murder in the first degree, regardless of the absence of intent to commit the latter crime; the capability of entertaining the felonious intent to commit robbery was sufficient. St. v. Reagin, 64 M 481, 210 P 86 (1922).

Homicide During Arson: Defendant who hired two men to set fire and burn his service station, during the course of which the two men were burned and subsequently died, was guilty of first-degree murder under the felony-murder rule since any death directly attributable to a plot to commit arson made all the conspirators in the arson plot equally guilty of first-degree murder. St. v. Morran, 131 M 17, 306 P2d 679 (1957).

Homicide During Burglary: Evidence in a prosecution for murder at nighttime in the perpetration of burglary, supported by a full confession by defendant, was sufficient to warrant the extreme penalty under 94-2503, R.C.M. 1947 (since repealed). St. v. Zorn, 99 M 63, 41 P2d 513 (1935).

ELEMENTS

Sufficient Circumstantial Evidence That Infant Born Alive to Substantiate Deliberate Homicide Verdict — Burden Not Shifted to Defendant: Elliott was convicted of killing her newborn infant, but the only evidence as to whether the infant was born alive or stillborn was circumstantial. Absent conclusive evidence, Elliott argued that the closest that the state could come would be to have the jury presume that the baby was alive and then provide the jury with the theory that the life was terminated by Elliott, which impermissibly shifted the burden of proof to Elliott to show that the baby was stillborn. The state contended that it had the burden of proving all elements of deliberate homicide beyond a reasonable doubt and that nothing changed or diminished the burden in this case, and the Supreme Court agreed. The state was required to prove that the baby was born alive and the jury was so instructed. Evidence showed that the baby was of viable gestational age and had sustained multiple skull fractures. Testimony also established that Elliott hid her pregnancy, told a friend that she had food poisoning before giving birth, delivered the baby in the bathroom of her home without calling for assistance, wrapped the baby in a towel and put it in a garbage bag on a shelf in her basement, and continued to deny the pregnancy even after undergoing an emergency hysterectomy. It was the jury's function to weigh the evidence, judge the credibility of the witnesses, and decide the factual issue of whether the baby was born alive, and there was sufficient evidence to support a deliberate homicide conviction. St. v. Elliott, 2002 MT 26, 308 M 227, 43 P3d 279 (2002).

Assault on Peace Officer Not Lesser Included Offense of Attempted Deliberate Homicide: Assault on a peace officer requires proof of an additional fact not necessary for attempted deliberate homicide, namely that the victim is a peace officer. Thus, assault on a peace officer is not a lesser included offense of attempted deliberate homicide. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001), distinguishing St. v. Castle, 285 M 363, 948 P2d 688 (1997).

No Error in Refusing Instruction on Mitigated Deliberate Homicide Absent Evidence of Extreme Emotional Distress: Martin contended that during his attempted deliberate homicide trial, the trial court erred in not giving an instruction on mitigated deliberate homicide, relying on St. v. Buckley, 171 M 238, 557 P2d 283 (1976), for the proposition that the instruction is required if there is any evidence of mitigation. The evidence Martin offered in support of the contention that he was under extreme emotional distress when he shot a pursuing police officer included the surprised look on his face after the shooting, coupled with his homelessness, unemployment, and pregnant girlfriend. The trial court concluded, and the Supreme Court agreed, that Martin's reliance on Buckley was misplaced and that Martin's evidence did not rise to the level of extreme emotional or mental distress. The evidence must indicate provocation of some sort in the form of a reasonable excuse or explanation. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Assault Lesser Included Offense of Deliberate Homicide — Error to Refuse Instruction on Lesser Included Offense: The defendant was convicted of deliberate homicide. At trial, the court refused the defendant's proposed jury instruction on the offense of assault. The Supreme Court determined that as a matter of law, under the express terms of 46-1-202, assault is an included offense of the crime of deliberate homicide. When there was some evidence supporting a defendant's theory that the defendant was guilty of assault but not murder, the District Court erred in refusing the proposed jury instruction on assault as a lesser included offense of deliberate homicide. St. v. Castle, 285 M 363, 948 P2d 688, 54 St. Rep. 1194 (1997).

Knowing, Purposeful Act Not Precluded by Psychotic State: Charges of attempted deliberate homicide and aggravated burglary both require proof of conduct committed purposely and knowingly. Cowan conceded that the alleged conduct occurred but contended that he did not have the requisite state of mind during the conduct because he had suffered for years from a serious mental disorder. However, the issue before the trial court was not whether Cowan was in a psychotic state, but whether he acted purposely and knowingly. The existence of a mental disease or defect does not necessarily preclude a person from acting purposely and knowingly. Although the testimony of all medical experts was consistent as to the presence of a mental defect, there was not a consensus that Cowan was suffering from an acute psychotic episode at the time of the incident. A rational trier of fact could have found beyond a reasonable doubt that Cowan possessed the requisite mental state to be convicted of the crimes. St. v. Cowan, 260 M 510, 861 P2d 884, 50 St. Rep. 1153 (1993).

Deliberate Homicide by Stabbing Affirmed: The conclusion that defendant committed deliberate homicide was reasonable in light of evidence that, instead of staying in the kitchen to avoid a fight, defendant selected a 5-inch kitchen knife, approached the unarmed victim from behind, and stabbed him several times. St. v. Crazy Boy, 232 M 398, 757 P2d 341, 45 St. Rep. 1145 (1988).

Burden of Proof of Mitigating Factors in Deliberate Homicide Case: Although the state must prove beyond a reasonable doubt every element of the crime charged, in a prosecution for deliberate homicide in which an instruction for mitigated deliberate homicide is also given, the state does not have to prove absence of mitigation beyond a reasonable doubt. Neither party has the burden of proof as to such mitigating factors. St. v. Ballenger, 227 M 308, 738 P2d 1291, 44 St. Rep. 1107 (1987).

Defendant With Mental Defect — "Knowing" State of Mind: Although defendant was suffering from paranoid schizophrenia at the time he committed deliberate homicide, the mental defect did not render him unable to appreciate the criminality of his conduct or render him unable to conform his conduct to the requirements of law. Any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. St. v. Tibbitts, 226 M 36, 733 P2d 1288, 44 St. Rep. 439 (1987).

Proof of Specific Intent to Cause Death Not Required:

Defendant was convicted of the deliberate homicide of the 19-month-old child of the woman with whom he was living. On appeal, he contended that the District Court improperly instructed the jury concerning the mental state "purposely". He contended the statutory definition of "purposely", coupled with the statutory definition of "deliberate homicide", confused the jury, in that if they found he purposely struck the child they need not find that he intended to cause the death or purposely cause the death. In a criminal homicide prosecution, the state must prove and the jury must find beyond a reasonable doubt that the voluntary and unjustified act of the defendant purposely, knowingly, or negligently caused the death of the victim. Proof of cause is a primary duty of the state and a necessary element to be found by the jury for a proper conviction in a criminal homicide case. It is true that under the instructions given and under the statutes defining crimes, the state was not required to prove the specific intent of the defendant to cause the death of the child. Our criminal law proscribes purposely doing an act which causes the death of another. Death may not be the intended result, but if the act which causes the death is done purposely, deliberate homicide is committed. The jury instructions were proper, and the evidence presented was strong enough to sustain the jury's finding that the defendant purposely engaged in conduct which resulted in the death of the child. St. v. Sigler, 210 M 248, 688 P2d 749, 41 St. Rep. 1039 (1984), followed in St. v. Leyba, 276 M 45, 915 P2d 794, 53 St. Rep. 7 (1996), St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993), St. v. McKimmie, 232 M 227, 756 P2d 1135, 45 St. Rep. 1011 (1988), and St. v. Ballenger, 227 M 308, 738 P2d 1291, 44 St. Rep. 1107 (1987). Sigler, Byers, and McKimmie were overruled in part in St. v. Rothacher, 272 M 303, 901 P2d 82, 52 St. Rep. 772 (1995). See also St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995), overruled in Mont. v. Egelhoff, 518 US 37, 135 L Ed 2d 361, 116 S Ct 2013 (1996).

Defendant was convicted of deliberate homicide. On appeal he alleged that the instruction on intent was incomplete in that it did not require the State to prove a specific intent to kill but allowed the State to imply such intent within the statutory mental states of purposely or knowingly. On appeal, the Supreme Court, relying on the compiler's comments to 45-5-102, held that the State need not establish a specific purpose to kill, nor must it show that death was the result of deliberation other than the deliberation implicit in the statutory definitions of "purposely" and "knowingly". Defendant's objections to the instruction were founded on mens rea requirements which are no longer the law in Montana. St. v. Weinberger, 204 M 278, 665 P2d 202, 40 St. Rep. 844 (1983), distinguished in In re R.L.S., 1999 MT 34, 293 M 288, 977 P2d 967, 56 St. Rep. 149 (1999). See also St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985), and St. v. Leyba, 276 M 45, 915 P2d 794, 53 St. Rep. 7 (1996).

Mitigated Deliberate Homicide and Affirmative Defense of Justification — Elements and Burdens Involved: Defendant was charged with deliberate homicide, asserted the affirmative defense of justification or self-defense as provided in 45-3-102, and was convicted of the lesser included offense of mitigated deliberate homicide. In analyzing the relationships of burdens of proof and persuasion between the affirmative defense and the lesser included offense, the Supreme Court held that the state has the burden of proving beyond a reasonable doubt every element of the offense charged or any lesser included crime within such charge; the defendant, if he raises an affirmative defense, has the burden of producing sufficient evidence on the issue to raise a reasonable doubt of his guilt. St. v. Daniels, 210 M 1, 682 P2d 173, 41 St. Rep. 880 (1984), followed in St. v. Miller, 1998 MT 177, 290 M 97, 966 P2d 721, 55 St. Rep. 719 (1998), and St. v. Longstreth, 1999 MT 204, 295 M 457, 984 P2d 157, 56 St. Rep. 795 (1999). See also St. v. Lafley, 1998 MT 21, 287 M 276, 954 P2d 1112, 55 St. Rep. 76 (1998). St. v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 623, held that the enactment of 46-16-131 in 2009 abrogated Longstreth, St. v. Henson, 2010 MT 136, 356 Mont. 458, 235 P.3d 1274, and other cases to the extent they held the burden of establishing justifiable use of force was the defendant's in a justifiable use of force case.

Systematic Series of Acts as Cause of Death: Defendant was convicted of deliberate homicide in the death of victim under 45-2-301 and 45-2-302. On appeal, the court found that the State did not attempt to prove that defendant struck the blow which killed victim. The State's case was that defendant was a major participant in a systematic series of acts which led to the death of victim. The State proved that defendant's conduct was a cause of death. St. v. Riley, 199 M 413, 649 P2d 1273, 39 St. Rep. 1491 (1982).

Child Beating Death — Proof of Specific Intent Not Required: Each of four defendants, while caring for a child at different times, engaged in incidences of child beating eventually leading to the child's death. The defendants acted knowingly because they were aware of the high probability that death would result from the repeated beating of the victim. Because the defendants engaged in a common design or course of conduct to accomplish an unlawful purpose, proof of specific intent to kill was not required to prove deliberate homicide. St. v. Powers, 198 M 289, 645 P2d 1357, 39 St. Rep. 989 (1982).

Child Beating Death — Mother's Neglect — Accountability: Where the evidence showed that the mother of a child beating victim aided and abetted the other defendants in causing the victim's death by her failure or refusal to perform her duties as a parent, terminate the beatings and discipline, and provide the victim with the needed medical care and attention, a conviction of deliberate homicide was sustained. Where codefendants undertake a course of conduct or common design which results in a person's death, all can be held criminally responsible for the murder. St. v. Powers, 198 M 289, 645 P2d 1357, 39 St. Rep. 989 (1982).

INFORMATION AND INDICTMENT

Information Charging Death of Newborn Child Sufficient in Alleging Probability of Homicide Despite Lack of Evidence That Child Born Alive: Elliott was charged with deliberate homicide of her newborn child. She moved to dismiss the information as insufficient because the state medical examiner offered no opinion as to whether the child was ever born alive and, without proof that the child was a person who was born and was alive, she should not have been charged with the death of a human being. The Supreme Court affirmed. The sufficiency of the charging documents is established by reading the information together with the affidavit in support of the motion for leave to file the information. The affidavit need not make out a prima facie case that defendant committed an offense. A mere probability that the offense was committed is sufficient. Thus, to withstand a motion to dismiss, the state needed only to show a probability that the baby was born alive and that Elliott committed the offense charged. In this case, the circumstances of the delivery of the baby, Elliott's hospitalization, her differing stories, the skull fractures suffered by the baby, and the concealment of the baby's body, all provided a sufficient basis to find probable cause for the deliberate homicide charge, and the District Court did not err in denying the motion to dismiss the information. St. v. Elliott, 2002 MT 26, 308 M 227, 43 P3d 279 (2002), followed, with regard to sufficiency of information, in St. v. Harlson, 2006 MT 312, 335 M 25, 150 P3d 349 (2006).

Parking Lot Gun Battle Participant Improperly Charged With Accountability for Death of Passenger: During a parking lot gun battle between Keyes and LaFromboise, a passenger in LaFromboise's vehicle was killed. Keyes was charged alternatively with deliberate homicide (Count I) under the felony-murder rule, deliberate homicide by accountability (Count II) under 45-2-302 and this section, and deliberate homicide by accountability (Count III) under the alternative theory that an unknown person was in Keyes' vehicle and fired the shots that killed the passenger. After the District Court denied Keyes' motion to dismiss Count II, Keyes filed an application with the Supreme Court requesting supervisory control and assumption of supervisory jurisdiction as to whether Count II states an offense under Montana law. The Supreme Court dismissed Count II, ruling that it does not state an offense under Montana law. In its belief that both Keyes and LaFromboise caused the death of the passenger, the state did not charge Keyes with deliberate homicide under the felony-murder rule for causing the death of the passenger while in the course of committing a felony of attempted deliberate homicide against LaFromboise. Rather, the state, believing that both were responsible for the death, attempted to charge both with accountability without having to declare either a victim. In doing so, the state failed to charge Keyes with an offense under Montana law, but created an offense by combining elements from the accountability statute and the felony-murder statute. Since the accountability statute does not provide for transferred intent, Count II must be dismissed because the state cannot create a new offense by grafting elements of the felony murder rule to the accountability statute. State ex rel. Keyes v. District Court, 1998 MT 34, 288 M 27, 955 P2d 639, 55 St. Rep. 125 (1998).

Conspiracy to Commit Deliberate Homicide — Fictitious Victim — Distinction Between Factual and Legal Impossibility — Factual Impossibility No Defense: Defendant was charged with conspiracy to commit deliberate homicide when he accepted money to kill an individual who was fictitious. The Supreme Court held that the District Court erred in denying the state's motion to file an information directly against the defendant. Legal impossibility exists when the contemplated act, if committed, would not be an offense. Factual impossibility exists when the contemplated act is an offense, but it cannot be carried out due to facts unknown to the conspirators. Legal impossibility is a defense to conspiracy but factual impossibility is not. This is a case of factual impossibility. While the intended victim of the deliberate homicide was fictitious, there appears to be a basis for proving the elements of conspiracy. The fact that the homicide could not have been carried out is immaterial. St. v. Houchin, 235 M 179, 765 P2d 178, 45 St. Rep. 2290 (1988).

Sufficiency of Information Charging Solely in Terms of Statute: An information charging a homicide is sufficient if it charges the offense in terms of a statute without reciting supporting evidentiary facts. In this case the information is sufficient. It charged three theories of homicide: (1) that the defendant as a principal purposely or knowingly caused the death of the victim by engaging in one or more of four enumerated kinds of conduct; (2) that the defendant aided and abetted in purposely or knowingly causing the death of victim by engaging in one or more of four kinds of conduct; and (3) that the death of the victim occurred while defendant was engaged in or aiding and abetting in the commission of aggravated assault. St. v. Riley, 199 M 413, 649 P2d 1273, 39 St. Rep. 1491 (1982).

Amendment of Information Because of Lack of Witnesses to Justify Lesser Offense — Not an Unconstitutional Shifting of Burden: Appealing her conviction for deliberate homicide and aggravated assault, the defendant claimed that the information, which first had charged her with mitigated deliberate homicide, was amended in violation of statute and both the state and federal constitutions. The allegation of error was rejected for three reasons. First, the appellant had relied on a case which construed the applicable statute, 46-11-403 (renumbered 46-11-205), before its 1977 amendment; the shootings had occurred in 1978. Second, the claim that the burden had been shifted unconstitutionally to the defendant to prove an element of mitigated deliberate homicide was untenable because one justification for the motion to amend the information was the fact that the defendant had failed to supply the State with the names of witnesses who would justify retaining the lesser offense; when it allows affirmative defenses at all, the State may regulate the burden of producing evidence and the burden of persuasion as long as it does not thereby shift to the defendant its own burden of proof as to each of the elements of the offense beyond a reasonable doubt. Third, the argument that the 1980 Cardwell decision should be applied retroactively was rejected. Cardwell sets out procedural safeguards of the defendant's constitutional rights when an information is amended. Although the statute on its face did not require leave of the trial court to file an amended information, such leave was obtained, thereby substantially complying with the procedural requirements of Cardwell. It was noted that the defendant had adequate notice and time to prepare her defense and that the State had the burden of proving the same elements under both homicide charges in any event. St. v. Sorenson, 190 M 155, 619 P2d 1185, 37 St. Rep. 1834 (1980).

Sufficiency of Information: The information filed in this case was sufficient since each count followed the language of the statutes for deliberate homicide, aggravated kidnapping, and sexual intercourse without consent. The state's attempt to amend the information did not aid the defendant in claiming the information was not sufficient. St. v. Coleman, 177 M 1, 579 P2d 732 (1978). For full appellate history of Coleman, see case note at 45-2-101, SERIOUS BODILY INJURY, *Evidence*.

Sufficiency of Affidavit: While obtaining leave to file an information is not a mere perfunctory matter, statements in an affidavit alleging: (1) that the defendant set a fire which caused the death of three persons; (2) that the defendant had admitted setting the fire; and (3) that the fire department had determined that the fire was deliberately set were sufficient to establish probable cause to prosecute. St. v. Hallam, 175 M 492, 575 P2d 55 (1978).

Probable Cause Lacking: Affidavit in support of application directly to the District Court for permission to file an information, which alleged only that defendant had entered a bar with a companion, that the companion had beaten the bar owner to death, that during such beating defendant had failed to restrain his companion, and that defendant had at least once said to the victim that "he had this coming", was insufficient to establish probable cause to believe that defendant had committed deliberate homicide, and leave to file the information should not have been granted. State ex rel. Murphy v. McKinnon, 171 M 120, 556 P2d 906 (1976).

Felony Murder Alleged: An information charging deliberate homicide should indicate whether the charge is made under subsection (1)(a), "purposely or knowingly", or subsection (1)(b), the felony-murder rule. If charges are made under both subsections, they should be made in separate counts. Aggravating circumstances which affect the possible sentence available upon conviction need not be set out in separate counts in the information. It is unnecessary to allege in the information the means of producing death or what the related felony was (where felony murder is alleged). State ex rel. McKenzie v. District Court, 165 M 54, 525 P2d 1211 (1974), followed in St. v. McKenzie (I), 171 M 278, 557 P2d 1023 (1976); certiorari granted, vacated and remanded, McKenzie v. Mont., 433 US 903, 97 S Ct 2968 (1977); reaffirmed, St. v. McKenzie (II), 177 M 280, 581 P2d 1205 (1978); certiorari granted, vacated and remanded, McKenzie v. Mont., 443 US 903, 99 S Ct 3094 (1979); reaffirmed, St. v. McKenzie (III), 186 M 481, 608 P2d 428 (1980); certiorari denied, McKenzie v. Mont., 449 US 1050, 101 S Ct 626 (1980); petition for habeas corpus denied, McKenzie v. Osborne (IV), 195 M 26, 640 P2d 368 (1981); affirmed, McKenzie v. Risley, 801 F2d 1519 (9th Cir. 1986); rehearing en banc granted, McKenzie v. Risley, 815 F2d 1323 (9th Cir. 1986); denial of habeas corpus affirmed, McKenzie v. Risley, 842 F2d 1525 (9th Cir. 1988).

EVIDENCE

No Error in Allowing Jury to Hear Evidence Regarding Missing Murder Weapon: Meredith contended that the jury should not have been allowed to hear evidence regarding a knife that was used during a homicide, even though the weapon was never recovered and the evidence was thus circumstantial. The Supreme Court concluded that the evidence was relevant because a weapon similar to that described had been used during the murder, and the court further concluded that the evidence was not unfairly prejudicial to Meredith, inasmuch as the jury could have properly inferred, without arousing any hostility toward Meredith, that the knife was used to kill the victim. Therefore, the trial court did not err in allowing the jury to hear the evidence. St. v. Meredith, 2010 MT 27, 355 Mont. 148, 226 P.3d 571.

Sufficient Evidence of Deliberate Homicide — Directed Verdict Properly Denied: Schmidt moved for dismissal after the state presented its evidence in a deliberate homicide case, but the trial court denied the motion. On appeal, the Supreme Court noted that although the precise sequence of events on the night in question remained elusive, it was undisputed that Schmidt stabbed the victim causing the victim's death, then fled the scene, threw away a knife and a cell phone, went home and burned his clothes, and lied to police about the clothing he was wearing and the knife he had used. The trial court properly allowed the jury to decide whether the state presented sufficient evidence to convict Schmidt and thus did not err in denying Schmidt's motion for a directed verdict. The trial court was affirmed. St. v. Schmidt, 2009 MT 450, 354 M 280, 224 P3d 618 (2009).

Sufficient Evidence of Deliberate Homicide and Attempted Deliberate Homicide to Support Conviction: Following the killing of one deputy and the wounding of another deputy during an altercation in the dark with Jackson, a jury convicted Jackson of deliberate homicide and attempted deliberate homicide. Jackson appealed on grounds that the evidence was mostly circumstantial and insufficient to support the conviction, arguing that the jury had adopted an inherently impossible interpretation of the evidence. The Supreme Court noted that the state's case was not entirely circumstantial and that the direct evidence of the wounded officer confirmed that Jackson was the shooter, even though the officer did not actually see Jackson pull the trigger.

The court also found that to conclude that the case rested solely on the officer's testimony would be to ignore the testimony of 53 witnesses and more than 240 items of physical evidence. Any rational trier of fact could have found that the circumstantial evidence was consistent with the officer's testimony, and the physical evidence and crime scene reconstruction also corroborated the officer's description of events. Thus, the jury's verdict was not inherently impossible, and there was sufficient evidence for the jury to find the essential elements of both deliberate homicide and attempted deliberate homicide beyond a reasonable doubt. Jackson's conviction was affirmed. St. v. Jackson, 2009 MT 427, 354 M 63, 221 P3d 1213 (2009).

Circumstantial Evidence of Deliberate Homicide Sufficient to Support Conviction: Morrisey was arrested for deliberate homicide 14 years after the crime but had been a suspect in the initial investigation. All evidence presented at trial was circumstantial, since no substantial evidence was found linking Morrisey directly to the crime initially or during the later investigation. There were numerous inconsistencies in Morrisey's testimony, and the evidence was susceptible to multiple reasonable interpretations, some pointing to Morrisey's guilt and others pointing to alternative explanations for Morrisey's actions. Nevertheless, when viewed collectively and in a light most favorable to the prosecution, the circumstantial evidence was of sufficient quality and quantity that a rational trier of fact could find beyond a reasonable doubt that Morrisey purposely or knowingly caused the victim's death. Thus, the Supreme Court declined to disturb the jury's verdict and the deliberate homicide conviction was affirmed. St. v. Morrisey, 2009 MT 201, 351 M 144, 214 P3d 708 (2009).

Sufficient Circumstantial Evidence to Show Essential Elements of Deliberate Homicide, Burglary, and Evidence Tampering to Warrant Jury Consideration: At the close of the state's case, Rosling moved for dismissal of deliberate homicide, burglary, and evidence tampering charges on grounds that the evidence was insufficient to send the case to the jury. The motion was denied, and on appeal, the Supreme Court affirmed. Rosling was with the victim the night of her death and was apparently the last person to see the victim alive. The victim was murdered at home, and a neighbor saw Rosling's car and a person matching Rosling's description at the home around the time of the murder. Footprints found at the home matched Rosling's shoes. The victim's father found the victim and discovered burning magazines beneath the victim, apparently left in an attempt to cover up the crime. A spot of the victim's blood was found on Rosling's coat, and other blood stains on the coat could not be ruled out as belonging to the victim. Rosling was unable to account for his whereabouts at the time of the murder and gave police inconsistent statements concerning his actions the night before and day of the murder. Although the evidence was circumstantial, it was sufficient the send the case to the jury, and the trial court did not err in denying Rosling's motion to dismiss on grounds of insufficient evidence. St. v. Rosling, 2008 MT 62, 342 M 1, 180 P3d 1102 (2008). See also St. v. Daniels, 2019 MT 214, 397 Mont. 204, 448 P.3d 511.

Sufficient Evidence That Defendant Knowingly or Purposely Caused Death: Roedel asserted that the state failed to prove that he knowingly or purposely killed his wife with a handgun. The Supreme Court declined to disturb the jury's guilty verdict based on evidence that neighbors heard three shots fired in rapid succession, Roedel admitted firing all three shots, including the shot that killed his wife, and the gun used in the shooting was incapable of discharging unless the trigger was pulled. St. v. Roedel, 2007 MT 291, 339 M 489, 171 P3d 694 (2007).

Sufficient Evidence for Conviction for Deliberate Homicide by Accountability — Evidence of Underlying Crime Required: Doyle asserted that there was insufficient evidence to convict him of deliberate homicide by accountability and that the accountability statute violated due process by relieving the state of proving that an offense had been committed. The Supreme Court affirmed the conviction based on sufficient, corroborated, independent evidence that Doyle played an active role in the homicide. The court also noted that under the accountability statute, a person may be convicted although the other person claimed to have committed the offense has not been prosecuted or convicted, has been convicted of a different offense, is not amenable to justice, or has been acquitted, but the statute in no way violates due process by lessening the state's burden of proving that the underlying offense of deliberate homicide was committed. St. v. Doyle, 2007 MT 125, 337 M 308, 160 P3d 516 (2007).

Sufficient Evidence to Submit Homicide Case to Jury — Directed Verdict Properly Denied: In a deliberate homicide trial, Smith asserted that the state failed to prove that he purposely and knowingly caused the death of another and that although the evidence may have established negligent homicide, there was an absence of proof that it was Smith's conscious object to cause the death, so Smith's motion for a directed verdict should have been granted. The evidence was conflicting, and some evidence was circumstantial but substantiated. However, without a complete absence of evidence to justify not sending the case to the jury, the trial court correctly declined to invade the province of the jury by directing the verdict. St. v. Smith, 2005 MT 325, 329 M 526, 127 P3d 353 (2005), followed in Adams v. St., 2007 MT 35, 336 M 63, 153 P3d 601 (2007).

No Corroboration of Testimony of Witnesses to Extrajudicial Confession — Homicide Conviction Affirmed: Following McGarvey's conviction for deliberate homicide, McGarvey asserted that because the two witnesses who testified regarding McGarvey's extrajudicial confession were patently unreliable, corroboration should have been required to uphold their testimony. The Supreme Court agreed that corroboration is required when a defendant's confession is obtained by law enforcement, but the confession in this instance was heard by two lay witnesses, and the Supreme Court declined to require independent corroborating evidence to establish the trustworthiness of McGarvey's alleged extrajudicial confession. Rather, the court noted that in addition to the lay testimony alleging that McGarvey confessed, the state provided sufficient evidence, as a whole, for the trier of fact to determine that McGarvey was guilty beyond a reasonable doubt. The conviction was affirmed. St. v. McGarvey, 2005 MT 308, 329 M 439, 124 P3d 1131 (2005), distinguishing Opper v. U.S., 348 US 84 (1954), Escobedo v. Ill., 378 US 478 (1964), and U.S. v. Lopez-Alvarez, 970 F2d 583 (9th Cir. 1992).

Sufficient Evidence to Convict of Deliberate Homicide Rather Than Mitigated Deliberate Homicide — Lack of Extreme Mental or Emotional Stress: Brown contended that he should have been convicted of mitigated deliberate homicide rather than deliberate homicide because the state failed to present any evidence to refute Brown's contention that he was acting under extreme mental or emotional distress when he killed a man. The Supreme Court noted that mitigated deliberate homicide is an affirmative defense that the defendant bears the burden of proving by a preponderance of the evidence and that whether a defendant is acting under extreme mental or emotional distress is a question of fact for the jury. In this case, the physical evidence at the crime scene, coupled with Brown's calm demeanor following the killing, belied Brown's contention that he was under extreme mental or emotional distress and was sufficient for the jury to find the essential elements of deliberate homicide. Brown's conviction was affirmed. St. v. Brown, 2003 MT 166, 316 M 310, 71 P3d 1215 (2003).

Whether Baby Born Alive Factual Question for Jury: Elliott was charged with deliberate homicide of her newborn child. The District Court concluded that the question of whether the child was born alive or stillborn was a factual determination to be made by the jury. Elliott alleged that allowing the jury to speculate on the issue allowed the state to proceed without probable cause. The Supreme Court disagreed. The evidence was circumstantial, inasmuch as the state medical examiner offered no opinion as to whether the child was born alive, but it is well established that when circumstantial evidence is susceptible to differing interpretations, it is within the province of the jury to decide which will prevail. The factual issue here was similar to other unresolved issues in a homicide case and was clearly a factual issue for the jury to decide. St. v. Elliott, 2002 MT 26, 308 M 227, 43 P3d 279 (2002).

Improper Admission of Coconspirator's Out-of-Court Statements and Confession — Reversible Error: In a videotaped interview with detectives, Steilman admitted that he and Francis had murdered a man to prove their worth to each other in conducting other criminal activity. Steilman was offered a plea agreement and was called to testify at Francis's trial. When called as a witness, Steilman refused to answer any questions on fifth amendment grounds, so the state sought the admission of the videotaped interview and Steilman's out-of-court statements to lay witnesses. The state contended that the statements to lay witnesses were admissible as statements of a coconspirator made in furtherance of a conspiracy and that the statements to police were admissible as admissions against Steilman's penal interests. The District Court allowed the statements, but not the videotape, although the videotape was subsequently shown to the jury pursuant to a motion by defense counsel, in response to the ruling on the admissibility of the out-of-court statements, in order to give the jury an opportunity to observe Steilman. Francis was ultimately convicted of deliberate homicide and appealed on grounds that admission of the out-of-court statements was reversible error. The state conceded on appeal that the statements to lay witnesses were inadmissible because statements made after attainment of the conspirator's object are not admissible unless the movant can prove that an express agreement existed among the coconspirators to continue to act in concert to cover up the crime after its commission, and the state offered no such proof. Moreover, the statements were not admissible as testimony regarding out-of-court statements made by Francis, or admissible as statements made by Steilman and adopted by Francis. The state also conceded on appeal that the statements made to police were not admissible as statements against Steilman's penal interests. Pursuant to St. v. Castle, 285 M

363, 948 P2d 688 (1997), the fact that portions of a declarant's confession are admissible because they are self-inculpatory does not necessarily make the collateral noninculpatory statements either credible or admissible, particularly when the declarant implicates another person, as in this case when Steilman's confession consisted mainly of blaming Francis. The Supreme Court then applied 46-20-701, in light of St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), to determine whether admission of the out-of-court statements constituted structural error or trial error and whether the error was reversible. The error here was trial error. In order to be considered harmless, it was necessary that the state demonstrate that there was no reasonable possibility that the inadmissible evidence contributed to the verdict. The court agreed that there was sufficient cumulative admissible evidence regarding Francis's purposeful participation in the killing. However, the court was forced to conclude that there was also a reasonable possibility that the erroneously admitted testimony of Steilman's out-of-court statements implicating Francis might have contributed to the conviction, so the case was reversed and remanded for a new trial. St. v. Francis, 2001 MT 233, 307 M 12, 36 P3d 390 (2001).

Sufficient Evidence to Support Attempted Homicide Verdict — State of Mind: Martin was convicted of attempted deliberate homicide after shooting a police officer who was in pursuit following Martin's attempt to cash a forged check. Martin contended that the evidence was insufficient to prove that he acted with the purpose of causing the officer's death. Martin argued that he only intended to scare the officer and that if he had intended to kill the officer, he would not have looked surprised or confused after the shooting, as some witnesses testified. However, other witnesses testified that Martin appeared calm during the chase and even slowed before turning to shoot. Another witness testified that Martin always carried a gun and had boasted that he would shoot anyone who got in his way, "even a cop". In deference to the jury's resolution of the conflicting evidence, the Supreme Court affirmed, concluding that a rational trier of fact could have found the essential elements of attempted deliberate homicide beyond a reasonable doubt. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Sufficient Circumstantial Evidence of Deliberate Homicide — Motion for Directed Verdict Properly Denied: At the end of the state's case in chief in Clausell's deliberate homicide trial, Clausell moved for a directed verdict on grounds that the state failed to introduce evidence upon which the jury could conclude that Clausell knowingly or purposely caused his girlfriend's death. The District Court denied the motion, which Clausell contended on appeal was an abuse of discretion because gunshot residue tests failed to establish who was holding the gun when it discharged, there was no other evidence that Clausell was the shooter, there was no well-established motive to prove intent, and there was no evidence of flight. The Supreme Court agreed with the state that there was sufficient circumstantial evidence from which any rational trier of fact could infer that Clausell was holding the gun and that he acted knowingly or purposely. The court also noted that neither motive nor flight is an element of deliberate homicide. Clausell recounted at least eight different versions of the facts that were inconsistent with each other and with the physical evidence. When viewed in the light most favorable to the state, the record showed ample circumstantial evidence that Clausell committed the crime, and denial of the motion for a directed verdict was not an abuse of discretion. St. v. Clausell, 2001 MT 62, 305 M 1, 22 P3d 111 (2001). See also St. v. Lancione, 1998 MT 84, 288 M 228, 956 P2d 1358 (1998).

Circumstantial Evidence Held Sufficient to Convict on Charges of Arson and Deliberate Homicide: Enright was convicted in District Court of arson and deliberate homicide of Leonard. The Supreme Court held that circumstantial evidence could be the entire evidentiary basis for the conviction and that there was sufficient circumstantial evidence introduced to convict Enright. That evidence consisted of the following: (1) Enright purchased six life insurance policies on Leonard and then denied the existence of those policies to investigators; (2) Enright and her family and friends moved furniture out of the trailer home prior to the fire and then claimed the loss of those pieces of furniture in the fire to the insurance company; (3) Leonard's body showed evidence of sedative drugs; (4) the smoke alarm nearest to Leonard's body was missing the battery required for its use; (5) the only other alarm in the trailer was at the other end of the trailer; (6) there were no signs of clean laundry in the living room where Enright claimed to have left it; (7) despite Enright's claim of having been exposed to the smoke of the fire numerous times, investigators did not smell smoke on her clothing; and (8) there was expert testimony that the fire was intentionally set. St. v. Enright, 1998 MT 322, 292 M 204, 974 P2d 1118, 55 St. Rep. 1308 (1998), followed, on the basis of identical facts, in St. v. Link, 1999 MT 4, 293 M 23, 974 P2d 1124, 56 St. Rep. 13 (1999).

Circumstantial Evidence of Prison Slaying Sufficient to Support Homicide Conviction: Johnson contended that the state failed to present sufficient evidence by which the jury could find that he knowingly and purposely caused the death of another prison inmate. Although the evidence was circumstantial, it was strong, and although Johnson had different views of the evidence and attempted to explain his view, it was all considered by the jury and rejected. After weighing the evidence and judging the credibility of the witnesses, the jury could have found the essential elements of the crime beyond a reasonable doubt. Johnson's homicide conviction was affirmed. St. v. Johnson, 1998 MT 289, 291 M 501, 969 P2d 925, 55 St. Rep. 1186 (1998).

Deliberate Homicide — Sufficiency of Evidence to Support Guilty Verdict:

Notwithstanding Sattler's claim of self-defense, a reasonable trier of fact could have found beyond a reasonable doubt that Sattler purposely or knowingly caused Martinson's death based on: (1) the undisputed fact that Sattler inflicted blows to Martinson's head and neck with a metal bar; (2) the medical examiner's testimony that one of the blows indented Martinson's skull, bruising his brain; (3) the nature of the injuries coupled with Sattler's awareness of his conduct and the jury's ability to infer that he was aware that there was a high probability that that conduct would result in Martinson's death; and (4) testimony from other incarcerated inmates that Sattler had been annoyed with Martinson on numerous occasions while in jail and had threatened to kill either Martinson or another inmate within 18 to 42 hours before Martinson's death. St. v. Sattler, 1998 MT 57, 288 M 79, 956 P2d 54, 55 St. Rep. 230 (1998), distinguishing St. v. Popescu, 237 M 493, 774 P2d 395 (1989), and St. v. Arlington, 265 M 127, 875 P2d 307 (1994).

In determining, on appeal, whether a criminal conviction is supported by substantial evidence, the evidence is viewed in the light most favorable to the State. The defendant's confession was found to have been voluntary, other evidence placed the defendant near the scene at the probable time of the murder, the defendant was unable to explain his whereabouts at the probable time of the murder, and the defendant was unable to explain his wet shoes while every witness who had been with him in the hours before the murder by drowning said the defendant had not walked near any water. This and other evidence, all viewed in the light most favorable to the State, was held sufficient to support conviction for deliberate homicide. St. v. Blakney, 185 M 470, 605 P2d 1093 (1979).

Victim Never Found — Sufficiency of Evidence: Evidence of the death of the victim, who was never found, was sufficient, and it was not an abuse of discretion to deny a motion for acquittal. There was evidence that brain tissue found in defendant's camper was the victim's, though defendant offered evidence that it could have been animal brain tissue. The victim disappeared after meeting defendant at a truck stop. Because the victim was a conscientious father and businessman, his disappearance was totally out of character. Defendant changed his story after being confronted with incriminating evidence. Defendant expended great effort to remove bullet fragments from, cover bullet holes in, and wash the interior of his camper. After the victim's disappearance, an attorney and the Sheriff each received a letter purportedly from the victim, but his wife's name was misspelled and the signatures were forged. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

Evidence of Use of Illegal Weapon Admissible in Deliberate Homicide Case — Just Warning Not Required: Defendant in a deliberate homicide case contended that the court erroneously allowed the state to present evidence that the shotgun used in the shootings had been illegally altered, without providing a Just notice or modified Just notice. However, the state was entitled to introduce evidence of the act of owning an illegal shotgun because it was inextricably related to the crime. A Just notice was not required because the evidence was part of the corpus delicti. St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993).

Evidence of Prior Misconduct — Single Similar Act Admissible: In a trial for deliberate homicide, the trial court did not abuse its discretion in allowing evidence of an incident that occurred 3 years prior to the crime when defendant threatened suicide over the breakup of his marriage and when he momentarily pointed a gun at a police officer. The linchpin for determining whether a single instance of prior conduct is sufficient to prove intent is relevancy based on similarity. St. v. Sadowski, 247 M 63, 805 P2d 537, 48 St. Rep. 93 (1991).

Nature of Crime Scene Irrelevant to Homicide Charge: Defendant contended District Court error in disallowing evidence regarding the nature of the apartment complex where the crime occurred, asserting that the dangerous surroundings magnified his fear. It was within the court's discretion to hold the evidence irrelevant as to whether deliberate homicide was committed and as to defendant's claim of self-defense. St. v. Crazy Boy, 232 M 398, 757 P2d 341, 45 St. Rep. 1145 (1988).

Sufficient Circumstantial Evidence to Support Conviction — Deliberate Homicide: The Supreme Court found substantial evidence, although primarily circumstantial, to support conviction for deliberate homicide when the state pathologist's conclusions that lack of soot in victim's windpipe, minimal carbon monoxide level in blood and tissues, and fact that victim was found face up with limbs spread while most fire victims are found face down in fetal position supported theory that victim was dead before the fire began. St. v. Atlas, 224 M 92, 728 P2d 421, 43 St. Rep. 2042 (1986).

Admissibility of Tape of Witness to Shooting — Probative Value: Defendant was convicted of deliberate homicide of his brother. At the trial, a tape recording of a call made by defendant's sister to the police after the shooting was admitted into evidence. Defendant can be heard in the background shouting obscenities and shooting. The Supreme Court refused to reverse the District Court's discretionary decision to allow the tape to be admitted, reasoning that although the tape was inflammatory, it had probative value with respect to the credibility of witnesses who were present at the shooting and its probative value outweighed its prejudicial effect. St. v. Johns, 201 M 192, 653 P2d 494, 39 St. Rep. 2049 (1982).

Evidence Sufficient to Prove Deliberate Strangulation: The evidence against the appellant was that he was with homicide victim between approximately 2:30 a.m. and 4:30 a.m. on June 5, 1980, and had sexual intercourse with her. Defendant's wallet was found under her couch. Her home showed no signs of a struggle. Defendant attempted suicide by drinking Drano on June 6, 1980. Defendant gave five statements to police containing several inconsistencies. In his statements, defendant implausibly claimed he heard victim gasping for breath when he returned to her home. He did not seek medical attention for her. Moreover, when defendant discovered his wallet was missing, he did not return to victim's home but rather went to the parking lot of a bar. These facts constitute substantial evidence and are therefore sufficient to support the deliberate homicide by strangulation conviction, though the case is a close one and the evidence is highly circumstantial. St. v. Plouffe, 198 M 379, 646 P2d 533, 39 St. Rep. 1064 (1982).

Child Beating Death — Color Photographs of Autopsy: A doctor testified that color photographs of an autopsy of a child, the victim of a beating death, accurately represented the victim's appearance at the autopsy and were reasonably necessary to depict the multiplicity and extent of the injuries, how they were caused, and their age. Because the probative value of the photographs outweighed their prejudicial effect, they were properly admitted into evidence. St. v. Powers, 198 M 289, 645 P2d 1357, 39 St. Rep. 989 (1982).

Purposely or Knowingly — Review of Sufficiency of Evidence in Federal Habeas Corpus Proceeding: Prior to a shooting, the petitioner had engaged in acts of surveillance, harassment, and threatening behavior towards the victim. This evidence was sufficient to support a finding by the jury that the petitioner had purposely or knowingly intended to shoot the victim. Bashor v. Risley, 539 F. Supp. 259, 39 St. Rep. 960 (D.C. Mont. 1982).

Psychiatric Testimony on Intent Element — Permissible for Rebuttal: Fish had an argument with Miller at the bar where Miller worked over money Miller owed Fish. A fight ensued, which was broken up by patrons. Fish left saying he would settle with Miller. Fish recruited some friends and went to Miller's trailer park. Miller had already arrived and had friends with him. Fish, upon discovering that Miller was at home, began knocking and pounding on the door. Fish's friends, Hubbard and Lodge, were with him. Lodge began kicking the door. Miller got a gun and shot through the door, killing Lodge. Hubbard got in his truck, and Miller put the gun through the truck window. Hubbard took the gun away from Miller, who ran from the truck. Hubbard shot and killed Miller. Fish was convicted of attempted burglary, and Hubbard was convicted of mitigated deliberate homicide. Hubbard contends the trial court erred by refusal to allow a psychiatrist to testify as to his mental state at the time Miller was shot. With respect to either deliberate homicide or mitigated deliberate homicide, the State must prove that the defendant "purposely or knowingly" caused the death of another human being. "Purposely or knowingly" are statutory descriptions of various states of the human mind. They are particular elements included in the definition of the offense. No element of an offense can be presumed, and thus the requisite state of mind must be established by the prosecution and believed by the jury beyond a reasonable doubt. The offered testimony included a conclusion that Hubbard, under the surrounding circumstances, more than likely did not intend to kill Miller when he shot but only intended to stop or apprehend him. The testimony would have gone to support a general rebuttal of the intent requirement. This was a proper subject for expert psychiatric testimony. To exclude testimony offered by Hubbard as rebuttal to an essential element of the crime denied him a full evidentiary hearing and deprived him of a fair trial. St. v. Fish, 190 M 461, 621 P2d 1072, 37 St. Rep. 2065 (1980).

Evidence of Drug Use of Witnesses Inadmissible as Too Remote and Without Foundation: The defendant appealed her conviction for deliberate homicide and aggravated assault in part by contending that it was error to prohibit the defense from referring to the use of marijuana by the victims in the hours before the shootings. In the Gleim case, Montana has endorsed the majority rule requiring a showing that the witness was under the influence of drugs at the time the events about which he testifies occurred before evidence of the witness' drug use is admissible. Implicit in the formulation of the Gleim rule is a recognition of the remoteness concept. The question of remoteness is directed to the discretion of the trial court. While remoteness is a matter that generally goes to the credibility of the evidence rather than to its admissibility, evidence can be excluded if it is so remote that it has no evidentiary value. Given the defendant's failure to lay a proper foundation that the witnesses were under the influence of drugs at the time of the material events in this case, exclusion of the evidence was justified both under the Gleim rule and under the remoteness doctrine. St. v. Sorenson, 190 M 155, 619 P2d 1185, 37 St. Rep. 1834 (1980).

Polygraph Test Results — Admissibility — Expert Testimony of Polygraphists: The defendant in a deliberate homicide case appealed the trial court granting of a motion in limine to prevent the introduction of expert testimony regarding polygraph test results of a friend of the defendant who had accompanied the defendant as a passenger in the defendant's car on the night of the shooting. The defendant alleged three grounds for this part of his appeal: (1) the trial court erred in refusing to hear defendant's offer of proof on the polygraph; (2) the trial court erred in ruling that the proposed testimony was inadmissible as a matter of law; and (3) the trial court erred in refusing admission of the particular polygraph-related testimony offered by the defendant. The Supreme Court said that if the trial judge's ruling that as a matter of law the testimony of the polygraph examiner was inadmissible was a correct ruling, it was not error for the District Court to refuse to consider the defendant's offer of proof or for it to refuse to admit into evidence this particular area of testimony and evidence. The Montana rule is that the results of polygraph examinations are not admissible as evidence in a criminal trial. The polygraph test results in this case do not fall into the same category as other scientific evidence that is admissible to assist the trier of fact to understand the evidence or to determine a fact in issue. Here only the friend's understanding of the defendant's motives could be established by the test, and that was not an issue in the case. For these reasons it was not error for the trial court to rule that as a matter of law the evidence was inadmissible. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Admission of Evidence of Prior Relationship Between the Defendant and the Victim's Girlfriend and Threats by Defendant Against Her: The defendant in a deliberate homicide case claimed on appeal that the trial court erred in admitting into evidence acts and statements of the defendant which occurred prior to the shooting. The evidence concerned the former romantic relationship of the victim's girlfriend with the accused, the ill feelings of the defendant toward the victim that developed after the defendant's relationship with the woman was replaced with the victim's relationship with her, and the ensuing threats made by the defendant toward the woman. Because the State had to prove that the defendant purposely or knowingly caused the victim's death, the evidence of the defendant's intent was relevant in general and specifically because the defendant here alleged that he shot the victim in self-defense. Although threats against a person other than the victim are not admissible generally, when the circumstances are such that the threat tends to show hostility toward the deceased, they are relevant. Although evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith, it may be admissible for other purposes such as proof of motive or intent or where such evidence forms a part of a single chain of facts so intimately connected that the whole must be considered in order to interpret its several parts. Further, the challenged testimony was crucial to prove defendant's mental state at the time of the shooting, and as a result, the probative value outweighed its prejudicial effect. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Justification as Question of Fact: Whether the defendant was justified in killing the McLeans and whether he was acting under extreme emotional distress were questions of fact for the jury. Substantial evidence was introduced, which if believed by the jury would result in convictions for deliberate homicide. The court upon appeal will not substitute its judgment for that of the jury where the verdict is supported by substantial evidence. St. v. Sunday, 187 M 292, 609 P2d 1188 (1980).

Self-Incrimination — Voluntariness of Confession: The police read the defendant his Miranda rights before they originally interrogated him and again just before he confessed to the homicide. Between the original interrogation and the confession, the police kept the defendant incommunicado in a small room in a hostile police environment. They used the nice cop-mean cop method of interrogation and lied to the defendant while using the guilt assumption technique of interrogation. The defendant eventually confessed to the homicide after a truth serum was administered and he was told that his story was inconsistent and contradictory to his "serum" story. The Supreme Court, after considering the totality of the circumstances, found the confession to be inadmissible on the basis that it was not made voluntarily. St. v. Allies, 186 M 99, 606 P2d 1043 (1979), distinguished in St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202, 57 St. Rep. 1268 (2000).

Sufficiency of Corroborating Evidence: While a conviction cannot be had on the testimony of one equally accountable for the same offense, where the corroborating evidence tends to connect the defendant with the commission of the offenses of robbery and homicide as a participant in the actual robbery and as an accomplice in the commission of and flight after the deliberate homicide, the evidence as a whole is sufficient to sustain defendant's conviction. St. v. Owens, 182 M 338, 597 P2d 72 (1979).

INSTRUCTIONS

No Abuse of Discretion by Declining Request of Lesser-Included Offense Instruction of Mitigated Deliberate Homicide — Only Theory Offered by Defense to Deliberate Homicide Was Defendant Did Not Commit Murder — When Only Defense Theory Presented Is Acquittal, Defendant Not Entitled to Lesser-Included Offense Instructions. St. v. Craft, 2023 MT 129, 413 Mont. 1, 532 P.3d 461.

Inapplicable Jury Instructions — Self-Defense Issue Clearly Argued to Jury — No Review Under Plain Error or Ineffective Assistance: The District Court's specific purpose jury instruction instead of a more appropriate self-defense instruction did not warrant review under either the doctrine of plain error or ineffective assistance of counsel. Given the trial record, the Supreme Court was not firmly convinced that failure to review the inapplicable instruction would have resulted in a manifest miscarriage of justice, left unsettled the question of fundamental fairness of the trial, or compromised the integrity of the judicial process. The Supreme Court also determined that the instruction did not derail what was a clearly directed trial about the defendant's intentions and his assertion that his actions of stabbing the victim with a knife multiple times were justified by self-defense. St. v. St. Marks, 2020 MT 170, 400 Mont. 334, 467 P.3d 550.

Burden on State in Justifiable Use of Force Case to Prove Absence of Justification: The enactment of 46-16-131 in 2009 abrogated St. v. Henson, 2010 MT 136, 356 Mont. 458, 235 P.3d 1274, St. v. Longstreth, 1999 MT 204, 295 Mont. 457, 984 P.2d 157, and other cases to the extent they held the burden of establishing justifiable use of force was the defendant's. Under 46-16-131, a defendant has the initial burden of offering evidence of justifiable use of force; the burden then shifts to the state to prove the absence of justification beyond a reasonable doubt. St. v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 623.

Unlawful Entry Prerequisite to Justifiable Use of Force Instruction: In a deliberate homicide trial in which the defendant asserted justifiable use of force, the District Court properly denied the defendant's proffered jury instructions regarding use of force in defense of an occupied structure and the definition of burglary as a forcible felony. Unlawful entry is a prerequisite to both of the proffered instructions, and the evidence clearly established the victim entered the defendant's house lawfully. St. v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 623.

No Error in Refusing to Give Lesser Included Offense Instruction When Defendant Could Not Rationally Be Convicted of Lesser Offense: Schmidt contended that the trial court improperly denied a request to give an instruction on aggravated assault as a lesser included offense of deliberate homicide. The Supreme Court disagreed. By definition, aggravated assault does not include death, and if a death occurs, homicide is implicated, so the jury could not rationally have found Schmidt guilty of aggravated assault when the victim of Schmidt's attack died. The fact that aggravated assault constitutes a lesser included offense of deliberate homicide does not in itself satisfy the statutory requirement for a lesser included offense instruction if the jury was not warranted in finding guilt of aggravated assault based on the evidence. St. v. Schmidt, 2009 MT 450, 354 M 280, 224 P3d 618 (2009).

Lack of Proximate Cause Instruction Not Violative of Right to Fair Trial: In Dubois' deliberate homicide trial, defense counsel did not request a jury instruction on proximate cause. Dubois argued on appeal that without a proximate cause instruction, the jury lacked the means to make a factual finding regarding the central defense theory, which was that the victim died of morphine intoxication in the hospital following the assault rather than from the massive head injuries inflicted by Dubois that put the victim in the hospital, and that defense counsel offered ineffective assistance by failing to request a proximate cause instruction. The Supreme Court disagreed on both issues. The jury was properly and fully instructed that it did not need to find that Dubois intended to kill the victim, but only that Dubois caused the death. The lack of a proximate cause instruction thus did not result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process. In addition, because a proximate cause instruction was not required for Dubois to have a fair trial, defense counsel was not ineffective for failing to offer the instruction. St. v. Dubois, 2006 MT 89, 332 M 44, 134 P3d 82 (2006).

Scope of Review — Jury Instructions: The Supreme Court reviews jury instructions to determine whether the instructions as a whole fully and fairly instructed the jury on the applicable law. The standard of review is whether the trial court abused its broad discretion in formulating jury instructions. St. v. Smith, 2005 MT 325, 329 M 526, 127 P3d 353 (2005). See also St. v. Meyer, 2005 MT 215, 328 M 247, 119 P3d 1214 (2005).

Improper Jury Instructions — Mitigated Deliberate Homicide Verdict Without First Finding Guilt of Deliberate Homicide — Reversible Error: Demontiney was charged with deliberate homicide. On the first morning of trial, counsel exchanged jury instructions, and neither party's instructions included mitigated deliberate homicide. Following 3 days of testimony, the state proposed an instruction on mitigated deliberate homicide, arguing that evidence introduced at trial obligated the state to offer the instruction. The trial court agreed and stated that the jury would be instructed on mitigated deliberate homicide. Consistent with St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202 (2000), the state prepared instructions and a verdict form incorporating the "failure to agree" concept, directing the jury to consider all evidence relating to both the greater and lesser charges before considering the verdict on the greater charge. Nevertheless, the trial court's instructions and verdict form did not match those offered by either party. Rather, the trial court instructed the jury that it should first consider the deliberate homicide charge, and if it reached a not guilty verdict or was unable to reach a verdict on that charge, it was then to consider the mitigated deliberate homicide charge. The jury found Demontiney not guilty of deliberate homicide, but guilty of mitigated deliberate homicide. The Supreme Court found that the jury instructions were not a full and fair instruction on the applicable law. The District Court was bound by Scarborough, whether the court agreed with that decision or not. A finding of guilt on mitigated deliberate homicide requires a finding of every element of deliberate homicide, plus an additional finding of extreme mental or emotional stress. Thus, the jury's verdict was logically impossible, prejudicing Demontiney, and the jury instructions constituted reversible error. The verdict was vacated, and Demontiney was immediately discharged. (See 2003 amendment to 45-5-103.) Demontiney v. District Court, 2002 MT 161, 310 M 406, 51 P3d 476 (2002), distinguished in St. v. Schmidt, 2009 MT 450, 354 M 280, 224 P3d 618 (2009). However, see St. v. MacGregor, 2013 MT 297, 372 Mont. 142, 311 P.3d 428, in which the Supreme Court held that an improper jury instruction on mitigated deliberate homicide did not rise to the level of plain error because the defendant did not prove any mitigating factors as a matter of law.

No Abuse of Discretion in Refusing to Instruct Jury on Lesser Included Offense of Negligent Homicide Absent Supporting Evidence: German was convicted of attempted felony assault and deliberate homicide. At trial, the court instructed the jury on German's defense of justifiable use of force and gave a mitigated deliberate homicide instruction but refused to give a jury instruction regarding the lesser included offense of negligent homicide, finding no evidence to support the instruction. German appealed on grounds that the trial court erred in failing to give the negligent homicide instruction. The Supreme Court affirmed. District Courts have broad discretion in formulating jury instructions, including the authority to reject instructions that are not supported by evidence. A lesser included offense instruction must be given when properly requested and when the jury could be warranted in finding defendant guilty of the lesser included offense, based on the evidence, but the instruction need not be given if there is no evidence to support it. A lesser included offense instruction is not supported by the evidence when defendant's evidence or theory, if believed, would require an acquittal. Here, German's justifiable use of force defense, if proved, would have required an acquittal. German cited St. v. Martinez, 1998 MT 265, 291 M 306, 968 P2d 705 (1998), for the proposition that a defendant is generally entitled to a lesser included offense instruction and that the District Court may usurp the jury's function by factually deciding the merits of the lesser included offense. The Supreme Court disagreed. Martinez neither overruled nor was inconsistent with cases entitling defendant to a lesser included offense instruction when evidence supports the instruction, and in both civil and criminal proceedings, the determination of whether there is sufficient evidence to raise an issue of fact for a jury is a question of law for the trial court. Only when the trial court determines as a matter of law that factual disputes exist are those disputes turned over to the jury. In this case, German's own testimony was that he consciously made the decision to shoot the victim, so there was no support for a negligent homicide instruction and the trial court did not err in refusing to give one. St. v. German, 2001 MT 156, 306 M 92, 30 P3d 360 (2001), following St. v. Swan, 279 M 483, 928 P2d 933 (1996).

Instruction That Person Acts Purposely if Conscious Object Is to Cause Death or "Similar" Type of Harm Not in Error: At Clausell's deliberate homicide trial, the District Court instructed the jury that a person acts purposely with respect to deliberate homicide if it is that person's conscious object to cause death or a "similar" type of harm to another human being. Clausell contended that the instruction was improper because the statutory definitions of purposely and deliberate homicide do not contain the word "similar". The Supreme Court cited St. v. Rothacher, 272 M 303, 901 P2d 82 (1995), in holding that the use of "similar" did not lower the state's burden of proving every element of the crime. The mental state for deliberate homicide can be established if the result involves the same or a similar type of harm or injury as contemplated by defendant, although the actual degree of injury is greater than intended. St. v. Clausell, 2001 MT 62, 305 M 1, 22 P3d 111 (2001), followed in St. v. Dubois, 2006 MT 89, 332 M 44, 134 P3d 82 (2006).

Burden on Defendant in Justifiable Use of Force Case to Raise Reasonable Doubt of Guilt: Longstreth was charged with deliberate homicide and relied on a defense of justifiable use of force. After being convicted of negligent homicide, Longstreth alleged that the jury was incorrectly instructed in violation of her due process rights, contending that the instructions improperly allocated the burden of proof by failing to require the state to prove an absence of justification beyond a reasonable doubt. Citing St. v. Daniels, 210 M 1, 682 P2d 173, 41 St. Rep. 880 (1984), and St. v. Miller, 1998 MT 177, 290 M 97, 966 P2d 721 (1998), the Supreme Court reiterated that justifiable use of force is an affirmative defense and that only the defendant has the burden of producing sufficient evidence to raise a reasonable doubt of guilt. The state's burden is to prove the elements of the charged offense beyond a reasonable doubt, which does not include the absence of justification. Further, 45-5-112 allows for a permissive inference by the jury rather than a mandatory inference. As long as the instructions given to the jury make it clear that the burden of proof of guilt and all necessary elements of guilt lies squarely with the state, placing the burden of presenting evidence to raise a reasonable doubt of guilt on the defendant is not unconstitutional. St. v. Longstreth, 1999 MT 204, 295 M 457, 984 P2d 157, 56 St. Rep. 795 (1999). See also Leland v. Oreg., 343 US 790, 96 L Ed 1302, 72 S Ct 1002 (1952), Patterson v. N.Y., 432 US 197, 53 L Ed 281, 97 S Ct 2319 (1977), and St. v. Lopez, 185 M 187, 605 P2d 178 (1980). St. v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 623, held that the enactment of 46-16-131 in 2009 abrogated Longstreth, St. v. Henson, 2010 MT 136, 356 Mont. 458, 235 P.3d 1274, and other cases to the extent they held the burden of establishing justifiable use of force was the defendant's in a justifiable use of force case.

Counsel Failure to Request Lesser Included Offense Instruction Based on Defense That No Rational Jury Would Believe: In a prosecution for attempted deliberate homicide, defendant's counsel did not render ineffective assistance by failing to request a jury instruction on the lesser included offense of aggravated assault. Therefore, counsel's performance was not outside the range of competence demanded of attorneys under similar circumstances. Defendant admitted that he shot a peace officer in the chest with a .41 caliber magnum pistol while running from the officer, who only wanted to talk to him. His defense was that he thought that the officer was part of a hit team hired by the government to get him and that a voice in his head told him that the officer had a flak jacket on and that if defendant shot the officer in the chest, he would not hurt the officer. The evidence did not support the instruction, and from the evidence, it would be irrational to conclude that defendant shot the officer with any intent other than to kill him. No jury could have rationally accepted the defense and have found defendant guilty of aggravated assault and not of attempted deliberate homicide. St. v. Sellner, 286 M 397, 951 P2d 996, 54 St. Rep. 1464 (1997), followed in St. v. Howell, 1998 MT 20, 287 M 268, 954 P2d 1102, 55 St. Rep. 72 (1998).

Erroneous Instruction — Harmless Error: The defendant was charged with deliberate homicide and convicted of mitigated deliberate homicide. At trial, the District Court erroneously instructed the jury that the state merely needed to prove that the defendant acted purposely, without regard to the result that was intended. The giving of the instruction, when potential prejudice could occur if the defendant had acted purposely but without intent to cause harm, was harmless error when there were no facts presented from which an argument could be made that when the defendant struck the victim in the face and kicked the victim in the head while the victim was lying on the ground, the defendant intended no harm to the victim. The instruction was, at worst, superfluous. The jury was correctly instructed on the meaning of deliberate homicide, the lesser included offense of mitigated deliberate homicide, and on the statutory provision that purposeful and knowing causation can occur without intending a specific result, so long as the same type of harm or injury was contemplated. Because the challenged instruction did not apply to any facts offered as proof in the case, the error in giving the instruction was harmless beyond a reasonable doubt. St. v. Rothacher, 272 M 303, 901 P2d 82, 52 St. Rep. 772 (1995), followed in St. v. Patton, 280 M 278, 930 P2d 635, 53 St. Rep. 1402 (1996). Patton was followed in St. v. Nick, 2009 MT 174, 350 M 533, 208 P3d 864 (2009).

Instruction — Prior Decisions Overruled: The defendant was charged with deliberate homicide and convicted of mitigated deliberate homicide. At trial, the District Court instructed the jury that it was not necessary for the state to prove that the defendant intended to cause the death of the victim. The Supreme Court held that the District Court erred when it instructed the jury that the state needed to prove that the defendant acted purposely, without regard to the result that was intended. To the extent that prior decisions in Sigler, McKimmie, and Byers are inconsistent with this opinion, they are overruled. St. v. Rothacher, 272 M 303, 901 P2d 82, 52 St. Rep. 772 (1995), followed in St. v. Patton, 280 M 278, 930 P2d 635, 53 St. Rep. 1402 (1996).

Instruction on Criminal Endangerment Unnecessary Absent Evidence: Defendant convicted of deliberate homicide contended that the District Court erred in refusing to give a proposed instruction on criminal endangerment as a lesser included offense. However, defendant presented no evidence at trial, neither testifying himself nor calling a single defense witness. Evidence must be presented at trial to warrant an instruction on criminal endangerment. A court's refusal to instruct on criminal endangerment is proper when a purposeful or knowing act causes death or when the failure to act results in accountability for deliberate homicide. St. v. Olivieri, 244 M 357, 797 P2d 937, 47 St. Rep. 1668 (1990).

Instruction Proper in Cases of Circumstantial Evidence but Improper in Cases of Direct Evidence: Defendant's offered jury instruction regarding the effect of circumstantial evidence was improper in light of the fact that his case was based solely on direct eyewitness testimony. St. v. Crazy Boy, 232 M 398, 757 P2d 341, 45 St. Rep. 1145 (1988).

Failure to Instruct on Felony Assault (now Assault With a Weapon) and Aggravated Assault — No Error: It was proper for the trial court to refuse an instruction on lesser included offenses of felony assault (now assault with a weapon) and aggravated assault where evidence was substantial in support of a finding of deliberate homicide. The trial court had only to instruct on lesser offenses to which the evidence was applicable. The jury was warranted in finding the accused guilty. St. v. Ballenger, 227 M 308, 738 P2d 1291, 44 St. Rep. 1107 (1987).

Harmless Error in Relation to Charge of Which Defendant Was Acquitted: Any error in failure to give self-defense instruction with respect to (purposeful or knowing) deliberate homicide charge was harmless because defendant (convicted of deliberate homicide under the felony-murder rule) was acquitted of that charge. St. v. Nichols, 225 M 438, 734 P2d 170, 44 St. Rep. 382 (1987).

Negligent Homicide Instruction When Deliberate Homicide Charged — Right to Instruction if any Evidence Supports Negligence: It was reversible error requiring a new trial when court in which appellant was charged with deliberate homicide and convicted of mitigated deliberate homicide refused to give a negligent homicide instruction, because there was conflicting evidence on what blows were inflicted upon victim, who died after a fight with appellant, and on the reasons for the blows and the exact cause of death. There was evidence to support a negligent homicide instruction, and it is a fundamental rule that the instructions should cover every issue or theory having support in the evidence. St. v. Sotelo, 209 M 86, 679 P2d 779, 41 St. Rep. 568 (1984).

Intent to Cause Death Instruction: Defendant was convicted of deliberate homicide. On appeal he contended an instruction that said the State must prove defendant "purposely or knowingly performed the act or acts causing the death of Floyd Azure" allowed the jury to convict him if it found he intended to perform the act which caused death rather than intending death as the result of the act. The court held that although the requisite mental state attaches to the result in deliberate homicide cases, the instructions taken as a whole were proper and fairly and accurately presented the case to the jury. The jury could not have convicted defendant unless it found he had performed the act or acts causing Azure's death with the knowledge that he was causing or with the purpose to cause Azure's death. St. v. Weinberger, 204 M 202, 665 P2d 202, 40 St. Rep. 844 (1983), distinguished in In re R.L.S., 1999 MT 34, 293 M 288, 977 P2d 967, 56 St. Rep. 149 (1999).

Failure to Instruct on Lesser Included Offense — Review in Federal Habeas Corpus Proceeding: Failure of the trial court to instruct the jury on the lesser included offenses of mitigated and negligent homicide does not present a federal question cognizable in a federal habeas corpus proceeding. Bashor v. Risley, 539 F. Supp. 259, 39 St. Rep. 960 (D.C. Mont. 1982).

Defense of Occupied Structure Not Available if Entry Made Peacefully or Lawfully: The Montana statute defining the justifiable use of force in defense of an occupied structure is derived from Illinois law, which requires an unlawful entry to trigger the statute. The defendant could not assert justification when the victims entered her premises lawfully and then engaged in unlawful conduct for which the defendant sought to expel the victims. The appellant asserted that once she had ordered the customers out of her bar and they refused to go, their continued presence became an unlawful entry. The reviewing court concluded that the shooting did not occur while the appellant was trying to prevent or terminate an entry into her premises. No authority was cited by the appellant or found by the court to support the theory that a "tumultuous entry" into a tavern makes the entry unlawful. The refusal of the offered instructions was proper. St. v. Sorenson, 190 M 155, 619 P2d 1185, 37 St. Rep. 1834 (1980). See also St. v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 623.

Verbal Provocation Enough to Become Aggressor: In appealing her conviction for deliberate homicide and aggravated assault, the defendant alleged error in jury instructions on an aggressor's use of force in self-defense and an aggressor's duty to withdraw. She contended she was not the aggressor and argued that the instructions were abstract and incomplete statements of the law and that a person must have the specific intent to become an aggressor before he or she may be deprived of the right of self-defense on the ground of provocation. The reviewing court held that the evidence supported the giving of the instructions and stated that a person could become an aggressor if he or she purposely or knowingly provoked the victim verbally. The court noted that the jury was instructed on the requisite mental state in both challenged instructions. St. v. Sorenson, 190 M 155, 619 P2d 1185, 37 St. Rep. 1834 (1980).

Adequacy of Jury Instruction — Definition of Statutory Term — Case-by-Case Determination: Defendant in a deliberate homicide case urged that a proposed jury instruction defining "forcible felony" was refused incorrectly. As in an earlier case, the Montana Supreme Court held that a definition of every term in an applicable statute need not be given but rather, by necessity, each case must be considered on its own facts as to the adequacy of instructions on every theory having support in the evidence presented. Here, the definition of "forcible felony" added nothing to the term being defined and the lack of the instruction could not prevent the defendant from fully presenting his case to the jury. Therefore, there was no error in refusing the proposed instruction. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Jury Instruction on "Aggressor" — Self-Defense: An instruction defining "aggressor" and stating the unavailability of the defense of self-defense to an aggressor was appealed because there allegedly was no evidence presented in support of the instruction and, as given, allegedly was an incorrect statement of the law. The Supreme Court said that the trial judge must instruct the jury on every essential question presented by the evidence. Testimony that the defendant and a friend had made efforts to attract the victim's attention as he came out of the bar just before the shooting, coupled with the testimony of the defendant's prior acts of hostility towards the victim and his girlfriend, was sufficient to justify the aggressor instruction. Defendant's allegation that the jury instruction incorrectly stated the law was also rejected on appeal. The exceptions to the lack of availability of the defense of self-defense to an aggressor were inapplicable to the facts. Furthermore, the State had offered an instruction incorporating statutory language of 45-3-105, but the defendant rejected that proposed jury instruction. The reviewing court held that having objected to the very instruction he now asserts should have been included, defendant may not then predicate error on the absence of the qualifying instruction. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Jury Instruction on "Occupied Structure" — Coverage of Vehicles: On appeal from a conviction for deliberate homicide, the defendant claimed his proposed jury instruction on "occupied structure" was correct because the statutory definition includes "vehicle". However, the Chevrolet Blazer in which the defendant was sitting when he shot the victim was not covered by the definition, since the structure must be suitable for human occupancy or night lodging of persons or for carrying on business and the Blazer was not so suitable. A defendant is entitled to an instruction having support in the evidence presented but not if there is no such support. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Jury Instructions on Lesser Included Offenses — No Error When Omitted Instruction Not Offered by Appellant: On appeal, the defendant in a deliberate homicide case alleged error in the failure to give jury instructions on mitigated deliberate homicide and negligent homicide. The general rule is that an instruction is required where there is some evidence to support the lesser included offense. Both negligent homicide and mitigated deliberate homicide are to be considered lesser included offenses of deliberate homicide. Here, a lesser included offense instruction was offered by the State and objected to by the defense. The Montana Supreme Court reiterated its position that error may not be predicated upon the failure to give an instruction when the party alleging the error failed to offer the instruction. Failure to offer an instruction removes the cause of error, particularly when the defense counsel has objected to the instruction upon the ground that the defendant was either guilty of deliberate homicide or not guilty. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Jury Instructions on "Serious Bodily Harm" and "Serious Bodily Injury" — Applicability — Requirements: Defendant in a deliberate homicide case contended on appeal that the trial court failed to instruct the jury fully and fairly on the law of self-defense. The disagreement centered on the differences between "serious bodily harm" and "serious bodily injury", and the proper uses of instructions on the two terms. The Montana Supreme Court said that the test is whether the instructions given on justifiable force gave the defendant ample opportunity to expound to the jury in argument his theory with respect to the use of force as self-defense against an unlawful act. The court found the test had been passed in this case. Further, the court agreed that "harm" and "injury" are not necessarily synonymous and that there is no indication that the Legislature intended to integrate the definition of "serious bodily injury" into the self-defense statute. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Proof of Elements of Crime — Sandstrom-Type Jury Instruction: Defendant, convicted of attempted deliberate homicide and aggravated burglary, appealed claiming error in the jury instruction stating that "you may infer that the attempted homicide was committed knowingly or purposely" under certain circumstances. Because the instruction did not apply to the burglary charge, that conviction stood. As to the homicide charge, the Supreme Court said that the instruction in question must be examined in the context of the other instructions given, as the court had decided previously that an identical instruction was not error in the context of the other instructions given. In finding the instruction in question here not error, the court contrasted the Sandstrom instruction, a presumption mandatory by its very terms which allowed the jury no discretion, with the instruction here in which the jury was told it "may infer" an element of the crime, namely, that the attempted homicide was committed knowingly or purposely. The latter instruction referred to an inference of fact and was, by its express terms, permissive. The language did not involve either a conclusive or burden-shifting presumption, nor did the instruction have the effect of allocating to the defendant some part of the burden of proof that properly rested on the state throughout the trial. This was made clear by the other instructions given by the trial court. It was not necessary for the jury to be instructed that they need not make the inference because the terms of the instructions made clear the effect and operation of the inference. Further, the operation and effect of the inference was clearly explained to the jury. St. v. Sheriff, 188 M 26, 610 P2d 1157 (1980).

Felony Murder — Flight After — Instruction Justified by Evidence: It was not error to give an instruction concerning the felony-murder rule of 45-5-102 where the evidence established that a homicide was committed while defendant was in flight after committing a burglary. In order for the court to reverse the District Court's ruling on the instructions, objection must be made at the time the instruction is proposed, and this was not done here. St. v. Sunday, 187 M 292, 609 P2d 1188 (1980).

Self-Defense Admits Purposeful Act — No Undue Burden: Defendant contends the jury was incorrectly and incompletely instructed on the affirmative defense of self-defense. Self-defense admits a purposeful act but claims the purposeful act was justified. Defendant asserts the trial court's instructions failed to explain self-defense as a concept of fear to be judged in light of appearances and failed to explain that he had no duty to retreat. The concepts of self-defense were conveyed to the jury by the body of the instructions. The defendant was given ample opportunity to present his theory of defense to the jury. Evidence presented by the State showing the totality of the circumstances surrounding the homicides did not raise the issue of self-defense. The defendant was required to present evidence of self-defense, and no undue burden was placed upon him by the trial court. St. v. Sunday, 187 M 292, 609 P2d 1188 (1980).

Sandstrom Jury Instruction — Presumptions of Intent of Consequences of Acts — Harmless Error: Defendant, charged with mitigated deliberate homicide, alleged as error the giving of the jury instruction, "The law presumes that a person intends the ordinary consequences of his voluntary acts." Under Montana law, causing the death of another becomes deliberate homicide only when it is committed purposely or knowingly. These elements are necessary to the proof of this particular crime and must be proved beyond a reasonable doubt by the prosecution. Intent is a difficult element to prove. The evidence normally must be in the nature of outward manifestations of the defendant's state of mind, but when a telephone line to the police station from the scene of the murder happened to be open and the defendant was overheard at length, the court knew what he was thinking from his own words. It is difficult to conceive of a better indication as to defendant's intent. Also, the officer heard the fight at the time these words were spoken, and another officer found the defendant and the victim's body minutes later. The only contested element here was intent, and the evidence on it was overwhelming. Basing its holding on the probable impact of the instructions upon the minds of the average jury, in the light of the evidence, the impact of the instruction upon the jury could not reasonably have contributed to the verdict. The error in giving the contested instruction was harmless. St. v. Hamilton, 185 M 522, 605 P2d 1121 (1980).

Sandstrom Instruction — Viewing Instructions as a Whole — Assurance of Effect on Jury: Petition for Writ of Habeas Corpus was filed in U.S. District Court. When the Sandstrom instruction (Sandstrom v. Mont., 442 US 510 (1979)) was given at a homicide trial, it may be that the defect can be cured by viewing all of the instructions as a whole; other instructions may be so "rhetorically inconsistent" (ibid. 518-519, n. 7) with the Sandstrom instruction that they overcome its presumptive effect. The court may not speculate on the curative effects of the other instructions on the jury; it must be assured that the jury did not find the defendant guilty on the grounds that he merely acted voluntarily, rather than finding the necessary criminal intent. In examining the instructions given, the court was not so assured and the petition for a Writ of Habeas Corpus was granted. McGuinn v. Crist, 492 F. Supp. 478 (D.C. Mont. 1980).

Jury Instruction on "Knowingly": The District Court does not invade the factfinding duty of the jury to find the intent for a crime when it instructs that "a person acts knowingly with respect to the result of conduct [constituting a crime] when he is aware that it is highly probable that such result [would] . . . be caused by his conduct". The jury is not called upon to determine "high probability" in place of "reasonable doubt" but rather the existence of defendant's awareness, beyond a reasonable doubt, of a high probability that the result of his conduct makes his conduct criminal. It is consistent with modern concepts of intent to define knowledge as an awareness of probable consequences, so that no error was committed in giving this instruction. St. v. Coleman, 185 M 299, 605 P2d 1000 (1979). For full appellate history of Coleman, see case note at 45-2-101, SERIOUS BODILY INJURY, *Evidence.*

Test of Prejudicial Effect of Jury Instruction Under Sandstrom Rule: The true test of a jury instruction under the Sandstrom decision is whether that instruction has the effect of allocating to the defendant some part of the burden of proof that properly rests on the State throughout the trial. The Sandstrom instruction was by its terms mandatory, but the Coleman instruction is permissive and in terms of an inference which might be drawn by the jury. When read in conjunction with the other instructions, the instruction stating that if the jury found defendant to have committed the homicide and that if no circumstances of mitigation, excuse, or justification were found that the jury might infer that defendant acted knowingly or purposely was not prejudicial to defendant. St. v. Coleman, 185 M 299, 605 P2d 1000 (1979). For full appellate history of Coleman, see case note at 45-2-101, SERIOUS BODILY INJURY, *Evidence.*

Sandstrom Instruction — Presumption of Intent — Constitutionality — Harmless Error: The jury in a deliberate homicide case was instructed that "the law presumes that a person intends the ordinary consequences of his voluntary acts". The U.S. Supreme Court determined that this instruction denied a defendant the constitutional right to a jury determination of proof beyond a reasonable doubt of all elements of the offense. The case was remanded to the Montana Supreme Court to determine if the instruction constituted harmless error. To find harmless error, the court must be able to assert that the offensive instruction could not reasonably have contributed to the jury verdict. The court could not make this assertion. The case was remanded to the District Court for retrial. St. v. Sandstrom, 184 M 391, 603 P2d 244 (1979).

Knowingly and Purposely: The Montana Criminal Code of 1973 replaced the former terms relating to "mens rea", such as "willfully", "deliberately", and "intentionally", with the terms "knowingly" and "purposely", both of which are carefully defined in 94-2-101, R.C.M. 1947 (now 45-2-101). Instructions defining "knowingly" and "purposely" are all that are required (citing Montana Criminal Code, 1973, Annotated). St. v. Sharbono, 175 M 373, 563 P2d 61 (1977).

Mitigated Deliberate Homicide Instruction Unnecessary:

Defendant was not entitled to an instruction on mitigated deliberate homicide where his only defense was that he had nothing to do with the killing and no evidence of mitigation was presented. St. v. Baugh, 174 M 456, 571 P2d 779 (1977). See also St. v. Craft, 2023 MT 129, 413 Mont. 1, 532 P.3d 461.

Where evidence established that the defendant first wounded the victim, then walked towards the victim shooting him twice more before inflicting the fatal shot at pointblank range, there was sufficient evidence to establish deliberate homicide and an instruction on mitigated deliberate homicide was unnecessary. St. v. Buckley, 171 M 238, 557 P2d 283 (1976).

Degree of Proof: Instruction defining the degree of proof necessary to convict as being that which convinces the mind "to a moral certainty of the truth of the charge, no more and no less" was proper. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976). For full appellate history of McKenzie, see case note at 45-5-102, INFORMATION and INDICTMENT, *Felony Murder Alleged.*

Incomplete Instruction: Jury instruction that was not a complete statement of the law defining manslaughter was not reversible error as the whole of the law on a subject cannot be given in one instruction. In determining the effect of given instructions, all instructions must be considered as a whole to determine if they fairly tender the case to the jury. St. v. Caryl, 168 M 414, 543 P2d 389 (1975).

Inclusion of "Only" in Standard of Proof: In prosecution for murder, trial court erred by giving instruction describing State's burden as "only that degree of proof" and proof beyond a reasonable doubt as "only such proof as may be" since the inclusion of the word "only" could tend to confuse a jury composed of laymen and in effect dilute the degree of guilt and proof the State is bound to establish. St. v. Taylor, 163 M 106, 515 P2d 695 (1973).

Proof of Corpus Delicti: In prosecutions for first-degree murder, trial court did not err in refusing defendant's proposed instructions in the language of the section on proof of corpus delicti where the matter of proof beyond a reasonable doubt was included in another instruction. St. v. Quigg, 155 M 119, 467 P2d 692 (1970).

SENTENCING

Life Sentence for Juvenile Offender Upheld — Miller v. Alabama Is Procedural Rule — Not Substantive — Not Watershed Procedural — Not Retroactive on Collateral Review: In 1984, petitioner was sentenced to the maximum sentence of 100 years' imprisonment for a deliberate homicide that was committed when he was age 17. Twenty-eight years later, the U.S. Supreme Court held in Miller v. Alabama, 567 US 460, 132 S Ct 2455 (2012), that: (1) mandated life incarceration without the possibility of parole for a juvenile offender is unconstitutional; and (2) a sentencer must follow a certain process before imposing a life without the possibility of parole sentence on a juvenile. In light of Miller, petitioner, in a habeas corpus proceeding, argued that his sentence is equal to life without parole and unconstitutional given that his sentencer did not consider how age counseled against his sentence. After concluding that the sentencing consideration rule is a new rule, subject to the general rule of nonretroactivity, the Supreme Court declined to apply an exception and label the rule as a substantive rule or a watershed procedural rule. Instead, the court determined that Miller is a procedural rule that is not retroactive on collateral review and it did not reach the merits in the case. Beach v. St., 2015 MT 118, 379 Mont. 74, 348 P.3d 629.

Aggravated Assault as Lesser Included Offense of Felony Homicide — Merger of Offenses — Conviction for Both Offenses Error: Russell was convicted of felony homicide and aggravated assault. Aggravated assault was charged as the predicate offense for charging felony homicide. Russell asserted that because the felony homicide conviction was predicated on the same assault, the conviction for aggravated assault should be dismissed. The District Court declined to dismiss the assault conviction, but on appeal the Supreme Court reversed. A defendant cannot be found guilty of felony homicide without having committed a predicate felony offense. When the offenses are charged in that fashion, the offenses merge and the predicate offense becomes a lesser included offense of felony homicide. Therefore, the District Court erred by not granting Russell's motion to dismiss the lesser included offense of aggravated assault after being convicted of felony murder. St. v. Russell, 2008 MT 417, 347 M 301, 198 P3d 271 (2008), followed in St. v. Williams, 2010 MT 58, 355 Mont. 354, 228 P.3d 1127, regarding vacation of lesser included offense and denial of new trial despite double jeopardy violation.

Life Sentence Under Felony-Murder Rule Not Considered Cruel and Unusual Punishment: Although his accomplice admitted committing the murder, Rickman was involved, pleaded guilty, and was convicted of deliberate homicide under the felony-murder rule. Rickman was sentenced to life with no parole eligibility for 55 years and appealed on grounds that the sentence was cruel and unusual punishment because the sentence was the same as the sentence of his accomplice who actually committed the murder, even though Rickman was less culpable.

Deferring a detailed proportionality analysis to the Sentence Review Board, the Supreme Court nevertheless considered whether Rickman's sentence violated the prohibition against cruel and unusual punishment and decided in the negative. Given the horrific and random nature of the crime and Rickman's significant role in it, the sentence was not so disproportionate as to shock the conscience, and when combined with Rickman's substantial criminal history and a higher-than-average statistical risk that Rickman would reoffend, the sentence was not considered cruel and unusual and was affirmed. St. v. Rickman, 2008 MT 142, 343 M 120, 183 P3d 49 (2008).

Partial Parole Restrictions Affirmed: Rickman was sentenced to life with no parole eligibility for 55 years for deliberate homicide under the felony-murder rule. Rickman appealed the sentence on grounds that the sentencing court had no authority to restrict parole eligibility for only part of the sentence. Noting that challenges to partial parole restriction have been upheld since at least 1988, the Supreme Court disagreed with Rickman's assertion. A sentencing court has discretion to impose parole restrictions, and if a sentencing court has discretion to impose a restriction of no parole eligibility, then a sentencing court can likewise impose a restriction of limited parole eligibility. St. v. Rickman, 2008 MT 142, 343 M 120, 183 P3d 49 (2008). See also St. v. Kirkbride, 2008 MT 178, 343 M 409, 185 P3d 340 (2008), and St. v. Bullman, 2009 MT 37, 349 M 228, 203 P3d 768 (2009).

Federal Prohibition Against Penalty Beyond Statutory Maximum Not Retroactively Applicable: Following Gratzer's 1982 conviction for deliberate homicide, the District Court sentenced Gratzer to a consecutive 10-year term for using a weapon in committing the crime. The U.S. Supreme Court subsequently decided Apprendi v. N.J., 530 US 466 (2000) (followed in Ring v. Ariz., 536 US 584 (2002), and Blakely v. Wash., 542 US 296 (2004)), holding that other than the fact of a prior conviction, any fact that increases a penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Gratzer later petitioned for a writ of habeas corpus on grounds that the consecutive sentence for use of a weapon was a violation of Gratzer's constitutional rights. Gratzer's sentence enhancement was not submitted to the jury, so Apprendi was potentially applicable. Notwithstanding that Gratzer's conviction became final in 1984, long before Apprendi and its progeny were decided, the Supreme Court nevertheless considered Gratzer's claim pursuant to Teague v. Lane, 498 US 288 (1989), on grounds of whether Apprendi and its progeny applied retroactively. Under Teague, a new constitutional rule of criminal procedure does not apply retroactively to cases on collateral review unless the rule: (1) places certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe; or (2) qualifies as a watershed rule of criminal procedure. Noting that the U.S. Supreme Court held that Ring (and by implication Apprendi and Blakely) did not apply retroactively in Schriro v. Summerlin, 542 US 348 (2004), the court applied the Schriro rationale to Gratzer's case, holding that Apprendi failed to satisfy the first Teague exception for retroactivity because Apprendi announced a rule that did not inhibit the state's ability to substantively proscribe and punish a defendant for using a weapon in the commission of an offense, but merely established procedures that the state must follow in doing so, nor did the Apprendi rule qualify as a watershed rule of criminal procedure without which the likelihood of an accurate conviction would be seriously diminished. Federal courts of appeals nearly unanimously agree that the Apprendi line of cases do not apply retroactively to cases on collateral review, and the Supreme Court concurred. Gratzer's petition was denied. Gratzer v. Mahoney, 2006 MT 282, 334 M 297, 150 P3d 343 (2006).

Maximum Statutory Sentence for Deliberate Homicide When Death Penalty Not Sought: Because 46-18-202(2) does not remove from the jury a determination of facts necessary to restrict parole, the statutory maximum for deliberate homicide when the death penalty is not sought is life imprisonment without the possibility of parole. St. v. Garrymore, 2006 MT 245, 334 M 1, 145 P3d 946 (2006), followed in St. v. Giddings, 2009 MT 61, 349 M 347, 208 P3d 363 (2009).

No Implied Presumption of Parole Eligibility — Federal Constitutional Protections Not Violated by Sentence of Life Imprisonment Without Parole — Montana Constitutional Protections Not Addressed: Garrymore was sentenced to life in prison without parole for the deliberate homicide of his adopted infant child. Garrymore appealed the parole restriction and sought to have the sentence vacated on grounds that subsection (2) of this section contains an implicit presumption of parole eligibility. Garrymore contended that under the statute, standing alone and without the operation of 46-18-202, he was entitled to a parole-eligible sentence, subject to 46-23-201, that was taken away by the sentencing judge in violation of due process and a trial by jury. The Supreme Court found nothing in sentencing statutes that creates a presumption in favor of parole eligibility that must be overcome in order for a sentencing judge to impose a parole restriction. Rather, sentencing courts have broad discretion under 46-18-202 to impose parole eligibility restrictions on felony sentences, and the Legislature has placed no limitation on the exercise of that authority. A parole-eligible sentence was not taken away from Garrymore because he was not entitled to such a sentence to begin with. Additionally, although the judge must state the reasons for a parole eligibility restriction when one is imposed, no particular finding of fact need be included among those reasons. Therefore, because the statutory maximum for violating subsection (1)(a) of this section is life in prison without parole, restricting Garrymore's parole eligibility did not violate any federal constitutional rights. The Supreme Court also declined to address Garrymore's undeveloped argument that the parole eligibility restriction violated the Montana Constitution's greater jury trial right absent a compelling reason why Montana's greater jury trial right dictated a different result. St. v. Garrymore, 2006 MT 245, 334 M 1, 145 P3d 946 (2006).

Sentencing Court Neither Allowed nor Required to Increase Punishment for Charged Offense: Garrymore contended that 46-18-202 allowed or required the sentencing court to add on to the sentence imposed by subsection (2) of this section, in violation of 46-1-401. The Supreme Court disagreed. Under this section, a District Court may impose both life imprisonment and life imprisonment without the possibility of parole. Thus, 46-18-202(2) does not, vis-a-vis an act, omission, or fact, allow or require a sentencing court to increase punishment for a charged offense. St. v. Garrymore, 2006 MT 245, 334 M 1, 145 P3d 946 (2006).

Absence of Facts Indicating Unconstitutional Sentence — Maximum Sentence Affirmed: Brown cited St. v. Baldwin, 192 M 521, 629 P2d 222 (1981), and St. v. Tate, 196 M 248, 639 P2d 1149 (1982), in arguing that a disparity between his sentence for deliberate homicide and a plea bargain offered by the state indicated that his due process rights were violated. The Supreme Court distinguished Baldwin and Tate because in Brown's case, the District Court was not directly involved with the plea negotiation process. Rather, the District Court enumerated a lengthy list of factors that were considered in imposing the maximum sentence on Brown. Absent anything in the record to support Brown's claim that his sentence was unconstitutional, the Supreme Court affirmed the sentence. St. v. Brown, 2003 MT 166, 316 M 310, 71 P3d 1215 (2003).

Death Sentence Appropriate Penalty for Deliberate Homicide by Accountability: Once a defendant is found guilty of deliberate homicide (acting alone) or deliberate homicide by accountability (not acting alone), the death penalty is an appropriate sentence. St. v. Turner, 262 M 39, 864 P2d 235, 50 St. Rep. 1267 (1993); St. v. Gollehon, 262 M 1, 864 P2d 249, 50 St. Rep. 1250 (1993). See also People v. Ruiz, 447 NE 2d 148 (Ill. 1982).

Death Sentence Following Invalid Life Sentence — Double Jeopardy: Defendant who was given a life sentence at his first deliberate homicide trial could not be given a death sentence at retrial because it placed him in double jeopardy. The life sentence constituted acquittal as to aggravating circumstances that would have justified the death penalty. Fitzpatrick v. McCormick, 869 F2d 1247 (9th Cir. 1989).

Sentence of 100 Years Appropriate for Guilty Plea to Deliberate Homicide: The two defendants, both 19 years of age, pleaded guilty to deliberate homicide. The guilty pleas involved a plea bargain in which the maximum sentence was reduced from a possible term of 140 years to 100 years. Both defendants received the benefit of the elimination of the potential additional 40 years for armed robbery. The sentence handed down by the court is within the statutory limits and therefore is not an abuse of discretion. St. v. Hintz, 213 M 364, 691 P2d 814, 41 St. Rep. 2172 (1984).

Increase of Sentence After New Trial — Due Process: The defendant, who had been sentenced to 100 years imprisonment for deliberate homicide, was not denied due process of law when, after a new trial on the same charge, he was sentenced to death. The Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal but only those that pose a realistic likelihood of vindictiveness. When the District Court Judge was replaced for the new trial and sentencing and the new judge stated his reasons for imposing the death penalty with clarity, the threat of vindictiveness was not a realistic likelihood. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343 (1980).

GUILTY PLEAS

Plea of Guilty — Felony Killing — Explanation of Intent: Defendant plead guilty to deliberate homicide and admitted in his confession that he entered a service station with the intent to rob it and that he shot a man. He did not prevail in his contention in a federal habeas corpus action that he did not understand the element of intent involved in deliberate homicide so that his plea of guilty was invalid as lacking informed consideration because he clearly had the intent to rob;

and under 45-5-102 as it relates to felony killing, that constitutes deliberate homicide, thus, further explanations of intent are unnecessary. Brown v. Crist, 492 F. Supp. 965 (D.C. Mont. 1980).

When Mitigating Factors Exist: Where there was evidence of mitigating factors, a judge, before accepting a plea of guilty of deliberate homicide, should have informed the defendant of the possibility of being found guilty at trial of mitigated deliberate homicide. St. v. Azure, 175 M 189, 573 P2d 179 (1977).

Attorney General's Opinions

Injuries to or Death of Firefighters Covered by Arson Statute: A person who negligently places a firefighter responding to a fire in danger of death or bodily injury by purposely or knowingly starting a fire or causing an explosion commits the offense of negligent arson under 45-6-102. 39 A.G. Op. 10 (1981).

Law Review Articles

The Death Penalty in Montana: A Violation of the Constitutional Right to Individual Dignity, Eklund, 65 Mont. L. Rev. 135 (2004).

45-5-103. Mitigated deliberate homicide.

Criminal Law Commission Comments

Source: New and M.P.C. 1962, § 210.3.

Section 94-5-103 [now MCA, 45-5-103] specifies the circumstances under which the punishment for deliberate homicide is mitigated.

Compiler's Comments

2013 Amendment: Chapter 271 in (1) in first sentence after "human being" inserted "or purposely or knowingly causes the death of a fetus of another with knowledge that the woman is pregnant". Amendment effective October 1, 2013.

Severability: Section 6, Ch. 271, L. 2013, was a severability clause.

2003 Amendment: Chapter 22 deleted former (2) that read: "(2) It is an affirmative defense that the defendant acted under the influence of extreme mental or emotional stress as provided in subsection (1). This defense constitutes a mitigating circumstance reducing deliberate homicide to mitigated deliberate homicide and must be proved by the defendant by a preponderance of the evidence"; in (2) provided that mitigated deliberate homicide is a lesser included offense of deliberate homicide as defined in 45-5-102(1)(a) but not in 45-5-102(1)(b); inserted (3) clarifying that mitigating circumstances are not an element of the reduced crime or an affirmative defense that requires proof, but allowing presentation of mitigating evidence by either party; and made minor changes in style. Amendment effective October 1, 2003.

Applicability: Section 2, Ch. 22, L. 2003, provided: "[This act] applies to offenses committed after [the effective date of this act]." Effective October 1, 2003.

1995 Amendment: Chapter 482 in version effective July 1, 1997, in (2), at end of first sentence, substituted "as provided in subsection (1)" for "for which there was reasonable explanation or excuse, the reasonableness of which shall be determined from the viewpoint of a reasonable person in the actor's situation"; in (4), near end, inserted reference to 46-18-219; and made minor changes in style.

Coordination Instruction — Effective Dates: Section 21, Ch. 482, L. 1995, provided: "(1) If House Bill No. 357 and [this act] [Senate Bill No. 66] are both passed and approved:

(a) [sections 1 through 18] of [this act] are effective July 1, 1997; and

(b) the sentencing commission shall include recommendations for implementing the public policy contained in [sections 1 through 18] of [this act].

(2) [Sections 19, 20, and this section] [enacted as codification and coordination instructions] are effective July 1, 1995.

(3) If House Bill No. 357 is not passed and approved, then this section is void." House Bill No. 357 was approved March 31, 1995, as Ch. 306, L. 1995. Therefore, the amendments to 45-5-103, enacted as sec. 3 of Senate Bill No. 66, are effective July 1, 1997.

1987 Amendment: At beginning of (1) substituted "A person commits the offense of" for "Criminal homicide constitutes" and after "homicide when" substituted "he purposely or knowingly causes the death of another human being but does so" for "a homicide which would otherwise be deliberate homicide is committed"; inserted (2) concerning affirmative defense in mitigated deliberate homicide; and inserted (3) providing that mitigated deliberate homicide is not an included offense in felony murder deliberate homicide.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section replaces the former offense of voluntary manslaughter. Traditionally, voluntary manslaughter has been defined as the unlawful killing of a human being without malice upon sudden quarrel or in the heat of passion. The crime customarily applied to cases in which the actor killed intentionally but because he did so in the heat of passion could not be said to have deliberated his act. This section continues the coverage of former law by finding guilt for mitigated deliberate homicide where the actor has killed knowingly or purposely (defined in MCA 45-2-101) but in which mitigating circumstances in the form of extreme emotional distress can be shown. The section follows former law additionally by providing both a lesser included offense for deliberate homicide when mitigating evidence is presented by the defense and a principal offense when the prosecution has conclusive evidence of mitigation before the trial. The section seeks, however, to avoid many of the definitional problems which pervaded the traditional approach to manslaughter by eliminating the terms "malice", "heat of passion", "sudden provocation", and by changing the title of the offense. It should be noted that the factor of mitigation is not an element which the prosecution must prove but is a defense which the defendant must raise. The wording for this section has been adapted from the Model Penal Code.

The 1977 amendment substituted "a term of not less than two years or more than forty years except as provided in 95-2206.18" in subsection (2) for "any term not to exceed forty (40) years", thus imposing a mandatory minimum sentence for the commission of the offense.

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GENERAL

Burden on State in Justifiable Use of Force Case to Prove Absence of Justification: The enactment of 46-16-131 in 2009 abrogated St. v. Henson, 2010 MT 136, 356 Mont. 458, 235 P.3d 1274, St. v. Longstreth, 1999 MT 204, 295 Mont. 457, 984 P.2d 157, and other cases to the extent they held the burden of establishing justifiable use of force was the defendant's. Under 46-16-131, a defendant has the initial burden of offering evidence of justifiable use of force; the burden then shifts to the state to prove the absence of justification beyond a reasonable doubt. St. v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 623.

Verdict of Guilty of Deliberate Homicide Against One Victim Not Inconsistent With Verdict of Guilty of Mitigated Deliberate Homicide Against Another Victim — Motion for Modified Verdict Properly Denied: Azure contended that the District Court should have granted his motion for a modified verdict, because the jury's verdict on deliberate homicide against one victim was logically and legally inconsistent with the jury's verdict of mitigated deliberate homicide against another victim. The Supreme Court disagreed. As stated in St. v. Sanderson, 214 M 437, 692 P2d 479 (1985), when separate acts are charged in an information, and each act is a separate offense, an acquittal or conviction of one or more counts does not affect the other counts. In Azure's case, for a charge of deliberate homicide to be reduced to mitigated deliberate homicide, the jury had to be convinced by a preponderance of the evidence that a reduction was warranted. The Supreme Court examined the record and concluded that the jury could logically have concluded that there was no reasonable explanation or excuse for Azure to shoot at one victim, while also concluding that there was a reasonable explanation for Azure's actions toward the other victim; therefore, denial of Azure's motion to modify the verdict was not erroneous. St. v. Azure, 2002 MT 22, 308 M 201, 41 P3d 899 (2002).

Application of Weapon Enhancement Statute to Conviction for Mitigated Deliberate Homicide Not Violative of Double Jeopardy Protection: Park was sentenced to 40 years for mitigated deliberate homicide, plus 10 years for use of a weapon. Citing St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999), Park contended on appeal that the imposition of the additional weapon enhancement sentence violated the constitutional prohibition against double jeopardy. The Supreme Court distinguished Guillaume because the offense charged in that case was felony assault, which requires the use of a weapon, while mitigated deliberate homicide does not. The double jeopardy question under Guillaume and its progeny is not whether a weapon was used in the offense, but rather whether the statutory definition of the offense includes the use of a weapon, with the result that defendant is punished twice for the same offense. The court also discounted Park's argument that use of a weapon is implied every time that a deliberate or mitigated homicide occurs. The court has limited the definition of weapon in several cases, and case law also provides numerous instances of homicide when no conceivable weapon caused the death. Park's enhanced sentence for use of a weapon was affirmed. St. v. Park, 2001 MT 157, 306 M 98, 30 P3d 1062 (2001), following St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966 (2000), and St. v. Dunnette, 2000 MT 33, 298 M 208, 996 P2d 379 (2000).

Authority of Prosecution to Conduct Mental Examination When Defense Based on Extreme Mental or Emotional Stress and Not Mental Disease or Defect: Park, who was charged with forgery and deliberate homicide, filed notice of his intent to use the affirmative defense that extreme mental and emotional stress caused him to commit the offenses and gave notice of his intent to use expert psychological testimony in the course of his defense. The state requested an examination of Park by its own psychological expert, but Park objected to the oral part of the requested examination on the grounds that his defense was not reliance upon a mental disease or defect and the state therefore had no right to a psychological examination. The Supreme Court, citing St. v. Hess, 252 M 205, 828 P2d 382 (1992), held that although 46-14-205 does not expressly grant the prosecution access for psychological testing purposes to a defendant who bases a defense upon mental or emotional stress, that section does apply generally to a defense based upon mental state to be proved by expert psychological testimony and therefore applied to Park's defense. In reaching this conclusion, the Supreme Court noted that: (1) fairness requires that if the defendant is going to rely upon his mental state, the state be allowed to test the defendant as to that mental state; (2) it was not holding that the state has a right of access for psychological testing purposes to every defendant in a case relying upon mitigated deliberate homicide, only that the state has the right in those cases in which the defendant puts the defendant's mental state at issue; and (3) access by the state to the defendant should not depend upon whether a defendant actually presents psychological testimony because to so require would put the state at a disadvantage and delay the trial. Park v. District Court, 1998 MT 164, 289 M 367, 961 P2d 1267, 55 St. Rep. 657 (1998).

Defense of Mental State for Mitigated Deliberate Homicide — Right of Defendant to Refuse to Answer Questions by State Psychological Expert — Remedy for Unrebuttable Testimony: Park, who was charged with forgery and deliberate homicide, filed notice of his intent to use the affirmative defense that extreme mental and emotional stress caused him to commit the offenses and gave notice of his intent to use expert psychological testimony in the course of his defense. The state requested an examination of Park by its own psychological expert, but Park objected to the oral part of the requested examination on the grounds that his defense was not reliance upon a mental disease or defect and the state therefore had no right to a psychological examination. In its decision granting supervisory control over the proceedings, the Supreme Court held that: (1) Park did not by the use of the defense of mitigated deliberate homicide waive his right to remain silent guaranteed by the U.S. and Montana Constitutions when questioned by the state's psychological expert; (2) by invoking his right against self-incrimination in the interview with the state's psychological expert, Park should not be able to put his version of the facts in the case before the jury through the testimony of his own psychological expert because giving the defendant that right would be similar to allowing Park to testify but not be subject to cross-examination, which the Supreme Court held in St. v. Wilson, 193 M 318, 631 P2d 1273 (1981), a defendant would not be allowed to do; and (3) if Park refuses to talk to the state's psychological expert but takes the witness stand in his own defense, the state's expert may listen to Park's testimony and respond accordingly to that testimony. Park v. District Court, 1998 MT 164, 289 M 367, 961 P2d 1267, 55 St. Rep. 657 (1998).

Adequacy of Advice Regarding Mitigated Deliberate Homicide: Defense counsel's use of the "heat of passion" description to explain mitigated deliberate homicide conveyed the substance of the offense. In a case in which defense counsel did not have foundational testimony to support a jury instruction on mitigated deliberate homicide, counsel's advice regarding the lesser offense was not deficient. Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997).

Transfer of Youth to District Court for Homicide Prosecution — Age of Youth Determines Whether Hearing Necessary: For a youth between 12 years and 16 years of age charged with homicide, a hearing may be held to determine whether prosecution should be transferred to District Court. For youth 16 years old or older, no hearing is authorized, and the youth must be transferred to District Court upon a motion by the County Attorney. In re Wood, 236 M 118, 768 P2d 1370, 46 St. Rep. 228 (1989).

Voluntary Intoxication — Mitigated Deliberate Homicide: On appeal of his conviction of mitigated deliberate homicide, defendant claimed that he was too intoxicated at the time of the crime to entertain the required mental state. Testimony of witnesses indicated that defendant was aware of his surroundings and of what he had done. The Supreme Court refused to overturn the conviction, pointing out that apparently the jury did take defendant's intoxication into consideration since it convicted him of mitigated deliberate homicide rather than the more serious offense of deliberate homicide. St. v. Sage, 221 M 192, 717 P2d 1096, 43 St. Rep. 738 (1986).

Death Causally Related to Intended Head Injury — No Error to Deny Withdrawal of Plea: The trial court did not abuse its discretion in denying defendant's motion to withdraw plea of guilty to charge of mitigated deliberate homicide since his acts meet the statutory requirements of the crime. Defendant by his own admissions intended to slap the victim numerous times about the head. The result, death by brain damage, may not have been intended. However, the result that did occur is a more severe form of the same kind of injury that was intended, i.e., injury to the head area of the victim. In these instances the deliberate homicide statutes and case laws state that the actor may be held accountable for the unintended death, if a causal relationship is established pursuant to 45-2-201. St. v. Koepplin, 213 M 55, 689 P2d 921, 41 St. Rep. 1942 (1984).

Mitigated Deliberate Homicide and Affirmative Defense of Justification — Elements and Burdens Involved: Defendant was charged with deliberate homicide, asserted the affirmative defense of justification or self-defense as provided in 45-3-102, and was convicted of the lesser included offense of mitigated deliberate homicide. In analyzing the relationships of burdens of proof and persuasion between the affirmative defense and the lesser included offense, the Supreme Court held that the state has the burden of proving beyond a reasonable doubt every element of the offense charged or any lesser included crime within such charge; the defendant, if he raises an affirmative defense, has the burden of producing sufficient evidence on the issue to raise a reasonable doubt of his guilt. St. v. Daniels, 210 M 1, 682 P2d 173, 41 St. Rep. 880 (1984), followed in St. v. Miller, 1998 MT 177, 290 M 97, 966 P2d 721, 55 St. Rep. 719 (1998), and St. v. Longstreth, 1999 MT 204, 295 M 457, 984 P2d 157, 56 St. Rep. 795 (1999). St. v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 623, held that the enactment of 46-16-131 in 2009 abrogated Longstreth, St. v. Henson, 2010 MT 136, 356 Mont. 458, 235 P.3d 1274, and other cases to the extent they held the burden of establishing justifiable use of force was the defendant's in a justifiable use of force case.

Burden of Proof as to Mitigating Circumstances on Neither Party: The defendant shot and killed his girlfriend's companion in a parking lot at Montana Tech (now Montana Technological University) on April 14, 1982. The issue on appeal was whether the defendant was guilty of deliberate homicide or mitigated deliberate homicide. The defendant argued that the defendant has the burden of coming forward with evidence of severe mental or emotional stress sufficient to raise a reasonable doubt, and that thereafter the state has the burden of proving beyond a reasonable doubt that defendant acted absent severe mental or emotional stress. The Supreme Court agreed with the District Court in holding that mitigating circumstances which reduce deliberate homicide to mitigated deliberate homicide are not an element of the reduced crime which the state must prove or an affirmative defense which the defendant must prove. Neither party has the burden of proof as to such mitigating circumstances, although either party may assume such burden. St. v. Gratzer, 209 M 308, 682 P2d 141, 41 St. Rep. 727 (1984), followed in St. v. Ballenger, 227 M 308, 738 P2d 1291, 44 St. Rep. 1107 (1987), and distinguished in Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997).

Amendment of Information Because of Lack of Witnesses to Justify Lesser Offense — Not an Unconstitutional Shifting of Burden: Appealing her conviction for deliberate homicide and aggravated assault, the defendant claimed that the information, which first had charged her with mitigated deliberate homicide, was amended in violation of statute and both the state and federal constitutions. The allegation of error was rejected for three reasons. First, the appellant had relied on a case which construed the applicable statute, 46-11-403 (renumbered 46-11-205), before its 1977 amendment; the shootings had occurred in 1978. Second, the claim that the burden had been shifted unconstitutionally to the defendant to prove an element of mitigated deliberate homicide was untenable because one justification for the motion to amend the information was the fact that the defendant had failed to supply the State with the names of witnesses who would justify retaining the lesser offense; when it allows affirmative defenses at all, the State may regulate the burden of producing evidence and the burden of persuasion as long as it does not thereby shift to the defendant its own burden of proof as to each of the elements of the offense beyond a reasonable doubt. Third, the argument that the 1980 Cardwell decision should be applied retroactively was rejected. Cardwell sets out procedural safeguards of the defendant's constitutional rights when an information is amended. Although the statute on its face did not require leave of the trial court to file an amended information, such leave was obtained, thereby substantially complying with the procedural requirements of Cardwell. It was noted that the defendant had adequate notice and time to prepare her defense and that the State had the burden of proving the same elements under both homicide charges in any event. St. v. Sorenson, 190 M 155, 619 P2d 1185, 37 St. Rep. 1834 (1980).

GUILTY PLEA

Acknowledgment and Waiver of Right to Stand on Nolo Contendere Plea Required: Under 46-12-211, the state can agree in a plea agreement to: (1) move for dismissal of other charges; (2) agree that a specific sentence is the appropriate disposition of the case; or (3) recommend or agree to not oppose a defendant's request for a particular sentence. The court may reject any of the three types of plea agreement. If the court rejects a plea agreement, the provisions of the agreement determine whether a defendant can withdraw a plea of guilty or nolo contendere. If the plea contains provisions wherein the state recommends or agrees to not oppose a defendant's request for a particular sentence, a defendant is not entitled to withdraw a guilty plea if the agreement is rejected. However, if the state agrees to dismissal of other charges or agrees that a specific sentence is appropriate, a defendant may elect to stand on the previously entered plea or to withdraw it, and the court must be satisfied that the defendant understands the statutory right to stand on the guilty plea as well as the possible consequences of waiving that right. In the present case, the plea agreement contained both a dismissal of other charges and a recommendation for a specific sentence, so when the agreement was rejected, the court was required to afford Bullplume an opportunity to withdraw the plea. Bullplume chose to withdraw a nolo contendere plea, but the court erred in not obtaining an acknowledgment that Bullplume understood his rights and was making an intentional and voluntary waiver of the right to stand on the nolo contendere plea to the charge of mitigated deliberate homicide. The proper remedy for failing to allow Bullplume to effectively withdraw the nolo contendere plea was to remand for sentencing on the mitigated deliberate homicide charge, with the sentencing court not being bound by the rejected plea agreement. St. v. Bullplume, 2009 MT 145, 350 M 350, 208 P3d 378 (2009).

Adequacy of Guilty Plea Colloquy — Defendant Informed of Possibility of Lesser Included Offense: The District Court did not affirmatively inquire whether defendant understood that by purposely or knowingly causing the victims' deaths, he may have committed either deliberate or mitigated deliberate homicide. However, the record demonstrated that defendant was informed of the possibility of the lesser included offense and had a full understanding of the precise kind of homicide to which he pleaded. The guilty plea colloquy was adequate. Bone v. St., 284 M 293, 944 P2d 734, 54 St. Rep. 890 (1997).

Improper Acceptance of Guilty Plea: Because the court did not determine whether defendant understood the different elements and effects of deliberate homicide and mitigated deliberate homicide, acceptance of his guilty plea was improper. The court should have granted defendant's motion for leave to withdraw the guilty plea. St. v. Azure, 175 M 189, 573 P2d 179 (1977).

INSTRUCTIONS

No Abuse of Discretion by Declining Request of Lesser-Included Offense Instruction of Mitigated Deliberate Homicide — Only Theory Offered by Defense to Deliberate Homicide Was Defendant Did Not Commit Murder — When Only Defense Theory Presented Is Acquittal, Defendant Not Entitled to Lesser-Included Offense Instructions. St. v. Craft, 2023 MT 129, 413 Mont. 1, 532 P.3d 461.

Jury Form and Instructions on Mitigated Deliberate Homicide Proper — Conviction Not Rendered Legal Impossibility: Schmidt contended that the jury's acquittal on the charge of deliberate homicide and conviction of mitigated deliberate homicide created a legal impossibility similar to Demontiney v. District Court, 2002 MT 161, 310 M 406, 51 P3d 476 (2002), requiring Schmidt's immediate release. The Supreme Court distinguished Demontiney and affirmed. The jury was instructed on the lesser included mitigated deliberate homicide offense at Schmidt's request, and the jury indicated on the verdict form that it found Schmidt not guilty of deliberate homicide. The District Court's jury instruction correctly directed the jury to consider whether Schmidt committed all the elements of deliberate homicide while acting under extreme mental or emotional stress, rather than first considering a verdict on the greater offense of deliberate homicide. In this way the District Court avoided the legal impossibility issue raised in Demontiney. Schmidt's proposed instruction contained language that would have created a prejudicial Demontiney situation, and Schmidt could not claim prejudice from the very instruction that he proposed. St. v. Schmidt, 2009 MT 450, 354 M 280, 224 P3d 618 (2009).

No Error in Use of "Lesser Included Offense" Language in Jury Instruction Defining Mitigated Deliberate Homicide: Sanchez contended that the trial court's use of the phrase "lesser included offense" in a jury instruction defining mitigated deliberate homicide improperly allowed the jury to consider sentencing in reaching a verdict because the word "lesser" may have permitted the jury to surmise that Sanchez would receive a lesser sentence if the conviction was for mitigated deliberate homicide rather than for deliberate homicide. The Supreme Court found no error in use of the phrase, noting that if Sanchez's argument prevailed, use of the word "mitigated" would also be improper. The jury instructions, when viewed as a whole, fully and fairly presented the applicable law to the jury, and Sanchez could not overcome the presumption that the jury followed the law. St. v. Sanchez, 2008 MT 27, 341 M 240, 177 P3d 444 (2008).

Improper Jury Instructions — Mitigated Deliberate Homicide Verdict Without First Finding Guilt of Deliberate Homicide — Reversible Error: Demontiney was charged with deliberate homicide. On the first morning of trial, counsel exchanged jury instructions, and neither party's instructions included mitigated deliberate homicide. Following 3 days of testimony, the state proposed an instruction on mitigated deliberate homicide, arguing that evidence introduced at trial obligated the state to offer the instruction. The trial court agreed and stated that the jury would be instructed on mitigated deliberate homicide. Consistent with St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202 (2000), the state prepared instructions and a verdict form incorporating the "failure to agree" concept, directing the jury to consider all evidence relating to both the greater and lesser charges before considering the verdict on the greater charge. Nevertheless, the trial court's instructions and verdict form did not match those offered by either party. Rather, the trial court instructed the jury that it should first consider the deliberate homicide charge, and if it reached a not guilty verdict or was unable to reach a verdict on that charge, it was then to consider the mitigated deliberate homicide charge. The jury found Demontiney not guilty of deliberate homicide, but guilty of mitigated deliberate homicide. The Supreme Court found that the jury instructions were not a full and fair instruction on the applicable law. The District Court was bound by Scarborough, whether the court agreed with that decision or not. A finding of guilt on mitigated deliberate homicide requires a finding of every element of deliberate homicide, plus an additional finding of extreme mental or emotional stress. Thus, the jury's verdict was logically impossible, prejudicing Demontiney, and the jury instructions constituted reversible error. The verdict was vacated, and Demontiney was immediately discharged. (See 2003 amendment to this section.) Demontiney v. District Court, 2002 MT 161, 310 M 406, 51 P3d 476 (2002), distinguished in St. v. Schmidt, 2009 MT 450, 354 M 280, 224 P3d 618 (2009). However, see St. v. MacGregor, 2013 MT 297, 372 Mont. 142, 311 P.3d 428, in which the Supreme Court held that an improper jury instruction on mitigated deliberate homicide did not rise to the level of plain error because the defendant did not prove any mitigating factors as a matter of law.

No Error in Refusing Instruction on Mitigated Deliberate Homicide Absent Evidence of Extreme Emotional Distress: Martin contended that during his attempted deliberate homicide trial, the trial court erred in not giving an instruction on mitigated deliberate homicide, relying on St. v. Buckley, 171 M 238, 557 P2d 283 (1976), for the proposition that the instruction is required if there is any evidence of mitigation. The evidence Martin offered in support of the contention that he was under extreme emotional distress when he shot a pursuing police officer included the surprised look on his face after the shooting, coupled with his homelessness, unemployment, and pregnant girlfriend. The trial court concluded, and the Supreme Court agreed, that Martin's reliance on Buckley was misplaced and that Martin's evidence did not rise to the level of extreme emotional or mental distress. The evidence must indicate provocation of some sort in the form of a reasonable excuse or explanation. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Deliberate Homicide Instruction Precluding Consideration of Mitigated Deliberate Homicide Incorrectly Given — Elements of Defense Not Proved — No Prejudice to Defendant Found: In giving jury instructions to a jury that heard evidence that Scarborough was a schizophrenic who had committed a murder, the District Court instructed the jury that it could convict Scarborough of mitigated deliberate homicide only if it first acquitted him of deliberate homicide, but that if it convicted Scarborough of deliberate homicide, it could go no further in its consideration of mitigated deliberate homicide. The Supreme Court held that this instruction was error because some of the elements of mitigated deliberate homicide are the same elements of deliberate homicide and the instruction precluded consideration of the defense. However, the Supreme Court held that the District Court's error was harmless because Scarborough did not prove the necessary element of mitigated deliberate homicide that he committed the murder while under extreme mental or emotional stress, because his expert witness testified only about the state of mind of schizophrenics generally and not about what state of mind Scarborough suffered from at the time that he committed the murder. The state, on the other hand, presented evidence that Scarborough committed the murder in a very deliberate way, and the Supreme Court therefore affirmed Scarborough's conviction. St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202, 57 St. Rep. 1268 (2000).

Counsel Failure to Request Lesser Included Offense Instruction Based on Defense That No Rational Jury Would Believe: In a prosecution for attempted deliberate homicide, defendant's counsel did not render ineffective assistance by failing to request a jury instruction on the lesser included offense of aggravated assault. Therefore, counsel's performance was not outside the range of competence demanded of attorneys under similar circumstances. Defendant admitted that he shot a peace officer in the chest with a .41 caliber magnum pistol while running from the officer, who only wanted to talk to him. His defense was that he thought that the officer was part of a hit team hired by the government to get him and that a voice in his head told him that the officer had a flak jacket on and that if defendant shot the officer in the chest, he would not hurt the officer. The evidence did not support the instruction, and from the evidence, it would be irrational to conclude that defendant shot the officer with any intent other than to kill him. No jury could have rationally accepted the defense and have found defendant guilty of aggravated assault and not of attempted deliberate homicide. St. v. Sellner, 286 M 397, 951 P2d 996, 54 St. Rep. 1464 (1997).

Deliberate Homicide Charged — Insufficient Evidence to Support Instruction on Negligent Homicide — No Purpose to Instruction on Definition of "Negligently": Goulet, Nelson, and Running Crane became intoxicated after drinking at several bars, and Goulet, after pushing Running Crane away when he tried to borrow a cigarette, stabbed Running Crane in the stomach, then in the chest, and finally in the back. During trial on charges of deliberate homicide, Goulet requested an instruction on negligent homicide, but the instruction was refused by the District Court. The Supreme Court held that the District Court did not err in refusing the requested instruction. The Supreme Court noted that a defendant is entitled to an instruction on a lesser included offense when the jury would be warranted in convicting on the lesser offense and acquitting on the greater offense. However, the Supreme Court noted that the only evidence that even approached evidence of negligence was that as he was stabbing Running Crane, Goulet was thinking that he hoped that he wasn't hurting Running Crane too badly. The Supreme Court called this evidence self-serving and insufficient to support the requested instruction. The Supreme Court also affirmed the District Court in its refusal to give an instruction on the definition of "negligently", saying that the District Court refused the instruction on the definition for the same reason that it refused the instruction on negligent homicide and that an instruction on the definition of a word standing alone, that is, not used in the instruction, would serve no purpose. St. v. Goulet, 283 M 38, 938 P2d 1330, 54 St. Rep. 482 (1997), followed in St. v. Fuqua, 2000 MT 273, 302 M 99, 13 P3d 34, 57 St. Rep. 1141 (2000).

Homicide Committed by Defendant While Intoxicated — Mitigated Deliberate Homicide Instruction Properly Refused: Goulet, Nelson, and Running Crane became intoxicated after drinking at several bars, and Goulet, after pushing Running Crane away when he tried to borrow a cigarette, stabbed Running Crane in the stomach, then in the chest, and finally in the back. During trial on charges of deliberate homicide, Goulet requested an instruction on mitigated deliberate homicide, but the instruction was refused by the District Court. Citing St. v. Williams, 262 M 530, 866 P2d 1099 (1993), the Supreme Court held that the District Court did not err in refusing to give the instruction because being angry or intoxicated did not warrant the instruction. Only extreme mental or emotional duress will warrant an instruction on mitigated deliberate homicide, and there were no facts presented from which the jury could find that Goulet was under either type of duress. St. v. Goulet, 283 M 38, 938 P2d 1330, 54 St. Rep. 482 (1997).

Lesser Included Offense — Jury Instruction Proper: Mitigated deliberate homicide is a lesser included offense to deliberate homicide only if the defendant presents evidence that he acted under extreme mental or emotional stress for which there is a reasonable explanation or excuse. This section does not prevent a jury's consideration of mitigating evidence and does not unconstitutionally shift the burden of proof to a criminal defendant. St. v. Knight, 251 M 85, 822 P2d 99, 48 St. Rep. 1060 (1991).

Instruction on Mitigated Deliberate Homicide Unnecessary:

Because he was charged alternatively with deliberate homicide under 45-5-102(1)(a) or (1)(b), defendant argued that the District Court erred in refusing to instruct the jury on mitigated deliberate homicide as a lesser included offense. However, having presented no credible evidence of mitigation and having espoused the theory in closing argument that he did not kill the deceased, defendant was not entitled to an instruction on mitigated deliberate homicide as a

lesser included offense. St. v. Heit, 242 M 488, 791 P2d 1379, 47 St. Rep. 919 (1990), followed in St. v. Olivieri, 244 M 357, 797 P2d 937, 47 St. Rep. 1668 (1990). See also St. v. Williams, 262 M 530, 866 P2d 1099, 50 St. Rep. 1672 (1993), and St. v. Craft, 2023 MT 129, 413 Mont. 1, 532 P.3d 461.

In a deliberate homicide trial, the court acted properly in not giving an alternate instruction on mitigated homicide when there was no evidence in the record to show mitigation. St. v. Baugh, 174 M 456, 571 P2d 779 (1977).

Where the evidence established that the defendant first wounded the victim, then walked toward the victim shooting him twice more before inflicting the fatal shot at pointblank range, there was sufficient evidence to establish deliberate homicide and an instruction on mitigated deliberate homicide was unnecessary. St. v. Buckley, 171 M 238, 557 P2d 283 (1976).

Sandstrom Instruction With Statement Presumption Disputable: Reversal of mitigated deliberate homicide conviction was required where the court gave the following Sandstrom instruction: "The law also presumes that a person intends the ordinary consequences of any voluntary act committed by him. This presumption, however, is termed a disputable presumption and may be controverted by other evidence." The error was not harmless. The instruction obviously permitted the jury to presume intent without proof beyond a reasonable doubt. Intent was hotly contested and an important element of the crime charged, and because of the instruction the jury could disregard the defendant's claim that he intended only to fire a warning shot. Then, with the presumption of intent, the jury could have concluded that defendant used deadly force to intentionally kill the victim. St. v. Musgrove, 202 M 59, 655 P2d 982, 39 St. Rep. 2327 (1982).

Jury Instruction — Justifiable Use of Force Necessitating Acquittal: Collins was convicted of mitigated deliberate homicide in the death of Darrell Gardipee. Collins relied on the defense of self-defense. The jury instruction given on mitigated deliberate homicide and on self-defense recited almost verbatim 45-5-103 and 45-3-102 through 45-3-104. Collins argued that the justifiable use of force instruction did not adequately instruct the jury that if they found his use of force justified, he was entitled to an acquittal. Rather, the instruction would lead a jury to conclude that justifiable use of force was merely a justification or excuse which would reduce deliberate homicide to mitigated deliberate homicide. The federal court agreed with Collins and granted his petition for a Writ of Habeas Corpus. United States ex rel. Collins v. Blodgett, 513 F. Supp. 1056, 38 St. Rep. 792 (D.C. Mont. 1981).

Defense of Occupied Structure Not Available if Entry Made Peacefully or Lawfully: The Montana statute defining the justifiable use of force in defense of an occupied structure is derived from Illinois law, which requires an unlawful entry to trigger the statute. The defendant could not assert justification when the victims entered her premises lawfully and then engaged in unlawful conduct for which the defendant sought to expel the victims. The appellant asserted that once she had ordered the customers out of her bar and they refused to go, their continued presence became an unlawful entry. The reviewing court concluded that the shooting did not occur while the appellant was trying to prevent or terminate an entry into her premises. No authority was cited by the appellant or found by the court to support the theory that a "tumultuous entry" into a tavern makes the entry unlawful. The refusal of the offered instructions was proper. St. v. Sorenson, 190 M 155, 619 P2d 1185, 37 St. Rep. 1834 (1980). See also St. v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 623.

Jury Instructions on Lesser Included Offenses — No Error When Omitted Instruction Not Offered by Appellant: On appeal, the defendant in a deliberate homicide case alleged error in the failure to give jury instructions on mitigated deliberate homicide and negligent homicide. The general rule is that an instruction is required where there is some evidence to support the lesser included offense. Both negligent homicide and mitigated deliberate homicide are to be considered lesser included offenses of deliberate homicide. Here, a lesser included offense instruction was offered by the State and objected to by the defense. The Montana Supreme Court reiterated its position that error may not be predicated upon the failure to give an instruction when the party alleging the error failed to offer the instruction. Failure to offer an instruction removes the cause of error, particularly when the defense counsel has objected to the instruction upon the ground that the defendant was either guilty of deliberate homicide or not guilty. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Sandstrom Jury Instruction — Presumptions of Intent of Consequences of Acts — Harmless Error: Defendant, charged with mitigated deliberate homicide, alleged as error the giving of the jury instruction, "The law presumes that a person intends the ordinary consequences of his voluntary acts." Under Montana law, causing the death of another becomes deliberate homicide only when it is committed purposely or knowingly. These elements are necessary to the proof of this particular crime and must be proved beyond a reasonable doubt by the prosecution. Intent is a difficult element to prove. The evidence normally must be in the nature of outward manifestations of the defendant's state of mind, but when a telephone line to the police station from the scene of the murder happened to be open and the defendant was overheard at length, the court knew what he was thinking from his own words. It is difficult to conceive of a better indication as to defendant's intent. Also, the officer heard the fight at the time these words were spoken, and another officer found the defendant and the victim's body minutes later. The only contested element here was intent, and the evidence on it was overwhelming. Basing its holding on the probable impact of the instructions upon the minds of the average jury, in the light of the evidence, the impact of the instruction upon the jury could not reasonably have contributed to the verdict. The error in giving the contested instruction was harmless. St. v. Hamilton, 185 M 522, 605 P2d 1121 (1980).

Evidence Admitted Pertaining to Charge Later Dismissed — Jury Instructed to Disregard: Defendant was charged with deliberate homicide and with conspiracy to commit homicide. The conspiracy charge was dismissed at the close of the State's case. The District Court instructed the jury to consider only the evidence pertaining to the charge of deliberate homicide and to disregard evidence pertaining to the conspiracy charge. Such an instruction is presumed to cure any error which may have been committed by the introduction of evidence pertaining to the conspiracy charge. St. v. Freeman, 183 M 334, 599 P2d 368 (1979).

Refusal to Give Jury Instruction — Self-Defense: Following St. v. Lagge, 143 M 289, 388 P2d 792 (1964), the court held that it is not error to refuse to give a requested instruction if the instruction's legal theory is adequately covered by the instruction given and as long as the rights of the defendant are fully protected. Following St. v. Collins, 178 M 36, 582 P2d 1179 (1978), the court held that the instruction given on justifiable force gave the defendant ample opportunity to expound to the jury in argument his theory with respect to the use of force as self-defense against an unlawful act. St. v. Freeman, 183 M 334, 599 P2d 368 (1979). See also St. v. Bingman, 229 M 101, 745 P2d 342, 44 St. Rep. 1813 (1987).

Lesser Included Offense: Since there was no evidence of mitigation that would fit within the statutory definition of mitigated deliberate homicide, the court properly refused to instruct on such crime. St. v. Coleman, 177 M 1, 579 P2d 733 (1978). For full appellate history of Coleman, see case note at 45-2-101, SERIOUS BODILY INJURY, *Evidence*.

Repetitious Instructions Refused: The court did not err by refusing repetitious instructions regarding self-defense and defense of another or by giving an instruction further defining "knowledge" beyond the language contained in defendant's proposed instruction. The jury was entitled to a complete definition of "knowledge" since the crimes charged require "knowledge" or "purpose" on the part of the accused. St. v. Larson, 175 M 395, 574 P2d 266 (1978).

Proximate Cause of Death:

Instruction that jury must have found beyond a reasonable doubt that the action of the "defendant contributed to or was the proximate cause of the death" of the decedent was an incorrect statement of law since the use of the word "or" could have been understood to have meant that the actions of the defendant need not have proximately caused the death but only contributed to it. St. v. Newman, 162 M 450, 512 P2d 258 (1973).

Instruction reading in part "if you find ... that the deceased ... was laboring under the effects of a poor physical condition, or had an alcoholic problem, to such a degree that in all probability these factors would have ultimately shortened her life, and if you further find the defendant inflicted a blow or blows upon the deceased which hastened or accelerated her death ... this is sufficient to constitute the crime of involuntary manslaughter as previously defined in these instructions", was defective as a comment on the evidence because the instruction could be understood to mean that the actions of the defendant need not have proximately caused the death of decedent but only contributed to it. St. v. Newman, 162 M 450, 513 P2d 258 (1973).

Lesser Included Offense:

Where judge instructed the jury in the language of the manslaughter statute, thereby giving the jury the definitions of both voluntary and involuntary manslaughter, defendant could not complain on ground there was no evidence of voluntary manslaughter where the jury found him guilty of involuntary manslaughter. St. v. Allison, 122 M 120, 199 P2d 279 (1948).

Where there was evidence showing defendant to be guilty of either murder in the first or second degree or manslaughter, the court had to give explicit instructions to the jury that a verdict of manslaughter could be returned, under the rule that where the evidence warrants it, instructions must be given upon every offense included in the crime charged. St. v. Mumford, 69 M 424, 222 P 447 (1924).

EVIDENCE

Prosecutor's Improper Statement of Elements of Mitigated Deliberate Homicide — No Prejudice: Sanchez contended that the prosecutor's misstatement of the law during closing arguments and rebuttal concerning the elements of mitigated deliberate homicide deprived Sanchez of a fair trial. The prosecutor stated that in order for deliberate homicide to be mitigated, the jury had to find that Sanchez's response to extreme emotional distress was reasonable, rather than that a reasonable explanation existed for the emotional distress. The Supreme Court agreed that the prosecutor misstated the law. However, because the jury was additionally provided with defense counsel's correct interpretation, because the trial court provided a correct and unambiguous interpretation in oral and written jury instructions, and because the jury was presumed to have followed the law, Sanchez could not show that the error was prejudicial, so the fair trial argument failed. St. v. Sanchez, 2008 MT 27, 341 M 240, 177 P3d 444 (2008).

No Prejudice to Defendant When Assistance of Counsel Not Deficient: Following conviction for deliberate homicide, Sellner filed a petition for postconviction relief based on ineffective assistance of counsel, contending that counsel was deficient in: (1) failing to investigate and present a case for justifiable use of force; (2) abandoning an attempted mitigated deliberate homicide defense; (3) pursuing a defense based on a civil suit filed against defendant; (4) failing to offer a "failure to agree" instruction to the jury; and (5) making other errors. The Supreme Court applied the Strickland test to determine whether counsel's performance was deficient and prejudicial, addressing each argument in turn, and concluded that Sellner's contentions of deficient counsel were unfounded. Absent a showing of deficient counsel, Sellner could not show prejudice, and the denial of the petition for postconviction relief was affirmed. Sellner v. St., 2004 MT 205, 322 M 310, 95 P3d 708 (2004), following St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001).

Sufficient Evidence to Convict of Deliberate Homicide Rather Than Mitigated Deliberate Homicide — Lack of Extreme Mental or Emotional Stress: Brown contended that he should have been convicted of mitigated deliberate homicide rather than deliberate homicide because the state failed to present any evidence to refute Brown's contention that he was acting under extreme mental or emotional distress when he killed a man. The Supreme Court noted that mitigated deliberate homicide is an affirmative defense that the defendant bears the burden of proving by a preponderance of the evidence and that whether a defendant is acting under extreme mental or emotional distress is a question of fact for the jury. (See 2003 amendment.) In this case, the physical evidence at the crime scene, coupled with Brown's calm demeanor following the killing, belied Brown's contention that he was under extreme mental or emotional distress and was sufficient for the jury to find the essential elements of deliberate homicide. Brown's conviction was affirmed. St. v. Brown, 2003 MT 166, 316 M 310, 71 P3d 1215 (2003).

Criminal Cases — Directed Verdict Proper Only When No Evidence Supports Guilty Verdict — Sufficient Evidence of Mitigation Element of Mitigated Deliberate Homicide to Preclude Directed Verdict: After the state presented its evidence in Lamere's mitigated deliberate homicide trial, Lamere moved for a directed verdict, asserting that the state failed to prove the mitigation element of the crime. The District Court denied the motion on grounds that the state cannot be required to prove a mitigating factor and that sufficient evidence of mitigation had been presented to defeat the motion for directed verdict. Lamere appealed. On the first issue, the Supreme Court decided that the District Court erred, because when the state charges the offense of mitigated deliberate homicide, the state must prove every element of the crime, including the mitigation element, beyond a reasonable doubt. In contrast, when a defendant asserts mitigating circumstances as an affirmative defense, the defendant must prove by a preponderance of the evidence that mitigating factors exist. On the second issue, the Supreme Court noted that a District Court should grant a directed verdict of acquittal only when there is no evidence whatsoever to support a guilty verdict and if a reasonable person could not conclude from the evidence that, taken in a light most favorable to the prosecution, guilt has not been proved beyond a reasonable doubt. Whether the trial court or a reviewing court would have viewed the evidence or found the facts differently from the jury is not the appropriate inquiry; rather, what is dispositive is the existence of evidence from which the jury could have found the mitigation element proved beyond a reasonable doubt, and if the evidence is properly before the jury, then resolving conflicts in the evidence, judging the credibility of witnesses, and finding the facts are acts uniquely within the province of the jury and the verdict will not be disturbed on appeal unless there is no evidence whatsoever to support the verdict. In Lamere's case, a reasonable trier of fact could have found that a person engaged in a fight and subjected to a threat from another person who is wielding a gun or knife may experience and act under extreme mental or emotional stress for which there is a reasonable explanation or excuse. Thus, the mitigation element was proved and the denial of the directed verdict motion on grounds of insufficient evidence of mitigation was affirmed. The Supreme Court applied the same standard as in civil cases to this criminal case—that unless there is an absence of any credible evidence in support of a verdict, a motion for a directed verdict is inappropriate. St. v. Lamere, 2003 MT 49, 314 M 326, 67 P3d 192 (2003).

Intoxication and Anger Only Mitigating Factors — Finding of Distress Unwarranted: A finding of extreme emotional or mental distress for which there is a reasonable explanation or excuse will not lie when the only mitigating circumstances asserted are defendant's anger and intoxication. St. v. Miller, 1998 MT 177, 290 M 97, 966 P2d 721, 55 St. Rep. 719 (1998), following St. v. Williams, 262 M 530, 866 P2d 1099 (1993).

Witness Credibility and Weight of Evidence: The defendant was charged with deliberate homicide and convicted of mitigated deliberate homicide. On appeal, the Supreme Court held that when numerous witnesses testified about the defendant's conduct and its relationship to the injuries received by the victim, sufficient evidence existed for the jury to determine that the defendant purposely or knowingly caused the victim's death but that the defendant was under extreme stress at the time. St. v. Rothacher, 272 M 303, 901 P2d 82, 52 St. Rep. 772 (1995).

Defense of Extreme Mental or Emotional Stress — No Reduction in Charges Absent Preponderance of Evidence That Reduction Warranted: Byers claimed that his assertion of the affirmative defense of extreme mental or emotional stress reduced the charge of deliberate homicide to mitigated deliberate homicide. He did not ask for a directed verdict, but rather asked the judge to determine as a matter of law that the jury could consider only mitigated deliberate homicide. However, in order for the charge to be reduced, the jury must be convinced by a preponderance of the evidence that a reduction is warranted. The determination of the weight to be given to testimony regarding mental or emotional stress is within the exclusive province of the jury as trier of fact. In Byers' case, the testimony of defense and state experts was contradictory and inconsistent and the jury chose to accept the conclusion that Byers was not under extreme mental or emotional stress at the time of the crime. Therefore, denial of Byers' motion to reduce the charge was not error. St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993), distinguishing St. v. Frates, 160 M 431, 503 P2d 47 (1972), St. v. Grenfell, 172 M 345, 564 P2d 171 (1977), and St. v. Kamrud, 188 M 100, 611 P2d 188 (1980).

Proof Defendant Had Motive and Pulled Trigger: On appeal of his conviction of mitigated deliberate homicide, defendant contended that insufficient evidence supported the conviction because no one saw him pull the trigger of the murder weapon and the state did not prove any motive for the killing. Neither of these factors is required for a proper conviction. The sole requirement necessary to support a conviction of deliberate homicide is that the state prove that the defendant purposely or knowingly caused the death of another. St. v. Sage, 221 M 192, 717 P2d 1096, 43 St. Rep. 738 (1986).

Overwhelming Evidence That Shooting Was Deliberate: On appeal of his conviction of mitigated deliberate homicide, defendant claimed that the shooting that was the basis of his conviction was accidental. The Supreme Court affirmed the conviction, ruling that the evidence was overwhelming that the shooting was not an accident since all of the witnesses except defendant and his wife testified that defendant had the gun in both hands, arms extended. The gun was pointed toward the decedent immediately after the shot was fired. St. v. Sage, 221 M 192, 717 P2d 1096, 43 St. Rep. 738 (1986).

No Evidence in Record to Warrant Jury Instruction on Intoxication as Mitigating Circumstance: Defendant contended District Court erred in refusing to give jury instructions on the lesser offense of mitigated deliberate homicide. On appeal, the Supreme Court found no error in refusing to instruct for two reasons: (1) the only potentially mitigating circumstance presented at trial concerned defendant's use of alcohol on the night in question; however, in St. v. White, 194 M 421, 632 P2d 1118, 38 St. Rep. 1417 (1981), the court held that voluntary intoxication alone was insufficient to show the extreme mental or emotional stress which would mitigate deliberate homicide charges; and (2) since defendant's main defense at trial was alibi, he was entitled either to an acquittal or to be found guilty, and if the jury believed his testimony, it would have been inconsistent with finding defendant guilty of mitigated deliberate homicide. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986).

Sufficient Evidence of Mitigated Deliberate Homicide: The jury was presented with sufficient evidence to conclude that the defendant was guilty of mitigated deliberate homicide and that his use of deadly force was not justified where the defendant confessed to the stabbing, was heard by a witness as having made an admission, the identification of the defendant was clear, and the defendant himself admitted that he could have returned to his seat after having been invited to go outside to fight. St. v. Graves, 191 M 81, 622 P2d 203, 38 St. Rep. 9 (1981), followed in St. v. Hagen, 273 M 432, 903 P2d 1381, 52 St. Rep. 1048 (1995).

Evidence of Drug Use of Witnesses Inadmissible as Too Remote and Without Foundation: The defendant appealed her conviction for deliberate homicide and aggravated assault in part by contending that it was error to prohibit the defense from referring to the use of marijuana by the victims in the hours before the shootings. In the Gleim case, Montana has endorsed the majority rule requiring a showing that the witness was under the influence of drugs at the time the events about which he testifies occurred before evidence of the witness' drug use is admissible. Implicit in the formulation of the Gleim rule is a recognition of the remoteness concept. The question of remoteness is directed to the discretion of the trial court. While remoteness is a matter that generally goes to the credibility of the evidence rather than to its admissibility, evidence can be excluded if it is so remote that it has no evidentiary value. Given the defendant's failure to lay a proper foundation that the witnesses were under the influence of drugs at the time of the material events in this case, exclusion of the evidence was justified both under the Gleim rule and under the remoteness doctrine. St. v. Sorenson, 190 M 155, 619 P2d 1185, 37 St. Rep. 1834 (1980).

Verbal Provocation Enough to Become Aggressor: In appealing her conviction for deliberate homicide and aggravated assault, the defendant alleged error in jury instructions on an aggressor's use of force in self-defense and an aggressor's duty to withdraw. She contended she was not the aggressor and argued that the instructions were abstract and incomplete statements of the law and that a person must have the specific intent to become an aggressor before he or she may be deprived of the right of self-defense on the ground of provocation. The reviewing court held that the evidence supported the giving of the instructions and stated that a person could become an aggressor if he or she purposely or knowingly provoked the victim verbally. The court noted that the jury was instructed on the requisite mental state in both challenged instructions. St. v. Sorenson, 190 M 155, 619 P2d 1185, 37 St. Rep. 1834 (1980).

Justification as Question of Fact: Whether the defendant was justified in killing the McLeans and whether he was acting under extreme emotional distress were questions of fact for the jury. Substantial evidence was introduced, which if believed by the jury would result in convictions for deliberate homicide. The court upon appeal will not substitute its judgment for that of the jury where the verdict is supported by substantial evidence. St. v. Sunday, 187 M 292, 609 P2d 1188 (1980).

Self-Defense and Mitigated Deliberate Homicide Not Inconsistent: The defense of self-defense is not inconsistent with the conviction of mitigated deliberate homicide. The jury could have found that the defendant was acting under mental or emotional stress brought about by the attack of the victim but could also have found that the counterforce used by the defendant was so excessive as not to be reasonable and justified. In such an instance a verdict of mitigated deliberate homicide is justified. St. v. Freeman, 183 M 334, 599 P2d 368 (1979), following St. v. Collins, 178 M 36, 582 P2d 1179 (1978).

45-5-104. Negligent homicide.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 210.4.

Section 94-5-104 [now MCA, 45-5-104] is addressed to homicides caused by negligence as defined in section 94-2-101 [now MCA, 45-2-101]. The negligence applicable to criminal homicide requires that the homicidal risk be of such a nature and degree that to disregard it involves a "gross deviation" from the standard of conduct that a reasonable person would observe in the actor's situation.

This code provision is especially relevant to vehicular homicides, since it is inevitable that they will predominate in number. In this country, however, it has been very difficult to convict the negligent motorist of a criminal homicide. Several states have attempted with varying success to deal with the problem by enacting special legislation, but such legislation should not be necessary in Montana with proper application of this provision. Clearly, if the evidence does not make out a case of negligence, as negligence is herein defined, there is no reason for creating criminal liability for homicide, as distinguished from any other traffic offense. However, because of the diverse facts surrounding negligent homicides the sentencing judge is given freedom to sentence the act either as a misdemeanor or a felony. See secton [sic] 94-1-105 [now MCA, 45-1-201].

Compiler's Comments

1999 Amendment: Chapter 381 in (3) increased maximum imprisonment term from 10 years to 20 years; and made minor changes in style. Amendment effective October 1, 1999.

1987 Amendment: In (1) substituted language describing offense of negligent homicide for former text that read: "Criminal homicide constitutes negligent homicide when it is committed negligently"; and inserted (2) providing that negligent homicide is not included offense in deliberate homicide.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section on negligent homicide replaces the offense of involuntary manslaughter, which was defined as the unlawful killing of a human being without malice, in the commission of an unlawful act not amounting to a felony or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection. In interpreting this statute many states, including Montana, required that for criminal liability to be imposed, the act must have been malum in se, bad in itself, rather than merely malum prohibitum. Montana solved the problem of determining when an act was malum in se by requiring the showing of criminal negligence in all cases. See St. v. Powell, 115 M 571, 138 P2d 949 (1943); St. v. Pankow, 134 M 519, 333 P2d 1017 (1959); St. v. Bosch, 125 M 566, 242 P2d 477 (1952). It may be concluded, therefore, that this section is a codification of the approach taken by the Montana courts which equated involuntary manslaughter with criminal negligence. Of course, this section avoids the tortuous and confusing language of the former law and provides a simpler solution to such negligent homicides as motor vehicle deaths, hunting mishaps, and death which results from professional malpractice. Negligence, as defined in § 45-2-101, requires that for culpability the homicidal risk be of such a nature and degree that to disregard it involves a "gross deviation" from the standard of conduct that a reasonable person would observe in the actor's situation. Clearly, if the evidence does not make out a case for criminal negligence, there is no reason for creating criminal liability for an event which is an unfortunate accident. By providing broad language, the section obviates the necessity of having numerous statutes to handle the different types of negligent homicides that occur. The language for this section is substantially similar to the Model Penal Code and as with the other sections on criminal homicide has been drafted in a manner designed to avoid all earlier distinctions and interpretations.

Case Notes

Independently Obtained Blood Alcohol Test Result Admissible in Prosecution of Negligent Vehicular Assault, Negligent Homicide, and Criminal Endangerment: Following a vehicle accident in which a person was killed, Schauf was charged with and convicted of negligent homicide, negligent vehicular assault, and criminal endangerment, but Schauf was not charged with DUI. At the hospital, a blood alcohol sample was taken at the direction of the investigating officer under the implied consent law and without advising Schauf of the right to an independent blood test. A second blood sample was drawn at the request of Schauf's treating physician in the emergency room. Schauf moved for suppression of the sample results, which showed that Schauf was intoxicated at the time of the accident. The District Court dismissed the results of the first test but admitted the results of the second test, and Schauf appealed, but the Supreme Court affirmed. The Supreme Court noted that the implied consent law applies when a person is charged with negligent vehicular assault, because that offense specifically relates to statutes governing DUI. However, proof of DUI is not an element of negligent homicide or criminal endangerment, so failure to advise Schauf of the right to an independent blood test provided no basis for dismissal of those charges. Additionally, to the extent that the negligent vehicular assault conviction rested upon the results of the second blood test, those results were obtained independently of state action and of the implied consent law. Thus, suppression of the law enforcement test was proper, but dismissal of all charges would have been an extreme measure given additional substantial evidence of Schauf's intoxication before and after the accident. St. v. Schauf, 2009 MT 281, 352 M 186, 216 P3d 740 (2009).

Revocation of Youth Court Probation and Imposition of Suspended Sentence Proper: When Hinkle was 17 years old, he pleaded true to the charge of negligent homicide. The case was tried in District Court, and Hinkle was committed to the Youth Court for suspended placement in a treatment facility until age 18, placed on formal juvenile probation until age 25, and given a stayed adult sentence of 20 years with the Department of Corrections, pursuant to 22 probation conditions, including requirements that Hinkle not violate the dispositional order, possess or consume alcohol, or commit a new offense. Twelve days after the sentencing hearing, Hinkle was cited for being a minor in possession of alcohol. The Youth Court revoked Hinkle's probation and transferred the case back to District Court for further proceedings. After considering numerous balancing factors, the District Court imposed the 20-year adult sentence that had been stayed, but suspended the sentence subject to 19 conditions, including prohibiting Hinkle from entering casinos and gambling. Hinkle appealed on grounds that his probation was improperly revoked, that the 20-year sentence was improperly imposed, and that the casino and gambling restriction was illegal. The Supreme Court affirmed on all issues. The District Court did not err in concluding that simply continuing Hinkle's youth probation for the probation violations would be no more than a slap on the wrist and would be inappropriate given the seriousness of the underlying homicide offense. Imposing a suspended adult sentence was in fact a further act of grace, in light of the fact that the court could have imposed a 20-year sentence of confinement, but Hinkle ignored the act of grace in asserting that the suspended sentence was unduly harsh. Additionally, Hinkle's personal characteristics made him particularly vulnerable to the pitfalls of irresponsible gambling, so the casino and gambling restriction was appropriate. Thus, the District Court's order was "neither arbitrary nor without conscientious judgment or exceeding the bounds of reason and was an appropriate exercise of discretion". St. v. Hinkle, 2008 MT 217, 344 M 236, 186 P3d 1279 (2008).

Evidence of Defendant's Conduct Prior to Accident Not Considered Irrelevant or Character Evidence — Failure of Counsel to Object Not Ineffective Assistance: Defendant contended that defense counsel erred by failing to object to evidence that defendant was driving erratically and aggressively for 10 miles prior to a fatal accident, asserting that the evidence was improper character evidence and irrelevant to and separate from the collision. The Supreme Court disagreed. The events preceding the accident were clearly relevant and closely related to the charged offenses of negligent homicide and criminal endangerment. An objection on grounds of improper character evidence and relevance would have been groundless, and defense counsel did not render ineffective assistance in failing to object. St. v. Tennell, 2007 MT 266, 339 M 381, 170 P3d 965 (2007).

Deliberate Homicide by Accountability — Instruction on Criminal Endangerment and Negligent Homicide Not Required: At Doyle's trial for deliberate homicide by accountability, Doyle contended that the trial court should have offered instruction on the lesser included offenses of criminal endangerment and negligent homicide. The Supreme Court disagreed. Criminal endangerment is not a lesser included offense of deliberate homicide by accountability based on the defendant's failure to act under 45-5-201(2)(b). St. v. Doyle, 2007 MT 125, 337 M 308, 160 P3d 516 (2007).

Failure to Establish That No Jury Could Have Found Elements of Negligent Homicide — Directed Verdict Properly Denied: English moved for a directed verdict in his negligent homicide trial on grounds that the state failed to produce sufficient evidence to permit a jury to convict. The trial court denied the motion, and English appealed, but the Supreme Court affirmed. English misapprehended the evidence presented by the state's accident reconstruction expert that English most likely would not have seen the victim before English ran over her with his van. The expert's testimony was conditioned upon several assumptions that presented a question of fact for the jury to decide. Additionally, the victim was last seen as a passenger in English's van, intoxicated but uninjured, and her injuries were consistent with being run over by the van. English failed to establish that no rational trier of fact could have found the elements of negligent homicide beyond a reasonable doubt or that the trial court acted arbitrarily, exceeded the bounds of reason, or abused its discretion by denying the motion for a directed verdict. St. v. English, 2006 MT 177, 333 M 23, 140 P3d 454 (2006).

Intoxication Instruction Properly Given in Negligent Homicide Case: The trial court in English's negligent homicide case instructed the jury that intoxication is not an essential element of negligent homicide, but rather one factor to be considered in determining whether English caused the victim's death. English contended that the instruction was an incorrect statement of the law, but the Supreme Court disagreed. This section provides that intoxication is not an essential element of negligent homicide. Coupled with other instructions defining negligently and clarifying that a finding of negligence was required in order to convict, the jury was properly allowed to consider whether English's intoxication contributed to his negligence. St. v. English, 2006 MT 177, 333 M 23, 140 P3d 454 (2006).

Negligent Homicide Considered Crime of Violence — Consideration of Sentencing Alternatives to Prison Not Required: English asserted that because negligent homicide is not a crime of violence, the trial court erred by failing to consider sentencing alternatives to prison pursuant to 46-18-101(3)(f) when sentencing English to 20 years in prison for negligent homicide. The Supreme Court found the argument unpersuasive. Under 46-18-104, a crime in which the offender causes serious bodily injury or death to a person other than the offender is defined as a violent crime. English negligently caused the death of another person, and the trial court did not err in ruling that the negligent homicide was a crime of violence or by failing to consider sentencing alternatives to prison. St. v. English, 2006 MT 177, 333 M 23, 140 P3d 454 (2006).

Sentence for Negligent Homicide Not Considered "Trial Tax" in Violation of Due Process: English contended that a sentence of 20 years with 10 suspended for negligent homicide constituted a "trial tax" imposed for taking the case to trial rather than pleading guilty, in view of the disparity between his sentence and cases cited by the trial court in which defendants pleaded guilty or nolo contendere. The Supreme Court disagreed. The trial court focused on the aggravating circumstances in English's case, not on the sentences imposed in prior negligent homicide cases, and there was no indication that the trial court imposed a "trial tax" on English for proceeding to trial. There may be appropriate differences between sentences imposed on defendants who have pleaded guilty and those who have proceeded to trial for the same offense. The sentence was within statutory parameters, did not violate English's due process rights, and was affirmed. St. v. English, 2006 MT 177, 333 M 23, 140 P3d 454 (2006).

Jury Properly Instructed on Definition of Criminal Negligence — Mental State Not at Issue: In Larson's negligent homicide trial, the court instructed the jury that a person acts negligently when an act is done with a conscious disregard of the risk of death or when a person disregards a risk of causing death that the person should be aware that the result will occur or that the circumstance exists. Larson contended that the instruction erroneously omitted the word "consciously" before the word "disregards". The Supreme Court disagreed. Under St. v. Gould, 216 M 455, 704 P2d 20 (1985), mental state is not at issue in negligent homicide cases. Contrary to Larson's contention, the instruction did not effectively lower the standard of proof for proving negligence, but rather constituted a correct statutory definition. Larson had a full opportunity to argue his defense, and the jury was properly instructed. St. v. Larson, 2004 MT 345, 324 M 310, 103 P3d 524 (2004).

Sufficient Evidence of Impairment to Support Negligent Homicide and DUI Conviction: Larson contended that evidence was insufficient to support a jury's determination of impairment by alcohol at the time of a fatal accident and that the inference of impairment resulting from Larson's blood alcohol concentration was rebutted by other evidence indicating that the accident was caused by a momentary lapse of attention while driving on a dangerous road. The state presented evidence that Larson drank a substantial amount of alcohol during the evening and morning hours prior to the accident; admitted that he had consumed a considerable amount of alcohol; drove his pickup at a high rate of speed off the shoulder of the highway, causing the vehicle to roll and eject the passengers; and tested for a blood alcohol concentration of 0.12 2 hours after the accident and 4 hours after he had stopped drinking. Although the Supreme Court could not discern precisely why the jury reached its decision to convict Larson, Larson fully presented his defense theory, and the jury rejected it. The evidence was sufficient to support the conviction, and the Supreme Court affirmed. St. v. Larson, 2004 MT 345, 324 M 310, 103 P3d 524 (2004).

Forty-Year Driving Ban for Multiple Negligent Vehicular Homicides Reversed: Following conviction on four counts of negligent vehicular homicide, Herd was sentenced to: (1) two concurrent 20-year sentences, all suspended; (2) enter and successfully complete a prerelease program; (3) remain under the jurisdiction of the Probation and Parole Bureau for the 40-year term; (4) pay $200 a month in restitution for 20 years; (5) not own or be in control of firearms for 40 years; (6) not enter any bars or casinos for 40 years; (7) not drink or possess alcoholic beverages for 40 years; (8) obtain any counseling requested by Herd's probation officer; (9) submit to drug and alcohol testing at any time that the probation officer had reasonable grounds to suspect that testing would reveal a probation violation; and (10) not drive during the entire 40-year sentence. Herd appealed the length of the driving restriction, and the Supreme Court reversed on grounds that the prohibition was unnecessary to protect a victim or society as a whole; and drastically inhibited Herd's ability to make a living, serve the needs of her family, and pay restitution; and impaired the prospects of rehabilitation. St. v. Herd, 2004 MT 85, 320 M 490, 87 P3d 1017 (2004).

Inadmissible Recorded Commentary of Crime — Harmless Error: During Strauss's negligent homicide trial, the District Court admitted two videotape recordings of the crime scene. One tape included an audio commentary portion by an investigating officer, and one depicted the positions of Strauss and the victim relative to their positions at the time that the crime was committed. Strauss objected to both tapes, but they were admitted over objection. On appeal, the Supreme Court agreed that the tape with commentary should have been admitted without sound because the commentary was the prior statement of a nonparty witness that the Montana Rules of Evidence classify as nonhearsay. However, the commentary was not offered to rebut an allegation of fabrication, improper influence, or motive or for identification, so it could not be classified as admissible nonhearsay. Nevertheless, the state presented admissible evidence that proved the same facts as the commentary, so its admission was harmless error. As for the second videotape, based on Peschke v. Carroll College, 280 M 331, 929 P2d 874 (1997), the tape was a reenactment of Strauss's crime and was therefore subject to the foundational requirements in St. v. Leroux, 133 N.H. 781, 584 A2d 778 (1990), and Pickren v. St., 269 Ga. 453, 500 SE 2d 566 (1998), including authentication and identification. A recorded reenactment must accurately portray the event in question, and the party presenting the recording must show that the reenactment was filmed under conditions substantially similar to the actual event, which may be satisfied by testimony of a witness who was present at the crime. The state failed to meet its burden by not presenting testimony of a witness who was present at the crime scene and could testify to the accuracy of the tape. However, that error was also considered harmless because the second tape was largely cumulative of the first recording, was not injurious to Strauss's defense, was not probative of any disputed issue, and did not contribute to Strauss's conviction. St. v. Strauss, 2003 MT 195, 317 M 1, 74 P3d 1052 (2003). However, see St. v. Zlahn, 2014 MT 224, 376 Mont. 245, 332 P.3d 247, holding that the District Court did not err in admitting a video existing primarily to document physical distances and vantage points at a time when all of the witnesses were available for cross-examination.

No Error in Allowing Statement Not Disclosed by State Prior to Trial and in Refusing Request for Continuance: On the first day of Strauss's negligent homicide trial, the prosecution disclosed to the District Court that an acquaintance of Strauss, a state witness, had indicated that Strauss had made a statement that was relevant to the shooting. Strauss's counsel argued in chambers that if the witness was allowed to testify about the statement, Strauss would move for mistrial. The District Court held that because the acquaintance was a listed witness and had been available to be interviewed by Strauss, no discovery violation occurred. The court also noted that the witness was not scheduled to testify until the following day, so Strauss could interview the witness that evening or be granted a brief continuance following cross-examination of the witness; however, Strauss chose instead to request a mistrial or 2-week continuance the next morning. The request was denied, and on appeal, Strauss contended that a fair trial was denied because there had been insufficient time to prepare to impeach the witness. The Supreme Court disagreed. Because Strauss turned down additional time to prepare further impeachment and offered no evidence to indicate that the defense was prejudiced, the District Court did not err in allowing the witness to testify or in disallowing Strauss's request for a 2-week continuance. St. v. Strauss, 2003 MT 195, 317 M 1, 74 P3d 1052 (2003).

No Prejudicial Error in Failure to Give Negligent Homicide Mental State Instruction in Wrongful Death Action When Other Instructions Adequately Reflect Negligence: Samson's son was killed by Bercier, a youth who walked away from a nonsecure, supervised licensed youth group home. Samson sued the state for foreseeable negligence. To boost the theory of foreseeability, Samson offered a jury instruction that defined Bercier's conduct as reckless and postulated therefrom that the conduct was foreseeable because of Bercier's background, seeking to undermine the state's theory that the shooting was an unforeseeable accident. The District Court refused to offer the instruction, instead instructing the jury on elements of wrongful death, and Samson appealed. The state argued that the mental state of Bercier was not a controlling issue and contended that it was not necessary to instruct the jury on the mental state of negligent homicide because the instructions as a whole properly included the key concepts of a wrongful death action. The Supreme Court agreed with the state. The fundamental issue concerned the state's negligence, not Bercier's mental state. Nevertheless, Samson was still able to present the foreseeability theory under the instructions that were given, so failure to give Samson's offered instruction did not result in prejudice to Samson's case. It is within a District Court's discretion to decide how to instruct the jury, taking into account the theories of the contending parties, and absent an abuse of discretion, the District Court was affirmed. Samson v. St., 2003 MT 133, 316 M 90, 69 P3d 1154 (2003). See also Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996).

No Abuse of Discretion in Refusing to Instruct Jury on Lesser Included Offense of Negligent Homicide Absent Supporting Evidence: German was convicted of attempted felony assault and deliberate homicide. At trial, the court instructed the jury on German's defense of justifiable use of force and gave a mitigated deliberate homicide instruction but refused to give a jury instruction regarding the lesser included offense of negligent homicide, finding no evidence to support the instruction. German appealed on grounds that the trial court erred in failing to give the negligent homicide instruction. The Supreme Court affirmed. District Courts have broad discretion in formulating jury instructions, including the authority to reject instructions that are not supported by evidence. A lesser included offense instruction must be given when properly requested and when the jury could be warranted in finding defendant guilty of the lesser included offense, based on the evidence, but the instruction need not be given if there is no evidence to support it. A lesser included offense instruction is not supported by the evidence when defendant's evidence or theory, if believed, would require an acquittal. Here, German's justifiable use of force defense, if proved, would have required an acquittal. German cited St. v. Martinez, 1998 MT 265, 291 M 306, 968 P2d 705 (1998), for the proposition that a defendant is generally entitled to a lesser included offense instruction and that the District Court may usurp the jury's function by factually deciding the merits of the lesser included offense. The Supreme Court disagreed. Martinez neither overruled nor was inconsistent with cases entitling defendant to a lesser included offense instruction when evidence supports the instruction, and in both civil and criminal proceedings, the determination of whether there is sufficient evidence to raise an issue of fact for a jury is a question of law for the trial court. Only when the trial court determines as a matter of law that factual disputes exist are those disputes turned over to the jury. In this case, German's own testimony was that he consciously made the decision to shoot the victim, so there was no support for a negligent homicide instruction and the trial court did not err in refusing to give one. St. v. German, 2001 MT 156, 306 M 92, 30 P3d 360 (2001), following St. v. Swan, 279 M 483, 928 P2d 933 (1996).

Motion to Dismiss Based on Insufficient Evidence of Negligent Homicide Properly Denied — Deviation From Reasonableness Standard Sufficient to Support Finding of Negligent Conduct: After consuming at least five shots of brandy and four beers at a tavern, Davis hit and killed a pedestrian on the way home, then left the accident scene. Upon arriving home, he told his girlfriend that he had hit a deer, ate dinner, and went to bed. Davis was later charged with negligent homicide and failure to remain at the scene of an accident that resulted in death or personal injuries. Following presentation of the state's case, Davis moved for dismissal based on insufficient evidence, which was denied. Davis was convicted and appealed. The Supreme Court affirmed, concluding that a rational trier of fact could have found the essential elements of negligent homicide beyond a reasonable doubt based on evidence that Davis consciously disregarded the risk posed by his driving under the influence of alcohol (even though blood alcohol content could not be tested because he left the scene) and that Davis's conduct immediately before, during, and after the accident revealed a gross deviation from the standard of conduct that a reasonable person not under the influence of alcohol would have observed. St. v. Davis, 2000 MT 199, 300 M 458, 5 P3d 547, 57 St. Rep. 773 (2000), followed in St. v. English, 2006 MT 177, 333 M 23, 140 P3d 454 (2006).

Criminal Liability Based on Failure to Act When Self-Preservation at Issue — No Legal Duty to Perform Legal Duty at Personal Risk: For criminal liability to be based on a failure to act, there must be a legally imposed duty to act and the person must be physically capable of performing the act. When self-preservation is at stake, the law does not require a person to save another's life by sacrificing one's own. No crime is committed by a person who in saving one's own life in the struggle for the only means of safety causes the death of another. Accountability may still exist for the results of the peril into which one person places another, but the law does not require a person to risk serious bodily injury to perform a legal duty. (See 40 Am. Jur. Homicide § 116 (1999).) State ex rel. Kuntz v. District Court, 2000 MT 22, 298 M 146, 995 P2d 951, 57 St. Rep. 111 (2000), following St. v. Mally, 139 M 599, 366 P2d 868 (1961), and distinguishing People v. Beardsley, 113 NW 1128 (1907). See also Burns v. Fisher, 132 M 26, 313 P2d 1044 (1957).

Failure to Stop at Scene of Automobile Accident Not Cause of Death of Another — Elements of Negligent Homicide Not Proved: It was a dark and stormy night. Schipman was on his way home from a Dillon bar, through open range, when a dark horse lunged out of the barrow pit and hit the side of his vehicle. Schipman did not stop but, looking back, did not see the horse on the highway and, assuming it was dead, proceeded home. Two other vehicles did stop. The driver of one vehicle found the horse, dead, in the southbound lane, so he parked in the northbound lane and turned on his flashers in an attempt to warn oncoming traffic. About the same time, two recent high school graduates, Keller and Dorvall, were returning home after an evening with friends in Virginia City. They noticed the two vehicles in the northbound lane and slowed down but could not see any reason why the two men were standing by the road, so they made a conscious decision to proceed. They swerved into the barrow pit to avoid the horse, and Dorvall was killed. When Schipman called authorities the following day to report the accident, he was charged with felony negligent homicide and misdemeanor negligent endangerment for leaving the scene of the accident, was convicted, and subsequently appealed. As a material element of either offense, the state was required to prove that Schipman's conduct was criminally negligent. Schipman argued that had he stayed at the accident scene instead of proceeding home to tend to his own injuries, the actual result would not have been any different. He contended that the jury should not have been allowed to speculate as to whether the graduates would have slowed down or stopped had there been three men and three vehicles instead of two and that the death of Dorvall should not be allowed to influence his criminal culpability. The Supreme Court held that cause in fact was not sufficiently established to sustain the negligent homicide conviction. The court assumed, without deciding, that Schipman's actions were criminally negligent by definition, but there was no basis to speculate that the road hazard would have been avoided had there been three men instead of two alongside the road that night. Absent evidence that Schipman's negligent act did, in fact, cause Dorvall's death, the conviction for negligent homicide was reversed. St. v. Schipman, 2000 MT 102, 299 M 273, 2 P3d 223, 57 St. Rep. 409 (2000).

Justifiable Use of Force — No Duty to Assist Aggressor in Zone of Risk — Revival of Duty to Summon Aid: Kuntz was charged with negligent homicide for stabbing Becker and then failing to immediately call for medical assistance. Kuntz pleaded justifiable use of force. The state contended that even if the use of force was justified, a proved subsequent failure by Kuntz to summon aid could constitute a gross deviation from ordinary care. The Supreme Court held that when a person justifiably uses force to fend off an aggressor, that person has no duty to assist the aggressor in any manner that could conceivably create the risk of bodily injury to that person or to other persons. This absence of a duty necessarily includes any conduct that would require the person to remain in or return to the zone of risk created by the original aggressor. The victim has but one duty after fending off an attack, and that is the duty owed to one's self, as a matter of self-preservation, to seek and secure safety away from the place where the attack occurs. Thus, a person who justifiably acts in self-defense is temporarily afforded the same status as an innocent bystander (see Pope v. St., 396 A2d 1054 (Md. 1979)). However, the duty to summon aid may in fact be revived but only after the victim has fully exercised the right to secure safety from personal harm. Only then may a legal duty be imposed to summon aid for the person placed in peril by an act of self-defense, and before that duty is imposed, there must be a showing that: (1) the person had knowledge of the facts indicating a duty to act; and (2) the person was physically capable of performing the act. Even so, a proved breach of the legal duty may still fall short of negligent homicide, which requires a gross deviation from an ordinary or reasonable standard of care. To find a person who justifiably acts in self-defense criminally culpable for causing the death of the aggressor, the failure to summon aid must be the cause in fact of the aggressor's death, not the justified use of force itself. State ex rel. Kuntz v. District Court, 2000 MT 22, 298 M 146, 995 P2d 951, 57 St. Rep. 111 (2000), following St. v. Bier, 181 M 27, 591 P2d 1115, 36 St. Rep. 466 (1979), and followed in St. v. Bowen, 2015 MT 246, 380 Mont. 433, 356 P.3d 449.

Release of Victim's Belongings to Family — No Negation of Circumstantial Facts: Buckles was involved in a one-car accident wherein his passenger was killed and drugs were found at the scene. Buckles' blood test indicated traces of drugs, and he was charged with negligent homicide and possession with intent to sell. Buckles contended that the state deliberately suppressed material evidence relevant to the charge of possession with intent to sell when it released the passenger's personal effects to the passenger's mother, claiming that if Buckles had had access to the passenger's belongings before they were released, an expert might have found traces of drugs that would suggest that the passenger, rather than Buckles, possessed the drugs found at the scene. The Supreme Court noted that all the passenger's belongings had been documented and logged and that, even if there were a trace of drugs found in the passenger's belongings, that evidence would not negate the very strong circumstantial facts indicating that the drugs were hidden at the accident scene by Buckles and that they were originally in Buckles' bag. Buckles could have proceeded to trial and established ownership of the items through his own testimony and testimony of the passenger's mother, but this Buckles did not do. The negligent homicide and possession with intent to sell convictions were affirmed. St. v. Buckles, 1999 MT 79, 294 M 95, 979 P2d 177, 56 St. Rep. 331 (1999).

DUI and Negligent Homicide Arising From Same Accident Not Part of Same Transaction — No Double Jeopardy: Booth pleaded guilty in Justice's Court to a DUI charge and claimed double jeopardy when he was subsequently charged in District Court with two counts of negligent homicide arising out of the accident that led to the DUI charge and conviction. Neither 46-11-503 nor 46-11-504 barred the District Court charges. Under each section, double jeopardy requires that the offenses arise out of the same transaction. Because Booth's conduct in allegedly causing the two deaths was not motivated by a purpose to accomplish the criminal objective of DUI, the DUI and negligent homicide offenses did not arise out of the same transaction within the meaning of the statutory definition of "same transaction" as conduct consisting of a series of acts that are motivated by a purpose to accomplish a criminal objective and that are necessary or incidental to the accomplishment of that objective. State ex rel. Booth v. District Court, 1998 MT 344, 292 M 371, 972 P2d 325, 55 St. Rep. 1395 (1998), followed in St. v. Condo, 2008 MT 114, 342 M 468, 182 P3d 57 (2008).

Multiple Negligent Homicides Arising Out of Same Act — Consecutive Sentences Allowed: Defendant was sentenced to two consecutive 10-year sentences for the deaths of two men in a drunken driving accident. Defendant appealed on double jeopardy grounds, claiming that the convictions arose out of a single act and that the District Court could only impose concurrent sentences. The Supreme Court held that because two people were killed in the accident, two distinct offenses of negligent homicide were committed. Montana law not only authorizes consecutive sentences for multiple offenses but presumptively requires them. St. v. Weigle, 285 M 341, 947 P2d 1053, 54 St. Rep. 1182 (1997).

Deliberate Homicide Charged — Insufficient Evidence to Support Instruction on Negligent Homicide — No Purpose to Instruction on Definition of "Negligently": Goulet, Nelson, and Running Crane became intoxicated after drinking at several bars, and Goulet, after pushing Running Crane away when he tried to borrow a cigarette, stabbed Running Crane in the stomach, then in the chest, and finally in the back. During trial on charges of deliberate homicide, Goulet requested an instruction on negligent homicide, but the instruction was refused by the District Court. The Supreme Court held that the District Court did not err in refusing the requested instruction. The Supreme Court noted that a defendant is entitled to an instruction on a lesser included offense when the jury would be warranted in convicting on the lesser offense and acquitting on the greater offense. However, the Supreme Court noted that the only evidence that even approached evidence of negligence was that as he was stabbing Running Crane, Goulet was thinking that he hoped that he wasn't hurting Running Crane too badly. The Supreme Court called this evidence self-serving and insufficient to support the requested instruction. The Supreme Court also affirmed the District Court in its refusal to give an instruction on the definition of "negligently", saying that the District Court refused the instruction on the definition for the same reason that it refused the instruction on negligent homicide and that an instruction on the definition of a word standing alone, that is, not used in the instruction, would serve no purpose. St. v. Goulet, 283 M 38, 938 P2d 1330, 54 St. Rep. 482 (1997), followed in St. v. Fuqua, 2000 MT 273, 302 M 99, 13 P3d 34, 57 St. Rep. 1141 (2000).

Intoxication Not Essential Element of Negligent Homicide — Jury Instruction Not Warranted: Defendant contended that the trial court failed to properly instruct the jury on the elements of driving under the influence because an essential element of his criminal negligence was dependent on his intoxication. However, intoxication is not an essential element of negligent homicide but merely one of the factors to be considered in determining whether the homicide was caused by the negligent actions of the actor. Defendant was never charged with driving under the influence, so an instruction regarding intoxication was not warranted. St. v. Arrington, 260 M 1, 858 P2d 343, 50 St. Rep. 905 (1993).

Definition of "Negligently" as Applied to Negligent Homicide — Not Unconstitutionally Vague: Defendant contended that the definition of "negligently", as applied to negligent homicide, is unconstitutionally vague when compared and contrasted with other terms like "gross negligence", "lack of ordinary care", and "reckless disregard for consequences". Defendant asserted the statute is vague because it did not require a conscious deviation from a known risk. After considering 45-5-104 and the definition of "negligently" in 45-2-101, the court found no indefiniteness on the face of the statutes sufficient to require a holding of unconstitutionality and no unconstitutional application by the lower court. The court enumerated the facts indicating that defendant's conduct was properly classified as a gross deviation, meaning a deviation that was considerably greater than the lack of ordinary care. St. v. Gould, 216 M 455, 704 P2d 20, 42 St. Rep. 946 (1985).

Negligent Homicide — Additional Sentence for Knowingly Using Gun Not Prohibited: That defendant was convicted of "negligent" homicide with a gun did not prohibit him from being given an additional sentence for "knowingly" using a dangerous weapon during the offense. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

Negligent Homicide and Causation Proven — Shooting Victim in Third Party's House: Proof of causation of death and of negligent homicide was shown beyond a reasonable doubt where defendant left his apartment in a depressed state at about 12:20 a.m., left his lawyer's telephone number with his live-in girlfriend in case he got into trouble, took a loaded .357 magnum handgun with him, indicated he wanted to photograph his recently divorced ex-wife's boyfriend's auto, which he had earlier seen at her home, went to her home, did not photograph the auto, was not permitted to be at her home, opened a locked door with a key, took pictures of his ex-wife and boyfriend in an intimate position, ordered them to sit down, threatened them with the gun, and struggled with the boyfriend, who was shot and killed. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

Negligent Homicide Law Not Ambiguous or Vague: Section 45-5-104 is not ambiguous and does not fail to give a person notice of to what he must conform his conduct. The Supreme Court was disinclined to review a claim to that effect where the state charged and attempted to prove deliberate homicide and objected to any instruction on mitigated deliberate homicide or negligent homicide, and defense counsel convinced the judge to give instructions on those two offenses. Any errors alleged by defendant in that respect were thus invited. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

Right to Bear Arms — Not Violated by Conviction of Negligent Homicide by Shooting: Defendant who killed his ex-wife's boyfriend in her home with a .357 magnum revolver argued on appeal that he was acquitted of deliberate homicide and mitigated deliberate homicide because the jury believed his self-defense argument, and that therefore the conviction of negligent homicide could only be based on the improper belief that possessing a weapon, a right protected by the Montana Constitution, was itself negligent. The argument was incredible and based on faulty assumptions concerning the verdict and also on an unbelievably strained construction of the right to bear arms. The right to bear arms conveys no right or privilege to enter a residence without permission, threaten its unarmed occupants, and discharge a weapon under unreasonable conditions. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

Negligent Homicide Instruction When Deliberate Homicide Charged — Right to Instruction if any Evidence Supports Negligence: It was reversible error requiring a new trial when court in which appellant was charged with deliberate homicide and convicted of mitigated deliberate homicide refused to give a negligent homicide instruction, because there was conflicting evidence on what blows were inflicted upon victim, who died after a fight with appellant, and on the reasons for the blows and the exact cause of death. There was evidence to support a negligent homicide instruction, and it is a fundamental rule that the instructions should cover every issue or theory having support in the evidence. St. v. Sotelo, 209 M 86, 679 P2d 779, 41 St. Rep. 568 (1984).

Nonconsensual Blood Extractions Admissible: The prohibition against nonconsensual extractions of blood samples in 61-8-402 (now repealed and content reorganized in Title 61, chapter 8, part 10) does not apply to prosecutions for negligent homicide. Therefore, it was proper to admit into evidence at defendant's trial on the charge of negligent homicide the results of a blood test performed without his consent. St. v. Thompson, 207 M 433, 674 P2d 1094, 41 St. Rep. 57 (1984), distinguished in St. v. Stueck, 280 M 38, 929 P2d 829, 53 St. Rep. 1288 (1996).

Sufficiency of Evidence — Negligent Homicide by Means of Vehicle — Identity of Driver: Defendant was convicted of negligent homicide after a vehicle owned by defendant and his wife struck and killed a pedestrian. Defendant's wife first admitted having been the driver of the vehicle at the time of the accident but later withdrew her statement. Subsequently her husband was arrested, tried, and convicted of the crime. In reviewing the conviction on the issue of sufficiency of the evidence, the Supreme Court ruled the evidence sufficient and based its ruling on the following factors: (1) defendant's wife testified that he was the driver; (2) a witness saw defendant driving shortly before the accident; (3) witnesses testified that it appeared that the driver was a male and that the passenger had long hair; and (4) medical evidence on the location of the injuries defendant sustained in the accident indicated that defendant was the driver. St. v. Henricks, 201 M 157, 653 P2d 479, 39 St. Rep. 2022 (1982).

"Knowing" Use of Firearm — Added Penalty — No Conflict With Negligent Homicide Mental State: There is no conflict between the mental state of 45-18-221, providing an additional penalty for the knowing use of a firearm or other dangerous weapon while engaged in the commission of an offense, and the negligent mental state in this section making criminal homicide negligent homicide when it is committed negligently. It is not a denial of due process to find one guilty of negligent homicide and to further find that he knowingly used a firearm during commission of the offense and therefore enhance the penalty under this section. St. v. Hubbard, 200 M 106, 649 P2d 1331, 39 St. Rep. 1608 (1982), contrasted in St. v. Goulet, 283 M 38, 938 P2d 1330, 54 St. Rep. 482 (1997).

Prosecutorial Comment on Presumption of Intoxication: In negligent homicide trial of defendant involved in auto collision while he was driving after drinking, a forensic scientist testified that blood taken from defendant 2 hours after the accident had a .17 blood alcohol content and that at that level one's driving ability would be obviously impaired and speech, hearing, balance, judgment, reaction time, and other motor skills would be affected. The trial judge ruled that because the charge was negligent homicide he would not instruct the jury on the statutory presumption that one with a .10 blood alcohol content level is under the influence. Prosecutor twice disregarded the ruling, stating in the cross-examination of a witness and in his closing argument that .10 is the legal level of intoxication. Prosecutor used an improper and unacceptable tactic, but defendant was not prejudiced as there was already sufficient evidence as to what a .17 blood alcohol content level meant. St. v. Morgan, 198 M 391, 646 P2d 1177, 39 St. Rep. 1072 (1982).

Driving Under Influence — Pedestrian Killed — Conviction Upheld: Defendant convicted of negligent homicide by hitting and killing pedestrian while driving his pickup truck admitted to drinking from 10 a.m. until 8:30 p.m. on the day of the accident and to consuming more than 12 beers, which he stated was about two and one-half times as much as he would normally drink. Witnesses testified that he drank all day long, staggered, appeared to be drunk, had slurred speech, drove in the wrong lane, and had to swerve to avoid oncoming traffic. The evidence was sufficient to show a conscious disregard for victim's safety and that defendant was intoxicated to such a degree that he had clearly grossly deviated from the standard of conduct that a reasonable person would observe in his situation. St. v. Cook, 198 M 329, 645 P2d 1367, 39 St. Rep. 1026 (1982).

Degree of Neglect — Failure to Provide Child With Medical Attention: The defendant is guilty of negligent homicide where, by failing to provide medical attention for her son, she disregarded a risk of which she should have been aware, and the risk was so great that to disregard it was a gross deviation from a reasonable standard of conduct. St. v. Hoffman, 196 M 268, 639 P2d 507, 39 St. Rep. 79 (1982).

Use of Color Slides as Evidence: The probative value of the use of color slides to portray degree of injury in negligent homicide case outweighed any prejudicial effect they may have had, where the reasonableness of the failure to provide medical attention was the controlling issue and where pathologist testified of the need for color photographs in order to accurately explain his findings. St. v. Hoffman, 196 M 268, 639 P2d 507, 39 St. Rep. 79 (1982).

Severance of Habitual Traffic Offender Charge Properly Denied: The District Court did not err in refusing to sever a habitual traffic offender charge from a DWI charge and a negligent homicide charge. None of the three basic kinds of prejudice outlined in St. v. Orsborn, 170 M 480, 555 P2d 509 (1976), was found to outweigh the judicial economy resulting from a joint trial. This balancing process is left to the sound discretion of the trial judge, which was not abused. St. v. Campbell, 189 M 107, 615 P2d 190 (1980), followed in St. v. Enright, 2000 MT 372, 303 M 457, 16 P3d 366, 57 St. Rep. 1590 (2000).

Lesser Included Offenses — Jury Instructions Regarding:

On appeal, the defendant in a deliberate homicide case alleged error in the failure to give jury instructions on mitigated deliberate homicide and negligent homicide. The general rule is that an instruction is required where there is some evidence to support the lesser included offense. Both negligent homicide and mitigated deliberate homicide are to be considered lesser included offenses of deliberate homicide. Here, a lesser included offense instruction was offered by the State and objected to by the defense. The Montana Supreme Court reiterated its position that error may not be predicated upon the failure to give an instruction when the party alleging the error failed to offer the instruction. Failure to offer an instruction removes the cause of error, particularly when the defense counsel has objected to the instruction upon the ground that the defendant was either guilty of deliberate homicide or not guilty. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Assuming arguendo that negligent homicide is a lesser included offense of deliberate homicide, the court considered whether or not an instruction on negligent homicide should have been given at trial. The rule is that an instruction on a lesser included offense is required where there is some evidence to support the lesser included offense; that is, any evidence which would permit the jury rationally to find him guilty of a lesser offense and acquit him of a greater. The court agreed with the trial court that, considering that death by manual strangulation takes 2 to 3 minutes (or longer if the victim struggles), it was inconceivable how the death could have occurred as a result of negligence. Therefore, the instruction was properly refused. St. v. Hamilton, 185 M 522, 605 P2d 1121 (1980).

Negligence Evidenced by Gross Deviation: Defendant's conduct in pulling out, cocking, and throwing a loaded gun within reach of his intoxicated wife clearly qualifies as a gross deviation giving rise to criminal culpability. St. v. Bier, 181 M 27, 591 P2d 1115 (1979).

Mental State — Intoxication Not a Factor: Since defendant was charged with negligent homicide, which does not require that the offense be committed purposely or knowingly, the trial court correctly refused defendant's proposed jury instruction which read: "An intoxicated condition may be taken into consideration in determining the existence of a mental state which is an element of the offense." St. v. Kirkaldie, 179 M 283, 587 P2d 1298 (1978).

Torture: The definition of torture as whenever one purposely assaults another physically for the purpose of inflicting cruel suffering upon the person assaulted for the particular purpose of enabling the assailant to satisfy some untoward propensity was a proper and correct statement of the law. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976). For full appellate history of McKenzie, see case note at 45-5-102, INFORMATION and INDICTMENT, *Felony Murder Alleged.*

Degree of Negligence:

Lack of due caution or circumspection, as required by 94-2507, R.C.M. 1947 (since repealed), in lawfully correcting child could be found from doctor's testimony that basal skull fracture and fatal liver transection required severe and extensive force. St. v. Henrich, 159 M 365, 498 P2d 124 (1972).

Defendant who deliberately drove his car around curve at a speed which he must have known was dangerous to the lives of himself and his passengers was properly convicted of involuntary manslaughter under 94-2507, R.C.M. 1947 (since repealed). St. v. Pankow, 134 M 519, 333 P2d 1017 (1958).

Instruction permitting conviction on findings that defendant was on wrong side of road and that decedent in no way contributed to the accident was reversible error in that it did not require union of act and criminal negligence and there was no instruction to consider the instructions as a whole. St. v. Strobel, 130 M 442, 304 P2d 606 (1956), explained in St. v. Pankow, 134 M 519, 333 P2d 1017 (1958).

Where the court instructed the jury that in order to find the defendant guilty of manslaughter under 94-2507, R.C.M. 1947 (since repealed), it must find that the defendant committed an unlawful act, not amounting to a felony, and that the unlawful act was the proximate cause of the injury and death, and then in a later instruction defined criminal negligence as such that amounts to a wanton, flagrant, or reckless disregard of consequences or willful indifference of the safety or rights of others, the instructions taken as a whole are correct. For while the former may, standing alone, be inaccurate or even erroneous, yet as qualified and explained by other portions of the charge, in pari materia, it fully and fairly submitted the case to the jury. St. v. Bosch, 125 M 566, 242 P2d 477 (1952).

Evidence in a manslaughter prosecution showing that defendant driver, blinded by bright lights of an approaching car, drove off the highway into a shallow depression filled with a pile of rocks hidden by brush, causing the car to sideswipe a tree, was insufficient to sustain conviction on theory of criminal negligence. St. v. Bast, 116 M 329, 151 P2d 1009 (1944).

Conviction of involuntary manslaughter in the commission of a lawful act required a higher degree of negligence than to establish liability in a civil case; it required aggravated, culpable, or gross negligence or recklessness, a disregard for human life, or an indifference to consequences, such a departure from the conduct of an ordinarily prudent or careful man under the circumstances as to be incompatible with a proper regard for human life. St. v. Powell, 114 M 571, 138 P2d 949 (1943).

The negligent handling of a loaded firearm causing or contributing to the death of another person could be found to support a conviction of involuntary manslaughter. St. v. Kuum, 55 M 436, 178 P 288 (1919).

Double Jeopardy: Prosecution for involuntary manslaughter under 94-2507, R.C.M. 1947 (since repealed), was not barred by defendant's prior conviction upon guilty pleas to driving while intoxicated and operating motor vehicle with improper brakes arising from same accident. St. v. McDonald, 158 M 307, 491 P2d 711 (1971).

Failure to Provide:

Where wife died from subdural hematoma after a period of unconsciousness, husband's failure to summon medical assistance for period of 28 hours was not such degree of culpable negligence as to support a conviction of involuntary manslaughter under 94-2507, R.C.M. 1947 (now MCA, 45-5-104), where unconsciousness appeared to have been from intoxication, wife appeared to be breathing well, and friend advised only bed rest. St. v. Decker, 157 M 361, 485 P2d 695 (1971).

Husband's failure to provide medical attention for wife for 2 days after she fell and sustained serious injuries was such culpable negligence as to support conviction for involuntary manslaughter, even though wife protested that she did not need attention, where she was in semicomatose condition and obviously did need attention. St. v. Mally, 139 M 599, 366 P2d 868 (1961), followed in State ex rel. Kuntz v. District Court, 2000 MT 22, 298 M 146, 995 P2d 951, 57 St. Rep. 111 (2000).

Failure of parents to provide food for baby, with resulting death from starvation, the baby weighing only 10 ounces more at 5 months than at birth, was such culpable negligence as to show a disregard for human life or an indifference to consequences and would support a conviction for involuntary manslaughter even without an intention to cause death. St. v. Bischert, 131 M 152, 308 P2d 969 (1957).

Intent:

Willful or evil intent was not an element of involuntary manslaughter under 94-2507, R.C.M. 1947 (now MCA, 45-5-104). St. v. Pankow, 134 M 519, 333 P2d 1017 (1959); St. v. Messerly, 126 M 62, 244 P2d 1054 (1952); St. v. Souhrada, 122 M 377, 204 P2d 792 (1949).

In prosecution for involuntary manslaughter under 94-2507, R.C.M. 1947 (now MCA, 45-5-104), the issue was one of criminal negligence rather than intent, and instruction that "intent is not an element of involuntary manslaughter" was proper. St. v. Souhrada, 122 M 377, 204 P2d 792 (1949).

45-5-105. Aiding or soliciting suicide.

Criminal Law Commission Comments

Source: New.

If the conduct of the offender made him the agent of the death, the offense is criminal homicide notwithstanding the consent or even the solicitations of the victim. See sections 94-5-101 through 94-5-105 [now MCA, 45-5-102 through 45-5-104].

Rather than relying on aiding or soliciting an attempted homicide, this section sets forth the specific formula to make such acts punishable. The rationale behind the felony sentence for the substantive offense of aiding or soliciting suicide is that the act typifies a very low regard for human life.

Compiler's Comments

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section makes it a felony to aid or solicit a suicide attempt which does not result in the death of the victim. Under the new sections on Causal Relationship Between Conduct and Result, MCA, 45-2-201, and Accountability, MCA, 45-2-302, a person may be convicted of Criminal Homicide, MCA, 45-5-101 (repealed—now deliberate or mitigated deliberate homicide, 45-5-102 and 45-5-103, respectively), for causing another to commit suicide—notwithstanding the consent of the victim. The reason for making aiding or soliciting suicide a separate offense is that such an act indicates a dangerous disregard for human life.

Law Review Articles

Privacy Dignity at the End of Life: Protecting the Right of Montanans to Choose Aid in Dying (The Honorable James R. Browning Symposium, The Right to Privacy), Tucker, 68 Mont. L. Rev. 317 (2007).

45-5-106. Vehicular homicide while under influence.

Compiler's Comments

2021 Amendment: Chapter 498 in (1) at end substituted "61-8-1002" for "61-8-401, 61-8-406, or 61-8-411". Amendment effective January 1, 2022.

Applicability: Section 48, Ch. 498, L. 2021, provided: "[This act] applies to DUI incidents taking place on or after [the effective date of this act]." Effective January 1, 2022.

Saving Clause: Section 45, Ch. 498, L. 2021, was a saving clause.

2013 Amendment: Chapter 153 in (1) inserted reference to 61-8-411; and made minor changes in style. Amendment effective October 1, 2013.

Effective Date: Section 6, Ch. 426, L. 2005, provided that this section is effective on passage and approval. Approved April 28, 2005.

Case Notes

No Constitutional Violation From Legislature's Imposition of Statutory THC Limit for Impaired Driving: The defendant was charged with vehicular homicide while under the influence after colliding with a motorcyclist while making a left turn. A blood draw after the accident showed a concentration of 19 nanograms per milliliter of THC in the defendant's bloodstream. Under 61-8-411 (now repealed), the THC level for impairment was 5 nanograms per milliliter. Five nanograms per milliliter is also the THC limitation contained in 61-8-1002, which was enacted in 2021. In District Court, the defendant argued that the 5 nanogram per milliliter limit on THC levels unconstitutionally violated his guaranteed right to due process of law. On appeal to the

Supreme Court, he added a claim that the provision also violated his equal protection rights. The defendant presented evidence regarding the difficulty of measuring impairment due to marijuana use based on factors like an individual's metabolism and how frequently the individual uses the drug. The District Court rejected the defendant's due process arguments, and the Supreme Court affirmed that the Legislature's policy of setting a limit on THC levels in a driver's bloodstream met the requirements of substantive due process by being rationally related to the government's compelling public safety interest in preventing impaired driving. The Supreme Court also noted that the limitation on THC levels did not create any classifications and did not violate equal protection. St. v. Jensen, 2020 MT 309, 402 Mont. 231, 477 P.3d 335.

No Error in Jury Instructions on Criminal Negligence at Trial for Vehicular Homicide While Under the Influence: At Coluccio's trial for vehicular homicide while under the influence, the trial court gave the jury an instruction on the definition of negligence. In another instruction the court told the jury that in order to convict Coluccio the jury had to find that the state proved that Coluccio was in physical control of a vehicle on state public roadways while under the influence and negligently caused a death, but the court omitted the requirement that the jury conclude that Collucio was criminally negligent, which Coluccio contended took away his defense that he was not criminally negligent while driving after drinking. The Supreme Court disagreed. Considering the instructions as a whole, the second instruction was not misleading. The court also noted that after jury instructions were given, the prosecutor argued that Coluccio was both under the influence and criminally negligent, and that Coluccio's counsel pointed out that the state had to prove not only that Coluccio was at fault, but also that his conduct was a gross deviation from the standard of care. Thus, the jury was fairly instructed and Coluccio was not deprived of his defense. St. v. Coluccio, 2009 MT 273, 352 M 122, 214 P3d 1282 (2009).

Sufficient Evidence of Vehicular Homicide While Under the Influence: After the state presented its case in chief at Coluccio's trial for vehicular homicide while under the influence, Coluccio moved to dismiss for lack of sufficient evidence on grounds that a reasonable juror could not conclude that his actions rose to the level of criminal negligence simply because he committed a minor traffic violation by failing to yield to another vehicle when making a left turn. The motion was denied, and on appeal the Supreme Court affirmed. The traffic offense was only part of the evidence. Other evidence showed that Coluccio drank at least three beers just before driving and then turned in front of a visible oncoming motorcycle, killing the rider. Coluccio's alcohol consumption and driving were sufficient evidence for a reasonable juror to conclude that turning in front of the motorcycle was a gross deviation from ordinary care. St. v. Coluccio, 2009 MT 273, 352 M 122, 214 P3d 1282 (2009).

Forty-Year Sentence for Two Counts of Vehicular Homicide Legal and Affirmed: Following conviction for two counts of vehicular homicide while under the influence, Baker was sentenced to 15 years suspended on the first count and 25 years with 5 years suspended on the second count. Baker contended that the 40-year sentence violated Montana's correctional and sentencing policies because the length of the sentence was not understandable, commensurate with punishment imposed on other persons committing the same offense, or neutral with respect to Baker's race. The Supreme Court concluded that the sentence was well within the statutory parameters as to length and therefore legal. Baker's sentence was affirmed. St. v. Baker, 2008 MT 396, 347 M 159, 197 P3d 1001 (2008).

45-5-111. Extrajudicial confession — evidence of death.

Compiler's Comments

Sections Not Part of Criminal Code: This section and 45-5-112 were not enacted as part of the Criminal Code of 1973 and were previously compiled as part of Title 46 on Criminal Procedure. The sections have been renumbered to this part for convenience. References to "Title 45" or to "this title" or "this code", meaning Title 45, technically do not include these sections.

Case Notes

No Corroboration of Testimony of Witnesses to Extrajudicial Confession — Homicide Conviction Affirmed: Following McGarvey's conviction for deliberate homicide, McGarvey asserted that because the two witnesses who testified regarding McGarvey's extrajudicial confession were patently unreliable, corroboration should have been required to uphold their testimony. The Supreme Court agreed that corroboration is required when a defendant's confession is obtained by law enforcement, but the confession in this instance was heard by two lay witnesses, and the Supreme Court declined to require independent corroborating evidence to establish the trustworthiness of McGarvey's alleged extrajudicial confession. Rather, the court noted that in addition to the lay testimony alleging that McGarvey confessed, the state provided sufficient evidence, as a whole, for the trier of fact to determine that McGarvey was guilty beyond a reasonable doubt. The conviction was affirmed. St. v. McGarvey, 2005 MT 308, 329 M 439, 124 P3d 1131 (2005), distinguishing Opper v. U.S., 348 US 84 (1954), Escobedo v. Ill., 378 US 478 (1964), and U.S. v. Lopez-Alvarez, 970 F2d 583 (9th Cir. 1992).

Evidence of Victim's Statements as to Perpetrator of Crime Not Within Concept of Corpus Delicti or Res Gestae — Use of Terms "Corpus Delicti" and "Res Gestae" Discouraged: The Supreme Court extensively reviewed the use of the terms "corpus delicti" and "res gestae", examining definitions and the historical development of Montana case law referencing the concepts. Here, statements by the victim to family members and friends regarding her troubled relationship with her husband, were not within the bounds of the concept of the corpus delicti because they tended to establish the perpetrator of the crime, which is not an element of the corpus delicti, and should not have been admitted under that rule. The statements were also inadmissible under the concept of res gestae. However, the admission of the victim's statements was merely cumulative and constituted harmless error. The Supreme Court urged that these vague and imprecise terms not be used in the future and advised that the court will henceforth review claims of error in the admission of evidence by determining whether the evidence was admissible under some provision of the Montana Code Annotated or under the Montana Rules of Evidence. St. v. Hansen, 1999 MT 253, 296 M 282, 989 P2d 338, 56 St. Rep. 997 (1999), clarifying numerous Montana cases that have properly or improperly applied the concepts.

Independent Evidence of Identity of Perpetrator Not Element of Corpus Delicti: According to this section, before an extrajudicial confession is admitted into evidence, the state is only required to introduce two elements: (1) that there was a death; and (2) that the death was caused by a criminal agency. It does not require independent evidence of the identity of the perpetrator. As stated in St. v. Kindle, 71 M 58, 227 P 65 (1924), in a prosecution for homicide, proof of the corpus delicti does not necessarily carry with it the identity of the slain or the slayer. St. v. Arrington, 260 M 1, 858 P2d 343, 50 St. Rep. 905 (1993). See also St. v. Gould, 216 M 455, 704 P2d 20 (1985).

Use of Defendant's Statements in Establishing Probable Cause for Leave to File Information: This section merely prohibits admission of a defendant's confession at trial prior to introduction of certain specified independent evidence. It does not relate in any way to use of defendant's statements in establishing probable cause for leave to file an information. St. v. Arrington, 260 M 1, 858 P2d 343, 50 St. Rep. 905 (1993).

45-5-112. Inference of mental state.

Compiler's Comments

Sections Not Part of Criminal Code: See compiler's comments to 45-5-111.

Case Notes

Burden on Defendant in Justifiable Use of Force Case to Raise Reasonable Doubt of Guilt: Longstreth was charged with deliberate homicide and relied on a defense of justifiable use of force. After being convicted of negligent homicide, Longstreth alleged that the jury was incorrectly instructed in violation of her due process rights, contending that the instructions improperly allocated the burden of proof by failing to require the state to prove an absence of justification beyond a reasonable doubt. Citing St. v. Daniels, 210 M 1, 682 P2d 173, 41 St. Rep. 880 (1984), and St. v. Miller, 1998 MT 177, 290 M 97, 966 P2d 721 (1998), the Supreme Court reiterated that justifiable use of force is an affirmative defense and that only the defendant has the burden of producing sufficient evidence to raise a reasonable doubt of guilt. The state's burden is to prove the elements of the charged offense beyond a reasonable doubt, which does not include the absence of justification. Further, this section allows for a permissive inference by the jury rather than a mandatory inference. As long as the instructions given to the jury make it clear that the burden of proof of guilt and all necessary elements of guilt lies squarely with the state, placing the burden of presenting evidence to raise a reasonable doubt of guilt on the defendant is not unconstitutional. St. v. Longstreth, 1999 MT 204, 295 M 457, 984 P2d 157, 56 St. Rep. 795 (1999). See also Leland v. Oreg., 343 US 790, 96 L Ed 1302, 72 S Ct 1002 (1952), Patterson v. N.Y., 432 US 197, 53 L Ed 281, 97 S Ct 2319 (1977), and St. v. Lopez, 185 M 187, 605 P2d 178 (1980). St. v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 623, held that the enactment of 46-16-131 in 2009 abrogated Longstreth, St. v. Henson, 2010 MT 136, 356 Mont. 458, 235 P.3d 1274, and other cases to the extent they held the burden of establishing justifiable use of force was the defendant's in a justifiable use of force case.

No Conclusive Presumption of Criminal Intent in Presentation of Evidence of Mental Disease or Defect — Sandstrom Not Contravened: Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979), established that the due process clause of the U.S. Constitution prohibits the use of a presumption that relieves the prosecution from the burden of proving mental state by requiring an inference of the existence of criminal intent from the fact of criminal conduct. Under 46-14-102, evidence of a mental disease or defect is admissible to prove that a criminal defendant did or did not have a state of mind that is an element of the charged offense. Cowan contended that because mental disease or defect does not constitute a valid defense to a criminal charge in Montana, a conclusive presumption is established as to mental state in violation of Sandstrom. However, under Leland v. Oreg., 343 US 790, 96 L Ed 1302, 72 S Ct 1002 (1952), the due process clause does not require the use of a particular insanity test or allocation of burden of proof, and the constitutionality of the abolition of the insanity defense has been affirmed in St. v. Korell, 213 M 316, 690 P2d 992 (1984). Cowan further contended that if, under this section, any evidence of organized or integrated conduct will suffice to establish criminal conduct beyond a reasonable doubt in spite of clear manifestations of insanity, then no one will ever be acquitted on grounds of insanity because it would be impossible for anyone to cause harm without engaging in a minimal level of organized conduct. However, this section establishes a permissive inference rather than a conclusive presumption, and an inference does not violate the Sandstrom rule. Therefore, the Montana statutes governing the presentation of evidence of mental disease or defect do not establish a conclusive or unrebuttable presumption of criminal intent in contravention of the due process clause or Sandstrom. St. v. Cowan, 260 M 510, 861 P2d 884, 50 St. Rep. 1153 (1993), followed in St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

Instruction on Acting "Knowingly" — Inference Permitted: In deliberate homicide case, the court instructed the jury that one acts knowingly with respect to conduct or a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists and that he acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. The court also gave an instruction that if the jury found that defendant committed a homicide and that no circumstances of mitigation, excuse, or justification appeared, the jury could infer that the homicide was committed knowingly or purposely. Neither instruction had the effect of allocating to defendant some part of the State's burden of proof through use of a presumption or contained a conclusive presumption. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983). See also St. v. Longstreth, 1999 MT 204, 295 M 457, 984 P2d 157, 56 St. Rep. 795 (1999).

Sandstrom Instruction — Overwhelming Evidence of Intent: Petitioner was convicted of deliberate homicide by shooting victim four times in the head. Federal District Court found it to be a violation of due process that a Sandstrom instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" had been given at trial, and granted habeas corpus. The circuit court reversed on appeal, stating that it was inconceivable that any rational juror could have been convinced beyond a reasonable doubt that petitioner shot victim four times in the head without also being convinced beyond a reasonable doubt that he did so "knowingly or purposefully" (the mental element of deliberate homicide in Montana). Thus the error was harmless, for the jury would beyond a reasonable doubt have reached the same conclusion even absent the instruction. McGuinn v. Crist, 657 F2d 1107 (9th Cir. 1981); reversing McGuinn v. Crist, 492 F. Supp. 478 (D.C. Mont. 1980).

Sandstrom Instruction — Harmless Error Doctrine Correct Test — Plain Error Rule Not Applicable — Federal Habeas Corpus: In rejecting the State's contention that the giving of the Sandstrom instruction (Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979)) constituted harmless error, the court stated that in applying the "harmless constitutional error" doctrine, as set out in Chapman v. Calif., 386 US 18, 17 L Ed 2d 705, 87 S Ct 824 (1967), it must be shown that the constitutional right affected is not a right basic to a fair trial and it must be found harmless beyond a reasonable doubt. For conviction the due process clause requires that each element of a crime be proven beyond a reasonable doubt, this being basic to a fair trial. The Sandstrom instruction by shifting the burden of proof of intent, an element of the crime of homicide, to the defendant denies him due process, and thus the court cannot consider the instruction as harmless error. The "plain error" doctrine is not applicable because it only sets a standard of "highly probable" that the instruction error "materially affected the verdict", the wrong standard by which to measure the effect of constitutional error. McGuinn v. Crist, 492 F. Supp. 478 (D.C. Mont. 1980); reversed by McGuinn v. Crist, 657 F2d 1107 (9th Cir. 1981), on the grounds that under the facts of this case the error was harmless.

Sandstrom Instruction — Viewing Instructions as a Whole — Assurance of Effect on Jury: Petition for Writ of Habeas Corpus was filed in U.S. District Court. When the Sandstrom instruction (Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979)) was given at a homicide trial, it may be that the defect can be cured by viewing all of the instructions as a whole; other instructions may be so "rhetorically inconsistent" (ibid. 518-519, n. 7) with the Sandstrom instruction that they overcome its presumptive effect. The court may not speculate on the curative effects of the other instructions on the jury; it must be assured that the jury did not find the defendant guilty on the grounds that he merely acted voluntarily, rather than finding the necessary criminal intent. In examining the instructions given, the court was not so assured and the petition for a Writ of Habeas Corpus was granted. McGuinn v. Crist, 492 F. Supp. 478 (D.C. Mont. 1980); reversed by McGuinn v. Crist, 657 F2d 1107 (9th Cir. 1981), on the grounds that under the facts of this case the error was harmless.

Sandstrom Instruction — Presumption of Intent — Constitutionality — Harmless Error: Defendant, charged with mitigated deliberate homicide, alleged as error the giving of the jury instruction: "The law presumes that a person intends the ordinary consequences of his voluntary acts." Under Montana law, causing the death of another becomes deliberate homicide only when it is committed purposely or knowingly. These elements are necessary to the proof of this particular crime and must be proved beyond a reasonable doubt by the prosecution. Intent is a difficult element to prove. The evidence normally must be in the nature of outward manifestations of the defendant's state of mind, but when a telephone line to the police station from the scene of the murder happened to be open and the defendant was overheard at length, the court knew what he was thinking from his own words. It is difficult to conceive of a better indication as to defendant's intent. Also, the officer heard the fight at the time these words were spoken and another officer found the defendant and the victim's body minutes later. The only contested element here was intent, and the evidence on it was overwhelming. Basing its holding on the probable impact of the instructions upon the mind of the average jury member, in light of the evidence, the impact of the instruction upon the jury could not reasonably have contributed to the verdict. The error in giving the contested instruction was harmless. St. v. Hamilton, 185 M 522, 605 P2d 1121 (1980).

The jury in a deliberate homicide case was instructed that "the law presumes that a person intends the ordinary consequences of his voluntary acts". The U.S. Supreme Court determined that this instruction denied a defendant the constitutional right to a jury determination of proof beyond a reasonable doubt of all elements of the offense. The case was remanded to the Montana Supreme Court to determine if the instruction constituted harmless error. To find harmless error, the Supreme Court must be able to assert that the offensive instruction could not reasonably have contributed to the jury verdict. The court cannot make this assertion. The case is remanded to the District Court for retrial. St. v. Sandstrom, 184 M 391, 603 P2d 244 (1979).

Use of Presumptions and Inferences in Instructions: In response to the defendant's allegations that the use of statutory inferences and presumptions in instructions effectively shifted the burden of proof on the issue of intent to the defendant, the Supreme Court concluded that, when read in their entirety, the instructions can only be interpreted to mean that the State had a burden of proving every element of the offense beyond a reasonable doubt, and the use of the presumptions and inferences merely set forth, in terms entirely consistent with Montana law, how the State could meet this burden by proof of objective facts. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978). For full appellate history of McKenzie, see case note at 45-5-102, INFORMATION and INDICTMENT, *Felony Murder Alleged.*

Valid Criminal Statutory Presumption: An instruction following this statute and the statute itself are constitutionally valid since they do not violate the requirements of Leary v. U.S., 395 US 6, 23 L Ed 2d 57, 89 S Ct 1532 (1969), that to have a valid criminal statutory presumption, the presumed fact must more likely than not flow from the proved fact on which it depends. St. v. Coleman, 177 M 1, 579 P2d 732 (1978). For full appellate history of Coleman, see case note at 45-2-101, SERIOUS BODILY INJURY, *Evidence.*

45-5-116. Harm to fetus of another — exceptions.

Compiler's Comments

Effective Date: This section is effective October 1, 2013.

Severability: Section 6, Ch. 271, L. 2013, was a severability clause.

Part 2
Assault and Related Offenses

45-5-201. Assault.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 211.1.

This section codifies what is generally known as "simple assault." The section makes several changes in the old assault law. The primary change is that it sets forth the elements of the offense of assault specifically rather than assigning to the offense conduct not covered by other more serious assault provisions. Another change is that the offense must be committed purposely, knowingly or negligently, thus maintaining the intent element consistent with the other proposed statutes dealing with offenses against the person. It should be noted that "battery," i.e., actual bodily injury or contact of some kind, is an essential element of the offense of assault in all instances except those arising under subdivision (1)(d). The type of apprehension required as an element of the offense under subdivision (1)(d) is apprehension of bodily injury, and not apprehension of mere physical contact. (See section 94-2-101(5) [now MCA, 45-2-101(5)], bodily injury.)

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 268, L. 2023. Amendment effective October 1, 2023.

1999 Amendment: Chapter 432 at beginning of (2) deleted exception clause; deleted former (3) that read: "(3) If the victim is less than 14 years old and the offender is 18 or more years old, the offender, upon conviction under subsection (1)(a), shall be fined not to exceed $50,000 or be imprisoned in the state prison for a term not to exceed 5 years, or both"; and made minor changes in style. Amendment effective October 1, 1999.

1991 Amendment: In (1)(d) deleted former second sentence that read: "The purpose to cause reasonable apprehension or the knowledge that reasonable apprehension would be caused shall be presumed in any case in which a person knowingly points a firearm at or in the direction of another, whether or not the offender believes the firearm to be loaded". Amendment effective March 26, 1991.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This is the simple assault section of the new criminal code. As such it replaces the prior law of simple assault contained in R.C.M. 1947, § 94-603. This section represents a change from prior law in that it specifically enumerates the elements of the offense rather than relying on a common-law definition of assault limited only by the exclusion of conduct assigned to the more serious forms of assault.

This provision differs from prior law in a number of substantive particulars. Actual physical contact or "battery" is required as an element of the offense except under subsection (d) and the apprehension which constitutes an element of the offense under that subsection is an apprehension of bodily injury, not mere apprehension of physical contact. Similarly, state of mind is made an explicit element of the offense with knowledge or purpose required under subsections (a), (c) and (d) and negligence required under subsection (b). Another significant change is the addition of the presumption that knowingly pointing a firearm at another is either with the purpose of creating reasonable apprehension of bodily injury or with the knowledge that reasonable apprehension of bodily injury will result.

The 1979 amendment added subsection (3) which provides for felony, rather than misdemeanor, punishment where the assault is inflicted by an adult upon a child. This subsection, in combination with § 45-5-201(1)(c), will reach types of sexual assaults upon children by adults that might not be actionable under the Sexual Assault section, MCA, 45-5-502. An actual withholding by the victim of consent to the sexual conduct is required to convict under § 45-5-502. The age of a child, from which lack of consent is implied in other sex offenses, is not sufficient under the Sexual Assault statute. Since young children do not always find it easy to withhold consent from an adult, there can be cases where the requisite lack of consent cannot be proved although the sexual contact is obvious. In such a case, the defendant may be charged under § 45-5-201(1)(c), which only requires a showing of physical contact of an insulting or provoking nature, and he would be subject to the increased penalty of § 45-5-201(3).

Case Notes

Assault Not Lesser Included Offense of Criminal Endangerment: A defendant charged with accountability to criminal endangerment was not entitled to a jury instruction setting forth assault, as defined in 45-5-201(1)(a), as a lesser included offense of criminal endangerment. St. v. Molenda, 2010 MT 215, 358 Mont. 1, 243 P.3d 387.

Failure to Instruct Jury on Misdemeanor Assault as Lesser Included Offense of Assault With Weapon — Reversible Error: Feltz's attorney requested that the jury be instructed on misdemeanor assault as a lesser included offense of assault with a weapon, based on the fact that one of the victims may not have been in fear of serious bodily injury or that the fear was not reasonable in light of the circumstances. The instruction was denied and Feltz appealed. The Supreme Court held that evidence in the record supported the instruction in this case. Failure to give the instruction was reversible error, and the case was remanded for a new trial. St. v. Feltz, 2010 MT 48, 355 Mont. 308, 227 P.3d 1035, distinguishing St. v. Reiner, 179 Mont. 239, 587 P.2d 950 (1978).

No Possibility of Lesser Plea Instruction — No Error in Denial of Motion to Withdraw Guilty Plea: As part of a plea agreement, Swensen pleaded guilty to felony assault and signed a waiver of rights, including the right to a jury instruction on a lesser included offense. Swensen subsequently moved to withdraw the guilty plea on grounds that the District Court failed to specifically advise him about the lesser included offense of misdemeanor assault during the change of plea hearing. The District Court denied the motion and Swensen was sentenced pursuant to the terms of the plea agreement. Swensen appealed, but the Supreme Court affirmed. A court may at any time before judgment and within 1 year after final judgment allow a defendant to withdraw a guilty plea upon a showing of good cause, which includes the minimal constitutional requirement that a guilty plea be voluntary and intelligent and may include additional criteria such as the discovery of new exculpatory evidence. In this case, Swensen's guilty plea to aggravated assault was voluntary, and the District Court's interrogation during the change of plea hearing was adequate. Additionally, Swensen's admissions on the record about the nature of the injuries inflicted on the victim effectively eliminated the possibility that Swensen was entitled to a lesser included offense instruction. Absent good cause, the District Court did not err in denying Swensen's motion to withdraw the guilty plea. St. v. Swensen, 2009 MT 42, 349 M 268, 203 P3d 786 (2009). See also St. v. Martinez, 1998 MT 265, 291 M 265, 968 P2d 705 (1998).

Assault Not Lesser Included Offense of Partner or Family Member Assault: A charge of assault under this section is not a lesser included offense of partner or family member assault under 45-5-206. St. v. Aune, 2006 MT 113, 332 M 211, 136 P3d 529 (2006).

Conflicting Evidence of Plaintiff's Damages From Battery — Motion for New Trial Properly Denied Absent Evidence of Damages: The trial court instructed the jury that Beye committed battery on Moore, but the jury concluded that Moore was not injured and was not entitled to damages. Moore moved to vacate the verdict and for a new trial, arguing that the evidence indicated that some injury occurred, so a zero damage award was inadequate. However, the motion was denied. On appeal, the Supreme Court affirmed. Although evidence regarding injuries was conflicting, Beye presented sufficient credible evidence to uphold the verdict, and the evidence was not trifling or frivolous when viewed in the light most favorable to Beye, so the Supreme Court declined to disturb the verdict. Moore v. Beye, 2005 MT 266, 329 M 109, 122 P3d 1212 (2005), followed in Hoffman v. Austin, 2006 MT 289, 334 M 357, 147 P3d 177 (2006).

Misdemeanor Assault Not Lesser Included Offense of Sexual Assault — Denial of Lesser Included Offense Instruction Not Error: In a sexual assault trial, Cameron requested a jury instruction that misdemeanor assault was a lesser included offense of sexual assault. The request was denied. On appeal, Cameron raised several arguments regarding the lesser included offense and claimed error in denial of the instruction. The Supreme Court noted that under St. v. Martinez, 1998 MT 265, 291 M 306, 968 P2d 705 (1998), two criteria must be met before a defendant is entitled to a lesser offense instruction: (1) the offense must actually constitute a lesser included offense of the offense charged; and (2) there must be sufficient evidence to support the lesser included offense instruction. The court examined the elements of both offenses and concluded that the elements of misdemeanor assault and sexual assault are not similar and do not overlap. Thus, misdemeanor assault is not a lesser included offense of sexual assault. The jury was therefore properly instructed, and the sexual assault conviction was affirmed. St. v. Cameron, 2005 MT 32, 326 M 51, 106 P3d 1189 (2005), followed in St. v. Gerstner, 2009 MT 303, 353 M 86, 219 P3d 866 (2009). See also St. v. Denny, 2021 MT 104, 404 Mont. 116, 485 P.3d 1227.

No Authority to Appeal Justice's Court Order Denying Motion to Withdraw Guilty Plea: The Feights got into a fight with a highway patrol officer at a high school basketball game and were charged with misdemeanor assault. They were informed of their rights in Justice's Court, waived their right to counsel, and pleaded guilty. More than a month later, they moved through counsel to withdraw their guilty pleas, claiming good cause under 46-16-105. The Justice's Court denied the motion, holding that the Feights had been given due process and had voluntarily, knowingly, and willingly entered guilty pleas. The Feights appealed the denial of their motion to withdraw their guilty pleas to District Court. The state moved to dismiss the appeal, contending that the District Court lacked jurisdiction to review denial of the motion to withdraw a plea. The District Court dismissed the appeal but remanded to Justice's Court with a recommendation that the Feights be allowed to withdraw their pleas. Instead, the Justice's Court reinstated judgment, and the Feights appealed to the Supreme Court. The Supreme Court affirmed. The statutes that provide for and determine the jurisdiction of a District Court to entertain an appeal from a Justice's Court include 3-5-303, 46-12-204, 46-17-203, and 46-17-311. However, none of these statutes provide authority for appeal to the District Court from the denial of a motion to withdraw a guilty plea. Further, the specific language of these sections prevails over the general language in 46-20-104 defining the scope of appeal by a criminal defendant. The Legislature has not created a statutory right of appeal from a Justice's Court denial of a motion to withdraw a guilty plea, and the Supreme Court refrained from creating one. St. v. Feight, 2001 MT 205, 306 M 312, 33 P3d 623 (2001), distinguishing St. v. Rogers, 267 M 190, 883 P2d 115 (1994).

Introduction of Evidence of Acts Not Referred to in Pretrial Order — Not Grounds for New Trial: As a result of a dispute, the relationship between neighbors Lopez, Monroe, and Josephson deteriorated until assault charges were filed against Josephson. The operative contentions in the pretrial order were that Josephson assaulted Lopez by pointing a firearm at Lopez's face and assaulted Monroe verbally and fired a weapon toward Monroe's property. The District Court found it impossible to determine from the allegations the dates, times, and places that the alleged assaults took place, but the court concluded that the pretrial order nevertheless placed Josephson on notice that he was being accused of assault on multiple occasions over an unspecified period of time. Josephson moved for a new trial on grounds that plaintiffs were improperly allowed to introduce evidence of acts not referred to in the pretrial order, evidence of bad character, and evidence of other crimes, wrongs, or acts. However, because Josephson waited until the day of trial to clarify which assaults formed the basis of the case against him, rather than using available pretrial motions and rules of discovery, the District Court was not found to have abused its discretion in giving plaintiffs latitude in their proof of the various assaults at trial, including allowing evidence of bad character to impeach Josephson's testimony. The District Court did properly preclude evidence of assaults by Josephson on nonparty persons. Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001).

Failure to Show That but for Negligent Legal Advice, Deportation Could Have Been Successfully Defended — Professional Negligence Claim Properly Dismissed: Fang, a Chinese citizen and lawful permanent United States resident employed by Montana State University-Bozeman, was involved in a domestic dispute with his wife that resulted in charges of assault. Fang consulted Bock, who worked at the university legal services offices, regarding the possibility of deportation. Bock in turn consulted Rice, an attorney who had made a presentation on immigration law at a seminar that Bock had attended, and asked if a misdemeanor domestic abuse charge was grounds for deportation. Rice informed Bock that the federal Immigration and Naturalization Service (INS) would not initiate deportation proceedings until the commission of two misdemeanors. Bock relayed that information to Fang, who relied at least in part on the information and pleaded guilty to family member assault. However, in 1996, Congress enacted a new immigration statute (see 8 U.S.C. 1227(a)(2)(E)(i)) that provides that domestic violence convictions are deportable offenses. Several weeks after pleading guilty, Fang received a notice to appear and face deportation. After hiring new counsel, Fang moved to withdraw the guilty plea. The District Court granted the motion on grounds that the failure of Bock to inform Fang of the possibility of removal to China constituted ineffective assistance of counsel, and the INS agreed to suspend further proceedings until the resolution of charges against Fang. Based on the advice of his new counsel, Fang reached a plea agreement with the Gallatin County Attorney to plead guilty to an amended charge of assault. Following conviction, the INS again moved to deport Fang, and based on the fact that assault also constitutes a crime of violence against a protected person pursuant to federal immigration law, Fang was ordered to be deported. Fang then filed a complaint against Bock, seeking damages for professional negligence and negligent supervision and treble damages under 37-61-406. The District Court applied Lorash v. Epstein, 236 M 21, 767 P2d 1335 (1989), and determined that Fang could not satisfy the last element of the test for a prima facie case of professional negligence, which requires a showing that but for such negligence, Fang would have successfully defended against the offense. The court then summarily dismissed the case. Fang appealed, contending that because of Bock's advice, he was exposed to the possibility of removal from this country and had to spend substantial amounts of money to avoid that exposure. Pursuant to Lorash, the Supreme Court had to determine whether Fang would have been exposed to the possibility of removal from this country with or without Bock's advice, in light of the offenses to which Fang pleaded guilty, the statutory basis for deportation, and the immigration judge's explanation for the deportation order. Under either charge, Fang was guilty of an offense of violence against a protected person—his wife. The title of the offense was irrelevant because for purposes of immigration law, misdemeanor assault is considered just as much a crime of violence against a spouse as family member assault. Further, Fang's argument that a different result was compelled by the fact that the assault conviction was subsequently expunged based on a deferred prosecution also failed because under federal case law, no effect is to be given to a state action that purports to remove a guilty plea or conviction by operation of a state rehabilitative statute. Thus, Fang's situation was a result of the conduct that he admitted and was the same following correct legal advice as it was following Bock's incorrect advice. Although Bock misinformed Fang, that advice did not lead to Fang's predicament, nor would the money that he spent to have the first conviction set aside have changed the result. Fang could not prove that but for negligent legal advice he could have avoided deportation, and Bock was entitled to judgment as a matter of law. Fang v. Bock, 2001 MT 116, 305 M 322, 28 P3d 456 (2001).

Failure to Complete Sexual Offender Treatment Sufficient to Warrant Suspended Sentence Revocation and Continued Incarceration: Vallier received 5 years for felony assault and 20 years for felony sexual assault of an 11-year-old child, with 10 years suspended if Vallier completed the prison sexual offender program. Vallier failed to complete the program by the time of scheduled discharge of the active sentence, so the District Court revoked the suspended portion of the sentence, further classifying Vallier as a level 3 sexual offender at a high risk to reoffend. On appeal, the Supreme Court affirmed, finding Vallier's failure to complete the sexual offender program of such a nature as to require Vallier's continued incarceration. Sufficient evidence was offered to prove that Vallier continued to be a serious community threat until the treatment was received, and Vallier did not meet the burden of showing that the District Court abused its discretion in revoking the suspended sentence. St. v. Vallier, 2000 MT 225, 301 M 228, 8 P3d 112, 57 St. Rep. 928 (2000).

Assault Lesser Included Offense of Deliberate Homicide — Error to Refuse Instruction on Lesser Included Offense: The defendant was convicted of deliberate homicide. At trial, the court refused the defendant's proposed jury instruction on the offense of assault. The Supreme Court determined that as a matter of law, under the express terms of 46-1-202, assault is an included offense of the crime of deliberate homicide. When there was some evidence supporting a defendant's theory that the defendant was guilty of assault but not murder, the District Court erred in refusing the proposed jury instruction on assault as a lesser included offense of deliberate homicide. St. v. Castle, 285 M 363, 948 P2d 688, 54 St. Rep. 1194 (1997).

Insufficient Evidence of Fear of Bodily Injury to Support Assault Conviction: Mavros was convicted of assault against Ohl. Although Ohl and Mavros engaged in a shouting match following an automobile collision, Ohl testified that there was no physical contact between the two and that she was not scared or afraid of Mavros or afraid of bodily injury during the entire incident. Absent sufficient evidence that Ohl had a reasonable apprehension of bodily injury, the assault conviction was reversed. Hamilton v. Mavros, 284 M 46, 943 P2d 963, 54 St. Rep. 741 (1997).

Not Necessary That Victim Be Direct Recipient of Defendant's Actions: Walsh argued that he should not have been convicted of assault of a passenger in a pickup when there was no evidence that he made any move toward the pickup, only that he had assaulted the driver outside the pickup. The Supreme Court held that it was undisputed that Walsh had made a move toward the victim's mother who was a passenger in the pickup and that the jury was entitled to use common experience to conclude whether a particular situation would cause a person to experience fear. St. v. Walsh, 281 M 70, 931 P2d 42, 54 St. Rep. 64 (1997).

Felony Assault (now Assault With a Weapon) Not Lesser Included Offense of Aggravated Assault: Arlington contended that he should have been charged with felony assault with a weapon (now assault with a weapon) rather than aggravated assault with a weapon enhancement because felony assault (now assault with a weapon) should be considered a lesser included offense of aggravated assault. Applying the test set out in Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932), the Supreme Court held that even though there may be substantial overlap in the proof that would be offered to establish both crimes, serious bodily injury, an element of aggravated assault, requires proof of different facts than does bodily injury, an element of felony assault (now assault with a weapon). The crime of aggravated assault does not contain the element that the crime be committed with a weapon; therefore, felony assault (now assault with a weapon) is not a lesser included offense of aggravated assault. St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994).

No Evidence of Fear of Bodily Injury — Conviction Reversed: The Supreme Court reversed a conviction of misdemeanor assault based on the insufficiency of evidence of reasonable apprehension of bodily injury on behalf of anyone whom defendant allegedly threatened. St. v. Felando, 248 M 144, 810 P2d 289, 48 St. Rep. 359 (1991).

Pointing Gun — Misdemeanor Assault: The elements of misdemeanor assault were present when defendant admitted knowingly and purposely pointing a gun at his live-in girlfriend and a Sheriff who had entered the house to retrieve the girlfriend's minor son. There were no facts to support a defense of justifiable use of force to protect family, property, or home. St. v. Beach, 247 M 147, 805 P2d 564, 48 St. Rep. 131 (1991).

Amended Information Without Supporting Affidavit Sufficient: The state originally filed an information accompanied by a supporting affidavit charging the defendant with criminal endangerment. The prosecutor subsequently amended the information, charging the defendant with misdemeanor assault. The lower court did not require the prosecutor to file a second affidavit. The defendant argued that the first affidavit did not allege the proper facts to charge him with assault. The Supreme Court held that the lower court could infer the necessary facts from the first affidavit to find probable cause as to the amended charge. St. v. Ecker, 243 M 337, 792 P2d 1079, 47 St. Rep. 906 (1990).

Misdemeanor Statute Presumption — Knowingly Pointing Gun: Defendant argued that the language of the misdemeanor assault statute, "shall be presumed in any case in which a person knowingly points a firearm at or in the direction of another", is a conclusive presumption that prevents the state from charging her with felony assault (now assault with a weapon) once the state proves she pointed a gun towards another. However, the misdemeanor statute is not the exclusive vehicle for prosecution when such conduct occurs. The misdemeanor assault statute addresses the reasonable apprehension of bodily injury, and the felony assault (now assault with a weapon) statute addresses the reasonable apprehension of serious bodily injury. A county attorney has the discretion to charge a defendant under either 45-5-202 or this section, and a subsequent conviction will stand if the evidence supports it. (See 1991 amendment.) St. v. Ottwell, 239 M 150, 779 P2d 500, 46 St. Rep. 1580 (1989).

Credible Evidence of Assault — Jury Instructions Sufficient: Despite defendant's contentions that the victim's testimony could not form a basis for a finding of guilt because the testimony was inconsistent and because the victim's credibility was questionable, the jury was properly instructed regarding the weight to be given to the testimony and, given the facts and law presented, correctly concluded that defendant was guilty of misdemeanor and felony assault (now assault with a weapon). St. v. Hammer, 233 M 101, 759 P2d 979, 45 St. Rep. 1326 (1988).

Verdict Supported by Sufficient Evidence of Felony Assault (now Assault With a Weapon) — "Use" of Weapon: Crabb was convicted of felony assault (now assault with a weapon) by use of a weapon after he pointed a .44 magnum revolver with an 8-inch barrel at Howard's face from a distance of 6 feet and threatened to kill him. Crabb's attorney claimed a misdemeanor assault charge would have been more appropriate because Crabb did not actually "use" the weapon, through firing or as a club. The Supreme Court labeled the argument as "ludicrous", noting the distinction between reasonable apprehension of bodily injury required in misdemeanor assault and reasonable apprehension of serious bodily injury required in felony assault (now assault with a weapon). Under the circumstances, a conviction of felony assault (now assault with a weapon) was appropriate and affirmed. St. v. Crabb, 232 M 170, 756 P2d 1120, 45 St. Rep. 966 (1988).

Shot Fired at Dog and in Direction of Dog Owner — Assault Conviction Affirmed: The elements of misdemeanor assault were present when the defendant, upset with barking dogs, fired a shot at a dog while the owner was standing nearby. St. v. Keup, 228 M 194, 741 P2d 1330, 44 St. Rep. 1451 (1987).

Assault Not Lesser Included Offense of Burglary: Since burglary does not require any showing of bodily injury and a person may be convicted of burglary without any such showing, assault is not a lesser included offense of burglary. St. v. McDonald, 226 M 208, 734 P2d 1216, 44 St. Rep. 593 (1987).

Constitutionality Not Considered: Defendant alleged for the first time on appeal that this section is unconstitutional because it fails to provide a parent, who may use reasonable and necessary force to restrain or correct his child under 45-3-107, with any guidance in determining what is or is not reasonable or necessary force. The Supreme Court refused to consider the allegation on appeal, since none of the exceptions of 46-20-702 (now 46-20-701(2)) were found to apply. St. v. Probert, 221 M 476, 719 P2d 783, 43 St. Rep. 988 (1986).

Jury Instruction Concerning Elements of Felony Assault (now Assault With a Weapon) Not Required: In conviction for felony assault (now assault with a weapon), the fact that victim is age 14 or younger and defendant is 18 or older is not an element of the crime but relates to sentencing only, determination of which is the exclusive province of the judge. No jury instruction distinguishing felony assault (now assault with a weapon) and misdemeanor assault is required. St. v. Probert, 221 M 476, 719 P2d 783, 43 St. Rep. 988 (1986).

Reasonable Force Instruction Unnecessary: In trial of parent for assault against child, since statute permits use of "reasonable" force to restrain or correct child, no jury instruction specifying what conduct is "reasonable" need be given. St. v. Probert, 221 M 476, 719 P2d 783, 43 St. Rep. 988 (1986).

No Exclusiveness of Workers' Compensation Remedy in Case of Personal Assault and Battery by Employer: A narrow exception to the exclusiveness of the workers' compensation remedy outlined in 39-71-411 exists when an employer personally commits an assault and battery upon an employee. Sitzman v. Schumaker, 221 M 304, 718 P2d 657, 43 St. Rep. 831 (1986).

Aggravated Assault — Assault and Resisting Arrest Co-Equal Lesser Included Offenses Under the Facts: When a Department of Highways (now Department of Transportation) enforcement officer stopped a truck to weigh it, the passenger unloaded it against officer's orders, threatened the officer with a chain binder, and drove away after being told he was under arrest. In light of these facts, it was not reversible error to instruct the jury that if the defendant was not found guilty of aggravated assault he could be found guilty of the lesser offense of assault, instead of instructing the jury that he could be found guilty of the lesser included offense of resisting arrest. The instruction amply covered defendant's version of the event as well as the instruction he requested would have done. St. v. Thornton, 218 M 317, 708 P2d 273, 42 St. Rep. 1614 (1985).

Prior Civil Action Against Victim — Exclusion: In the trial of a defendant for felony assault (now assault with a weapon) against a woman and her 14-month-old daughter, the trial court excluded testimony regarding a previous civil child protective action against the mother on grounds that the subject matter of the previous action was not relevant and its introduction would only serve to confuse the issues. The Supreme Court held that the District Court Judge did not abuse his discretion in determining that the offered evidence was irrelevant and that there was sufficient evidence to support the jury verdict despite the victim's denial of her previous statements about the assault. St. v. Oman, 218 M 260, 707 P2d 1117, 42 St. Rep. 1565 (1985).

"Knowingly" and "Negligently" Not Mutually Exclusive Mental States: The defendant's involvement in a vehicular accident resulted in his being convicted of knowingly causing serious bodily injury to one of the occupants of a car and negligently causing bodily injury to the remaining occupants. The two mental states are not mutually exclusive, as proof of knowledge necessarily proves the elements of criminal negligence. St. v. Pierce, 199 M 57, 647 P2d 847, 39 St. Rep. 1205 (1982).

Codefendants — Disparate Sentences — Suspension Versus Twenty Years: Defendant, a 28-year-old male with a history of involvement with weapons, and his codefendant, a 58-year-old alcoholic with a wooden leg and no record of violence, were each convicted of two counts of kidnapping and two counts of assault in regard to two girls 12 and 14 years old. Defendant was sentenced to two consecutive 10-year prison sentences on the kidnapping convictions and to 6 months on each assault charge, to run concurrently with each other and with the kidnapping sentences. Codefendant, defendant's natural father, received a 10-year sentence, all of which was suspended on the condition that he commit himself to alcohol treatment at a state institution and remain a law-abiding citizen. The Supreme Court ruled that there was no denial of equal protection as claimed by defendant. St. v. Herrera, 197 M 463, 643 P2d 588, 39 St. Rep. 731 (1982).

Circumstantial Evidence Sufficient for Conviction: A guard at the Montana State Prison was struck in the back by two handmade darts. The defendant's fingerprints were on the darts, and a plastic tube in the defendant's cell was loose and capable of being removed from the wall. The tube could be used to shoot the darts. The defendant had threatened the guard and was in a position to hit the guard with the darts. Based on this evidence, the defendant was convicted of assault. The defendant argued on appeal that the State failed to meet its burden of proof because it failed to produce an eyewitness to the assault. The Supreme Court held that although the State's case was based on circumstantial evidence, it was sufficient to meet its burden of proof. St. v. Shurtliff, 195 M 213, 635 P2d 1294, 38 St. Rep. 1798 (1981).

Affidavit Establishing Crime Required to Show Crime Charged: Petitioner was convicted of assault. Nothing contained in the affidavit filed with the original information related to assault. This is "plain error" of constitutional magnitude that requires reversal of petitioner's conviction of assault. Parker v. Crist, 190 M 376, 621 P2d 484, 37 St. Rep. 2048 (1980).

Sandstrom Instruction — Permissive Inference or Conclusive Presumption: A "Sandstrom-type" instruction was given at petitioner's trial, which resulted in his conviction on seven counts of armed robbery and one count of assault. No objection to the instruction was made at the trial, but the Supreme Court reviewed the instruction under the "plain error" rule. Petitioner contended that the instruction either shifts the burden of proof on the issue of intent from the State to the defendant or constitutes a presumption against the defendant, either of which is constitutionally impermissible under Sandstrom v. Mont., 442 US 510, 99 S Ct 2450, 61 L Ed 2d 39 (1979). The instruction given was a permissive inference and not a conclusive presumption. The questioned instruction was not a "naked" presumption as in Sandstrom; the instructions as a whole made it abundantly clear that the State bears the burden of proving beyond a reasonable doubt every essential element of the crimes of which defendant was charged. The court found that the error, if any, was harmless. (See 1991 amendment.) Parker v. Crist, 190 M 376, 621 P2d 484, 37 St. Rep. 2048 (1980).

Permissive Joinder — Not Grant of Jurisdiction: Relator was charged with misdemeanor assault and burglary (a felony). Relator contends that the District Court had no jurisdiction to try him for a misdemeanor. Section 46-11-404 allows an information to charge two or more offenses connected in their commission. This section is a permissive joinder statute for offenses within the jurisdiction of a given court, not a grant of jurisdiction. Jurisdiction for the misdemeanor assault lies with the Justice's Court. State ex rel. Rasmussen v. District Court, 189 M 183, 615 P2d 231, 37 St. Rep. 1498 (1980).

Circumstances Favoring Withdrawal of Guilty Plea: The defendant was not made aware of the differing elements of assault as set forth in 45-5-201 and 45-5-202, and the District Court had before it evidence indicating that defendant was under the influence of a combination of drugs and alcohol and was possibly suffering from mental distress or instability at the time of the alleged assault. Under those circumstances the judge should not have accepted defendant's guilty plea, and defendant should be allowed to withdraw the plea. St. v. Nelson, 184 M 491, 603 P2d 1050 (1979).

Instruction on Lesser Included Offense:

Where the defendant threatened his victims with a .357 magnum revolver, it was proper to charge him with aggravated assault and was not error to refuse to instruct the jury on the lesser included offense of assault. St. v. Reiner, 179 M 239, 587 P2d 950 (1978).

It is clear from the evidence a reasonable inference may be drawn that defendant accidentally or negligently shot the victim, and therefore it was prejudicial error to refuse to give the jury an instruction on misdemeanor assault. St. v. Bouslaugh, 176 M 78, 576 P2d 261 (1978).

Instruction on Assault: Instructing jury on assault as willfully inflicting grievous bodily harm when defendant had been charged with assault with intent to prevent or resist his lawful detention or apprehension was harmless error where the evidence conclusively demonstrated defendant's guilt of the offense charged. St. v. Jones, 161 M 117, 505 P2d 97 (1973).

Instructions to Jury:

It was error to refuse defendant's instructions defining assault in the third degree under 94-603, R.C.M. 1947 (now 45-5-201), and instead to instruct the jury as to assault in the first and second degree under 94-601, R.C.M. 1947 (now 45-5-202), and 94-602, R.C.M. 1947 (now 45-5-201), respectively, but omitting any instructions defining what felony was intended to be committed by assaulting a person with a gun. Since the jury had no way of knowing what felony, if any, the defendant intended to commit upon a person by pointing a gun at him, the jury should have been allowed to consider whether or not defendant was guilty of third-degree assault. St. v. Quinlan, 126 M 52, 244 P2d 1058 (1952), overruled on other grounds in St. v. Cooper, 158 M 102, 489 P2d 99 (1971).

Where the only evidence of assault was by pointing a firearm, defendant was guilty of assault in the second degree under 94-602, R.C.M. 1947 (now 45-5-201) or not guilty at all, so that it was error to give an instruction on the law applicable to assault in the third degree as defined in 94-603, R.C.M. 1947 (now 45-5-201). St. v. Karri, 84 M 130, 276 P 427 (1929).

Intent: A verdict finding a defendant guilty of an assault with corrosive acids and caustic chemicals, which failed to find that the assault was committed willfully or maliciously or with intent to injure, was a verdict of guilty of assault in the third degree under 94-603, R.C.M. 1947 (now 45-5-201). St. v. District Court, 35 M 321, 89 P 63 (1907).

45-5-202. Aggravated assault.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 211.1(2).

This section covers assaults committed under circumstances of aggravation. The elements of assault generally must be present in addition to the aggravating factor of causing "serious bodily injury" (see 45-2-101) with purpose or knowledge. It should be noted that the crime of battery is merged within the assault provision by direct reference to physical contact, bodily injury and serious bodily injury in [45-5-201(1)(a) and (1)(b) and (1)(c) and 45-5-202(2)(a) and (2)(c)]. Classical assault in a tort sense is included in 45-5-201(1)(d) and 45-5-202(2)(b).

Compiler's Comments

2007 Amendment: Chapter 472 in (1) at end after "to another" inserted "or purposely or knowingly, with the use of physical force or contact, causes reasonable apprehension of serious bodily injury or death in another"; and in (2) near middle after "term" substituted "not to exceed 20 years" for "of not less than 2 years or more than 20 years". Amendment effective October 1, 2007.

1999 Amendment: Chapter 432 deleted former (2) that read: "(2) A person commits the offense of felony assault if the person purposely or knowingly causes:

(a) bodily injury to another with a weapon; or

(b) reasonable apprehension of serious bodily injury in another by use of a weapon"; deleted former last sentence of (2)(a) that read: "Subject to the provisions of subsection (3)(b), a person convicted of felony assault shall be imprisoned in the state prison for a term not to exceed 10 years or be fined not more than $50,000, or both"; deleted former (3)(b) that read: "(b) In addition to any sentence imposed under subsection (3)(a), if the person convicted of felony assault is a partner or family member of the victim, as defined in 45-5-206, the person is required to pay for and complete a counseling assessment as required in 45-5-206(4)"; and made minor changes in style. Amendment effective October 1, 1999.

See 45-5-213, Assault with weapon, enacted in 1999 and containing the offense deleted from this section by Ch. 432.

1997 Amendments: Chapter 245 in (3)(a), at beginning of second sentence, inserted "Subject to the provisions of subsection (3)(b)"; inserted (3)(b) requiring payment for and completion of counseling assessment in certain circumstances; and made minor changes in style.

Chapter 433 deleted (2)(c) that read: "(c) bodily injury to a peace officer or a person who is responsible for the care or custody of a prisoner"; and made minor changes in style. Amendment effective April 29, 1997.

Applicability: Section 4, Ch. 433, L. 1997, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective April 29, 1997.

1995 Amendment: Chapter 482 in version effective July 1, 1997, in (3), near end of first sentence, inserted reference to 46-18-219; and made minor changes in style.

Coordination Instruction — Effective Dates: Section 21, Ch. 482, L. 1995, provided: "(1) If House Bill No. 357 and [this act] [Senate Bill No. 66] are both passed and approved:

(a) [sections 1 through 18] of [this act] are effective July 1, 1997; and

(b) the sentencing commission shall include recommendations for implementing the public policy contained in [sections 1 through 18] of [this act].

(2) [Sections 19, 20, and this section] [enacted as codification and coordination instructions] are effective July 1, 1995.

(3) If House Bill No. 357 is not passed and approved, then this section is void." House Bill No. 357 was approved March 31, 1995, as Ch. 306, L. 1995. Therefore, the amendments to 45-5-202, enacted as sec. 4 of Senate Bill No. 66, are effective July 1, 1997.

1985 Amendment: In (2) inserted introductory clause relating to felony assault; and in (3) inserted last sentence.

1981 Amendments: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Chapter 289 added "or a person who is responsible for the care or custody of a prisoner" to (1)(d).

Annotator's Note: This section of the new criminal code deals with the more serious forms of assault. As such it replaces the old crimes of First Degree Assault (R.C.M. 1947, § 94-601) and Second Degree Assault (R.C.M. 1947, § 94-602). This section requires that the acts be done with purpose or knowledge. In all but subsection (2)(b) an actual physical contact or "battery" is a required element and in subsection (2)(b) the required element is a reasonable apprehension of serious bodily injury caused by use of a weapon. The factor which distinguishes each of these from simple assault is, respectively, the infliction of serious bodily injury as opposed to mere bodily injury, the use of a weapon to inflict the bodily injury or to raise a reasonable apprehension of serious bodily injury, or the fact that the bodily injury is inflicted on a peace officer. In subsection (2)(b) the factor is that the apprehension is of serious bodily injury rather than mere bodily injury and that the apprehension is caused by the use of a weapon. It should be noted in this context that the use of any weapon, a length of pipe as well as the more obvious firearm, is sufficient aggravation to invoke the heavier penalties of this section if bodily injury or a reasonable apprehension of serious bodily injury results.

A 1977 amendment provided for a minimum aggravated assault prison term of 2 years.

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ELEMENTS

Definition of Mental State Applied by District Court Not Identified in Legal Conclusions — No Reversible Error: Following a bench trial, the District Court convicted the defendant of aggravated assault. In its legal conclusions, the District Court found that the defendant had committed the assault purposely or knowingly but did not specify which definition of mental state it had applied, 45-2-101(35) or 45-2-101(65). On appeal, the defendant argued that the court's failure to identify which definition it had applied required the reversal of his conviction. The state argued that even if the District Court had applied the incorrect definition, the error was harmless. The Supreme Court agreed, concluding that based on the evidence and testimony presented at trial, the District Court could reasonably infer that the defendant acted with the requisite mental state. St. v. Reim, 2014 MT 108, 374 Mont. 487, 323 P.3d 880.

Consent May Not Be Used as Defense to Aggravated Assault Charge: Mackrill argued that the jury verdict against him finding him guilty of aggravated assault should be dismissed because the victim consented to fight him. The Supreme Court ruled that 45-2-211(2)(d) provided that consent could not be used in a criminal case if it would be against public policy to permit the conduct or the resulting harm even if the victim had consented to the conduct or harm. The Supreme Court cited numerous cases from other jurisdictions with similar or related fact patterns in which the other courts had also held that consent in those cases could not be used as a defense because to allow the defense would violate public policy. St. v. Mackrill, 2008 MT 297, 345 M 469, 191 P3d 451 (2008).

Defendant May Not Claim Intoxication as Inability to Consent as Defense in Aggravated Assault Case: Mackrill argued that the jury verdict against him finding him guilty of aggravated assault should be dismissed because he was intoxicated at the time he had a fight with the victim and therefore could not have consented to enter into the fight. Since his argument that the victim consented to engage in the fight had been disregarded, Mackrill argued that the Supreme Court should also find that his own intoxication made it impossible for him to consent to the fight. The Supreme Court held that 45-2-203 specifically disallowed intoxication as a defense and that the defendant had not raised the due process issue at trial or properly argued the issue before the Supreme Court. St. v. Mackrill, 2008 MT 297, 345 M 469, 191 P3d 451 (2008).

Sufficient Evidence to Support Assault Convictions — Motion to Dismiss for Insufficient Evidence Properly Denied: Following the close of the state's case against McCaslin for aggravated assault and assault with a weapon, McCaslin moved to dismiss both counts on grounds of insufficient evidence, asserting that the state failed to prove that he purposely or knowingly caused bodily harm to another and that because he was not the aggressor, a self-defense argument was justified. The motion was denied, and the jury subsequently convicted McCaslin on both counts. On appeal, the Supreme Court reviewed the record and concluded that, with deference to the jury and in a light most favorable to the prosecution, a reasonable trier of fact could have found the essential elements of both crimes beyond a reasonable doubt. McCaslin's convictions were affirmed. St. v. McCaslin, 2004 MT 212, 322 M 350, 96 P3d 722 (2004).

Criminal Endangerment, Negligent Endangerment, and Partner or Family Member Assault Not Considered Lesser Included Offenses of Aggravated Assault: At trial for aggravated assault, the District Court refused Hoffman's request of lesser included offense instructions on the offenses of criminal endangerment, negligent endangerment, and partner or family member assault, and Hoffman appealed. The Supreme Court affirmed. Under 46-1-202(8)(a), a lesser included offense is one that is established by proof of the same or less than all the facts required to establish commission of the offense charged, while under 46-1-202(8)(c), a lesser included offense is one that differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission. Although Hoffman made prefatory reference to both subsections, the substance of Hoffman's argument focused entirely on subsection (8)(c), and the Supreme Court declined to address arguments related to subsection (8)(a) that were raised for the first time on appeal. It is incumbent on counsel to specify at trial which subsection is being relied upon. Subsection (8)(c) does not support a conclusion that criminal endangerment, negligent endangerment, or partner or family member assault is a lesser included offense of aggravated assault. The District Court's properly concluded that the offenses were too dissimilar to warrant a lesser included offense instruction. St. v. Hoffman, 2003 MT 26, 314 M 155, 64 P3d 1013 (2003), following St. v. Fisch, 266 M 520, 881 P2d 626 (1994).

Instructions for Self-Destructive Activity Given From Afar — Elements of Aggravated Assault Satisfied Given Foreseeability of Injury: Posing as a doctor, Sherer made numerous telephone calls from Florida to Montana women, asking the women to do destructive things to their bodies under the guise of performing self-tests to diagnose possible infection. Three women harmed themselves at Sherer's suggestion, for which Sherer was convicted of two counts of criminal endangerment and one count of aggravated assault and ordered to register as a violent offender. Sherer appealed the aggravated assault charge, arguing that encouraging "someone to injure themselves does not constitute aggravated assault" and that the causation element was too remote to form the basis of an aggravated assault charge. The Supreme Court disagreed. Sherer's instructions to the victims were intended to produce the precise injuries suffered, and by admitting to the facts in the information, Sherer could not credibly claim that he did not intend the injuries because the injuries flowed directly from Sherer's instructions. Statutes defining aggravated assault, cause, act, and conduct gave fair warning that the nature of Sherer's conduct constituted the offense of aggravated assault if that conduct resulted in the intended injuries. The definition of aggravated assault does not require a defined parameter of proximity between defendant and victim or require that a defendant personally direct force toward the victim, but specifically contemplates that any form of communication may itself be sufficient conduct. Sherer was successful in causing the intended injury, and his attempts to blame the victim for falling for the deceptive, illegal activity were meritless. The aggravated assault conviction was affirmed. St. v. Sherer, 2002 MT 337, 313 M 299, 60 P3d 1010 (2002).

Direct Blow to Face Likely to Cause Serious Bodily Injury: Houle was convicted of aggravated assault for punching another convenience store patron and breaking the patron's jaw but contended that he acted in self-defense and that the state failed to prove that he intended to seriously injure the victim. A defense of justifiable use of force concedes, in part, that the person purposely and knowingly struck the victim. Common experience would tell most people that a direct blow to the face of an unsuspecting victim can cause serious bodily injury, as defined by statute. Houle's conviction was affirmed. St. v. Houle, 1998 MT 235, 291 M 95, 966 P2d 147, 55 St. Rep. 989 (1998).

Aggravated Assault — Sufficiency of Circumstantial Evidence — Extraneous Allegation of Use of Weapon Held Not to Affect Conviction — Instruction Properly Refused: Neary was charged with aggravated assault of a female friend. The evidence at trial consisted of statements by witnesses who placed him, in an angry mood, with the injured woman at the top of some stairs and who heard admissions against interest and inconsistent statements from Neary about the circumstances of the woman's injury. The state also introduced expert medical testimony that the woman's injuries were consistent with a blow to the head with an object or a fall down some stairs onto an object. A neurologist testified for Neary that the woman's injuries could have been caused in the same manner and that the woman's blood showed evidence of alcohol, amphetamines, and a prescription drug, which, in combination, would cause a propensity to fall. Neary contended that the state's case was circumstantial and that the verdict was not supported by the evidence. The Supreme Court held that Neary's inconsistent statements, his other statements, and his actions before, during, and after the incident supported the jury's verdict. The Supreme Court distinguished St. v. Gould, 216 M 455, 704 P2d 20 (1985), and St. v. Gommenginger, 242 M 265, 790 P2d 455 (1990), by pointing out that in Gommenginger, unlike the case before it, testimony came from a drug informant with a motive to lie and that in Gould, the defendant had moved to suppress pretrial admissions, that Neary had not. The Supreme Court also held that the District Court did not err in refusing to amend one of the state's jury instructions to provide that Neary had committed the elements of aggravated assault "with a weapon". The Supreme Court noted that the fact that the text of the state's information alleged that Neary struck the woman "with some type of blunt weapon" did not change the fact that the jury was correctly given the elements of the offense of aggravated assault and that the jury was not required to find that Neary used a weapon to find him guilty of aggravated assault. Distinguishing St. v. Later, 260 M 363, 860

P2d 135 (1993), in which the defendant had been charged under the wrong statute, the Supreme Court held that Neary was not prevented from preparing an adequate defense by the statement in the information that Neary used a weapon. St. v. Neary, 284 M 409, 944 P2d 750, 54 St. Rep. 942 (1997).

Included Offense Based Upon Less Risk, Injury, or Culpability — Negligent Endangerment Not Lesser Included Offense of Aggravated Assault: Fisch was convicted of aggravated assault after the District Court refused to accept a jury instruction on negligent endangerment, which Fisch argued was a lesser included offense of aggravated assault. Citing St. v. Sheppard, 253 M 118, 832 P2d 370 (1992), the Supreme Court held that a person is entitled to an instruction on a lesser included offense only if, based upon the evidence, the jury could rationally find the person guilty of the lesser offense and if that entitlement is based upon one offense being, in law, an included offense of the other. Because the definition of "included offense" is written in the disjunctive with the qualifier "only", a lesser included offense may differ in one and only one way from that of the offense charged. Fisch's argument fails because at least two of the variations in degree exist between the offense charged and negligent endangerment. Moreover, Fisch's "less serious risk", "less serious injury", and "lesser kind of culpability" arguments under 46-1-202(8)(c) also fail. As a result, the Supreme Court held that no amount of evidence as to negligent endangerment would entitle Fisch to the instruction he sought. St. v. Fisch, 266 M 520, 881 P2d 626, 51 St. Rep. 907 (1994).

Included Offense Based Upon Similar Proof — Failure to Raise in District Court: Fisch was convicted of aggravated assault after the District Court refused to accept a jury instruction on negligent endangerment, which Fisch argued was a lesser included offense of aggravated assault. Citing St. v. Henderson, 265 M 454, 877 P2d 1013, 51 St. Rep. 606 (1994), the Supreme Court noted that Fisch's argument for a lesser included offense based upon 46-1-202(8)(a) was not raised in the District Court and that Fisch could not change his theory on appeal from that argued in the District Court. St. v. Fisch, 266 M 520, 881 P2d 626, 51 St. Rep. 907 (1994).

Felony Assault (now Assault With a Weapon) Not Lesser Included Offense of Aggravated Assault: Arlington contended that he should have been charged with felony assault with a weapon (now assault with a weapon) rather than aggravated assault with a weapon enhancement because felony assault (now assault with a weapon) should be considered a lesser included offense of aggravated assault. Applying the test set out in Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932), the Supreme Court held that even though there may be substantial overlap in the proof that would be offered to establish both crimes, serious bodily injury, an element of aggravated assault, requires proof of different facts than does bodily injury, an element of felony assault (now assault with a weapon). The crime of aggravated assault does not contain the element that the crime be committed with a weapon; therefore, felony assault (now assault with a weapon) is not a lesser included offense of aggravated assault. St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994).

"Reasonable Apprehension" Not Unconstitutionally Vague: Defendant challenged the terms "reasonable apprehension" in the aggravated assault statute and "deprive" in the theft statute as unconstitutionally vague. The court rejected the contention, indicating that the first term had been construed by the court before and that the second term was defined in 45-2-101. St. v. Campbell, 219 M 194, 711 P2d 1357, 42 St. Rep. 1948 (1985).

Assault and Resisting Arrest Co-Equal Lesser Included Offenses Under the Facts: When a Department of Highways (now Department of Transportation) enforcement officer stopped a truck to weigh it, the passenger unloaded it against officer's orders, threatened the officer with a chain binder, and drove away after being told he was under arrest. In light of these facts, it was not reversible error to instruct the jury that if the defendant was not found guilty of aggravated assault (this conduct would probably be felony assault (now assault with a weapon) under the 1985 amendment) he could be found guilty of the lesser offense of assault, instead of instructing the jury that he could be found guilty of the lesser included offense of resisting arrest. The instruction amply covered defendant's version of the event as well as the instruction he requested would have done. St. v. Thornton, 218 M 317, 708 P2d 273, 42 St. Rep. 1614 (1985).

Conviction for Aggravated Assault, Escape, and Obstructing a Peace Officer — No Double Jeopardy: There was no double jeopardy when defendant was convicted of aggravated assault, escape, and obstructing a peace officer, all of which arose out of the same event, as each offense contains an element not common to the other offenses. St. v. Thornton, 218 M 317, 708 P2d 273, 42 St. Rep. 1614 (1985).

Not Specific Intent Crime: The Lemmons were divorced after 20 years of marriage. Leroy was seeing Donna Myers, and Koralyn was seeing John Sweeting. Myers and Sweeting had just ended a personal and business relationship. Sweeting asked Koralyn to get a briefcase out of Leroy's truck. The briefcase actually belonged to Myers. Leroy and Myers returned to the truck and found the briefcase missing. They concluded Koralyn had taken it since the truck was not broken into. Leroy and Myers went to Koralyn's home. She heard them drive up and put a gun in the waistband of her pants. Leroy and Koralyn fought, and Leroy struck her in the head with the gun. Leroy and Myers put Koralyn on the floor of the truck and went to the Sheriff's department. The Sheriff was not immediately available, so Leroy and Myers left, with Koralyn still on the floor of the truck, to find Sweeting. A high speed chase ensued in which the cars rammed together and gunshots were exchanged. The chase ended when Leroy's transmission caught fire. The charges arising from the pursuit were dropped. Leroy was charged with aggravated assault (this conduct would probably be felony assault (now assault with a weapon) under the 1985 amendment) and kidnapping. He was convicted of assault and unlawful restraint. Leroy contended the evidence of intent was insufficient. The court held that the prosecution did not have to prove specific intent. The necessary elements for "mens rea" are embodied in "purposely" and "knowingly". Aggravated assault is not a specific intent crime. The prosecution was required to show only that he acted purposely or knowingly. St. v. Lemmon, 214 M 121, 692 P2d 455, 41 St. Rep. 2359 (1984).

Double Jeopardy — Assault Conviction in District Court — Driving Under the Influence Conviction in Justice's Court: The defendant's involvement in a vehicular accident resulted in his conviction in Justice's Court of driving under the influence of alcohol and his conviction in District Court of aggravated assault. The defendant's constitutional right against being placed in double jeopardy was not violated as each offense requires proof of a fact the other does not. Driving under the influence requires proof of intoxication, while assault does not. Assault requires proof of bodily injury, while driving under the influence does not. St. v. Pierce, 199 M 57, 647 P2d 847, 39 St. Rep. 1205 (1982).

"Knowingly" and "Negligently" Not Mutually Exclusive Mental States: The defendant's involvement in a vehicular accident resulted in his being convicted of knowingly causing serious bodily injury to one of the occupants of a car and negligently causing bodily injury to the remaining occupants. The two mental states are not mutually exclusive, as proof of knowledge necessarily proves the elements of criminal negligence. St. v. Pierce, 199 M 57, 647 P2d 847, 39 St. Rep. 1205 (1982).

Specific Intent Not Element of Crime: Since aggravated assault, as defined by this section, is not a specific intent crime, refusal to instruct jury on necessity of finding specific intent as an element of the crime is not error. St. v. Howard, 195 M 400, 637 P2d 15, 38 St. Rep. 1980 (1981).

Resisting Arrest as Included in Aggravated Assault: The defendant, convicted of aggravated assault, argued that the refusal of an offered jury instruction on resisting arrest was reversible error. The Supreme Court rejected the contention that resisting arrest could not possibly be a lesser included offense of aggravated assault. St. v. Gopher, 194 M 227, 633 P2d 1195, 38 St. Rep. 1521 (1981).

Aggravated Kidnapping and Aggravated Assault — Conviction From Same Act: Both aggravated kidnapping and aggravated assault may be charged for the same act. Section 46-11-502 (renumbered 46-11-410) does not prohibit such convictions because the elements of the crimes differ and neither aggravated kidnapping nor aggravated assault is a general offense a specific instance of which is prohibited by the other. St. v. Buckman, 193 M 145, 630 P2d 743, 38 St. Rep. 1007 (1981).

Aggravated Assault Not a Lesser Included Offense of Robbery: When, in the course of a robbery, the defendant fired a shotgun in the direction of a bartender, the District Court did not err in imposing sentences for both robbery and aggravated assault (this conduct would probably be felony assault (now assault with a weapon) under the 1985 amendment) following the defendant's conviction. Under the text established in Blockburger v. U.S., 284 US 299, 52 S Ct 180, 76 L Ed 306 (1932), as applied by St. v. Close, 191 M 229, 623 P2d 940 (1981), and other Montana cases, the "facts" to which 46-11-501(2) (now repealed) must be understood to refer are the statutory elements of the crime rather than the individual facts of each case. Here, because the aggravated assault statute requires proof of at least one element that is not needed to establish the offense of robbery, aggravated assault is not a lesser included offense in the crime of robbery. St. v. Ritchson, 193 M 112, 630 P2d 234, 38 St. Rep. 1015 (1981).

ADMISSION OF EVIDENCE

Voir Dire — Aggravated Assault — Questioning Jurors as to Past Assaults on Relatives and Friends: The defendant's right to a fair trial may have been prejudiced by not being allowed to ask each juror whether relatives and friends had ever been victims of an assault. However, no evidence was presented to the Supreme Court that the defendant was prejudiced by the judge's restrictions; therefore, it was not reversible error. St. v. Lamere, 190 M 332, 621 P2d 462, 37 St. Rep. 1936 (1980), followed in St. v. Dickens, 198 M 482, 647 P2d 338, 39 St. Rep. 1137 (1982).

Exclusion of Testimony: Testimony concerning threats to members of defendant's family made by the victim of the defendant's assault prior to the assault may be excluded if the testimony is repetitious and likely to distract and mislead the jury from the issues actually in controversy. The exclusion of such testimony is within the court's discretion. St. v. Breitenstein, 180 M 503, 591 P2d 233 (1979).

CHARGING DEFENDANT

Charging Information Not Required to Include Elements of Self-Defense: Dunfee contended that the District Court erroneously denied a motion to dismiss an information charging Dunfee with aggravated assault for lack of probable cause. Dunfee asserted that because facts relative to Dunfee's use of force in self-defense were known to officers at the time that the information was filed but were not included in the information, the charging documents lacked a showing of probable cause and should have been dismissed. The Supreme Court disagreed. The charging documents contained the required showing of probable cause that Dunfee committed aggravated assault. The state was not required to set forth evidence that Dunfee may have been acting in self-defense. The burden was on Dunfee during trial. The trial court did not err in refusing to dismiss the information for lack of probable cause. St. v. Dunfee, 2005 MT 147, 327 M 335, 114 P3d 217 (2005).

Aggravated Assault — Sufficiency of Circumstantial Evidence — Extraneous Allegation of Use of Weapon Held Not to Affect Conviction — Instruction Properly Refused: Neary was charged with aggravated assault of a female friend. The evidence at trial consisted of statements by witnesses who placed him, in an angry mood, with the injured woman at the top of some stairs and who heard admissions against interest and inconsistent statements from Neary about the circumstances of the woman's injury. The state also introduced expert medical testimony that the woman's injuries were consistent with a blow to the head with an object or a fall down some stairs onto an object. A neurologist testified for Neary that the woman's injuries could have been caused in the same manner and that the woman's blood showed evidence of alcohol, amphetamines, and a prescription drug, which, in combination, would cause a propensity to fall. Neary contended that the state's case was circumstantial and that the verdict was not supported by the evidence. The Supreme Court held that Neary's inconsistent statements, his other statements, and his actions before, during, and after the incident supported the jury's verdict. The Supreme Court distinguished St. v. Gould, 216 M 455, 704 P2d 20 (1985), and St. v. Gommenginger, 242 M 265, 790 P2d 455 (1990), by pointing out that in Gommenginger, unlike the case before it, testimony came from a drug informant with a motive to lie and that in Gould, the defendant had moved to suppress pretrial admissions, that Neary had not. The Supreme Court also held that the District Court did not err in refusing to amend one of the state's jury instructions to provide that Neary had committed the elements of aggravated assault "with a weapon". The Supreme Court noted that the fact that the text of the state's information alleged that Neary struck the woman "with some type of blunt weapon" did not change the fact that the jury was correctly given the elements of the offense of aggravated assault and that the jury was not required to find that Neary used a weapon to find him guilty of aggravated assault. Distinguishing St. v. Later, 260 M 363, 860 P2d 135 (1993), in which the defendant had been charged under the wrong statute, the Supreme Court held that Neary was not prevented from preparing an adequate defense by the statement in the information that Neary used a weapon. St. v. Neary, 284 M 409, 944 P2d 750, 54 St. Rep. 942 (1997).

Information Naming Wrong Offense Saved by Supporting Facts: Victim was twice assaulted the night of his death. Defendant admitted to the first; the second caused victim's death. The information charged defendant with deliberate homicide; he was convicted of aggravated assault arising from the first assault, and the information stated facts which made it clear the State intended to prove the nonfatal first assault as part of its deliberate homicide theory, so that defendant was informed of what was intended to be charged and could not have been surprised or misled at the trial. Therefore, an otherwise fatal defect inherent in the fact that, under the charge, defendant could have been convicted of the lesser included offense of aggravated assault in relation to the second assault but not the first, and was in fact convicted in relation to the first assault, was saved by the facts stated in the information. Therefore, the holding below that defendant was convicted of an uncharged offense and the grant of acquittal notwithstanding the guilty verdict was reversed. St. v. Longneck, 196 M 151, 640 P2d 436, 38 St. Rep. 2160 (1981).

Conviction of Lesser Included Offense as Bar to Subsequent Prosecution: A subsequent prosecution is barred by a prior conviction if the subsequent prosecution is: (1) based upon the same acts as was the prior conviction; (2) for an offense of which the offense in the prior conviction is a lesser included offense; and (3) in a court which is part of the same sovereign as the court involved in the prior conviction. Because the offense of disturbing the peace essentially requires no proof beyond that required for conviction of first-degree assault, it is a lesser included offense of the greater offense of assault. Yother v. St., 182 M 351, 597 P2d 79 (1979).

Double Jeopardy: The charge of possession of a weapon by a prisoner does not constitute an offense included in the charge of aggravated assault. Therefore, a conviction on both charges does not violate prohibitions against double jeopardy. St. v. Perry, 180 M 364, 590 P2d 1129 (1979).

Charge as a Matter of Prosecutor's Discretion: When the facts of a case support possible charges of both aggravated assault and attempted deliberate homicide, the crime to be charged is a matter of prosecutorial discretion, which will not be interfered with if different proof is required under each statute and there is no clear and manifest legislative intent to the contrary. St. v. Booke, 178 M 225, 583 P2d 405 (1978). See also St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994).

Dismissal of Counts — Effect on Trial of Remaining Count: The State's failure to dismiss two of three counts of aggravated assault prior to beginning of trial when it knew the victim would not be present to testify did not constitute denial of a fair trial on the remaining count because evidence admitted was permissible circumstantial evidence easily separated from direct evidence introduced on the first count and the jury was duly admonished to ignore all evidence stricken upon dismissal of two counts. St. v. Bradford, 175 M 545, 575 P2d 83 (1978).

Amendment of Information: The crimes defined in subsections (1)(a) and (1)(c) (now, under the 1985 amendment, subsections (1) and (2)(b)) of this section are different in nature, so amendment of the information from subsection (1)(a) (now (2)) of this section to subsection (1)(c) (now (2)(b)) was one of substance and should not have been allowed after the defendant had pleaded. St. v. Brown, 172 M 41, 560 P2d 533 (1976).

Weapons Used: Multiple counts of aggravated assault under subsection (1)(b), specifying various probable weapons, are unnecessary to inform the defendant of the charges against him since an information of aggravated assault naming weapons in the alternative fulfills the notice requirements. State ex rel. McKenzie v. District Court, 165 M 54, 525 P2d 1211 (1974). For full appellate history of McKenzie, see case note at 45-5-102, INFORMATION and INDICTMENT, *Felony Murder Alleged.*

EVIDENCE

Sufficient Evidence of Serious Bodily Injury to Sustain Aggravated Assault Conviction: Potter claimed that there was insufficient evidence of serious bodily injury to sustain an aggravated assault conviction. Potter's expert testified that the victim's facial discoloration, orbital rim injury, deviated septum, and ear perforation did not present a risk of death, any serious disfigurement, or the potential loss of function of a bodily member or organ. The state's witness noted these injuries also and additionally testified that the victim suffered a neck fracture and possible brain and psychological injuries. In a light most favorable to the prosecution, the jury was entitled to believe the evidence presented by the state and to rationally conclude that the victim suffered serious bodily injury. Potter's aggravated assault conviction was affirmed. St. v. Potter, 2008 MT 381, 347 M 38, 197 P3d 471 (2008).

No Ineffective Assistance of Counsel Because of Failure to Request Continuance of Aggravated Assault Trial: Trull contended that he received ineffective assistance of counsel because his attorney failed to request a continuance of Trull's aggravated assault trial when allegedly new medical testimony emerged at trial. The Supreme Court noted that medical records provided to counsel before trial showed that the victim did not have an orbital fracture and that the CAT scan presented at trial, which affirmed the medical records, did not constitute new evidence. Thus, counsel had no justifiable reason for requesting a continuance, and counsel's conduct could not be considered ineffective assistance. Counsel's decision to proceed with trial fell within the wide range of reasonable and professional assistance, and Trull's assertion failed. St. v. Trull, 2006 MT 119, 332 M 233, 136 P3d 551 (2006).

Protracted Impairment as Part of Definition of Serious Bodily Injury Not Unconstitutionally Vague: Trull contended that the term "protracted impairment" as part of the definition of serious bodily injury was constitutionally vague and that the use of the phrase "serious bodily injury" in the aggravated assault statute was therefore misleading. Assuming the constitutionality of the statute, the Supreme Court held that the terms "protracted" and "impairment" are not obscure or incomprehensible and are terms of common usage that the jury could understand. The jury found that during the assault, Trull inflicted a serious bodily injury resulting in a protracted impairment of the victim's vision, and the court declined to disturb the verdict based on vague or misleading definitions in the aggravated assault statute. St. v. Trull, 2006 MT 119, 332 M 233, 136 P3d 551 (2006).

Evidence of Serious Bodily Injury Sufficient to Prove Assault Without Expert Medical Testimony: Based on the nature of victim's injuries and his uncontroverted testimony as to how he was injured, any rational trier of fact could have found without the aid of expert medical testimony that serious bodily injury occurred. The state's failure to present such testimony was not fatal to establishing serious bodily injury under the circumstances. St. v. Bower, 254 M 1, 833 P2d 1106, 49 St. Rep. 586 (1992).

Reasonable Apprehension: While the State is required to present evidence to show the victim's state of mind at the time of the alleged assault, a showing of immediate fear is not the only way to prove "reasonable apprehension". A victim may be put in a position, such as here, of being so startled, shocked, or afraid that his reaction is a delayed one. The reasonable apprehension may be a response that the victim is not instantly aware of but his actions may clearly show that he apprehends the reality of the attack. Here the victim testified that he brushed off the defendant and hurried back into the store, doing just as the defendant told him. St. v. Lamere, 190 M 332, 621 P2d 462, 37 St. Rep. 1936 (1980).

Suppression of Defendant's Confession — When Miranda Warning Inadequate — Voluntariness: Appellant's statement was admitted into evidence erroneously for two reasons. First, the State failed to prove the voluntariness of appellant's confession at the suppression hearing by a preponderance of the evidence. When the State fails to show that appellant was advised of his Miranda rights or that appellant made the statement attributed to him or to introduce any evidence other than the evidence showing that the appellant had the mental capacity to make a voluntary statement, a finding that the State has carried its burden of proving voluntariness by a preponderance of the evidence is clearly against the weight of the evidence and must be overturned. Second, the Miranda warning allegedly given appellant was inadequate. The language, "we have no way of giving you a lawyer, but one will be appointed for you, if and when you go to court", was held confusing. Because the confession "undoubtedly weighed heavily in the minds of the jurors in finding [the] appellant guilty", conviction was reversed. St. v. Dess, 184 M 116, 602 P2d 142 (1979).

GUILTY PLEA

Circumstances Favoring Withdrawal of Guilty Plea: The defendant was not made aware of the differing elements of assault as set forth in 45-5-201 and 45-5-202, and the District Court had before it evidence indicating that defendant was under the influence of a combination of drugs and alcohol and was possibly suffering from mental distress or instability at the time of the alleged assault. Under these circumstances the judge should not have accepted defendant's guilty plea, and defendant should be allowed to withdraw the plea. St. v. Nelson, 184 M 491, 603 P2d 1050 (1979).

Voluntariness of Guilty Plea — Knowledge of Lesser Included Offenses: Defendant contends that his guilty plea was not voluntary because he did not understand the difference between aggravated assault and the lesser included offense of misdemeanor assault. The court said that this argument only applies where there is a fundamental mistake, such as where the defendant pleads guilty to nighttime burglary, a felony, when the burglary was committed in the daytime, a lesser offense. There is no fundamental mistake in the case where the defendant was informed of all the elements of aggravated assault. St. v. Campbell, 182 M 521, 597 P2d 1146 (1979).

INSTRUCTIONS

No Error in Refusing to Give Lesser Included Offense Instruction When Defendant Could Not Rationally Be Convicted of Lesser Offense: Schmidt contended that the trial court improperly denied a request to give an instruction on aggravated assault as a lesser included offense of deliberate homicide. The Supreme Court disagreed. By definition, aggravated assault does not include death, and if a death occurs, homicide is implicated, so the jury could not rationally have found Schmidt guilty of aggravated assault when the victim of Schmidt's attack died. The fact that aggravated assault constitutes a lesser included offense of deliberate homicide does not in itself satisfy the statutory requirement for a lesser included offense instruction if the jury was not warranted in finding guilt of aggravated assault based on the evidence. St. v. Schmidt, 2009 MT 450, 354 M 280, 224 P3d 618 (2009).

Criminal Endangerment, Negligent Endangerment, and Partner or Family Member Assault Not Considered Lesser Included Offenses of Aggravated Assault: At trial for aggravated assault, the District Court refused Hoffman's request of lesser included offense instructions on the offenses of criminal endangerment, negligent endangerment, and partner or family member assault, and Hoffman appealed. The Supreme Court affirmed. Under 46-1-202(8)(a), a lesser included offense is one that is established by proof of the same or less than all the facts required to establish commission of the offense charged, while under 46-1-202(8)(c), a lesser included offense is one that differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission. Although Hoffman made prefatory reference to both subsections, the substance of Hoffman's argument focused entirely on subsection (8)(c), and the Supreme Court declined to address arguments related to subsection (8)(a) that were raised for the first time on appeal. It is incumbent on counsel to specify at trial which subsection is being relied upon. Subsection (8)(c) does not support a conclusion that criminal endangerment, negligent endangerment, or partner or family member assault is a lesser included offense of aggravated assault. The District Court's properly concluded that the offenses were too dissimilar to warrant a lesser included offense instruction. St. v. Hoffman, 2003 MT 26, 314 M 155, 64 P3d 1013 (2003), following St. v. Fisch, 266 M 520, 881 P2d 626 (1994).

Standard Self-Defense Instruction Given — Second Instruction Tailored to Facts Improper: In aggravated assault trial, the 9th instruction fully set forth the elements of self-defense and the 10th instruction related to self-defense by one assaulted with fists, as defendant claimed he had been. The 10th instruction was repetitious and may have placed undue emphasis on the requirements for self-defense. On remand following reversal on another issue, the court recommended that the repetitious instruction not be given. St. v. White, 202 M 491, 658 P2d 1111, 40 St. Rep. 235 (1983).

Specific Intent Not Element of Crime: Since aggravated assault, as defined by this section, is not a specific intent crime, refusal to instruct jury on necessity of finding specific intent as an element of the crime is not error. St. v. Howard, 195 M 400, 637 P2d 15, 38 St. Rep. 1980 (1981).

Lesser Included Offense:

Where the defendant threatened his victims with a .357 magnum revolver, it was proper to charge him with aggravated assault (this conduct would probably be felony assault (now assault with a weapon) under the 1985 amendment) and was not error to refuse to instruct the jury on the lesser included offense of assault. St. v. Reiner, 179 M 239, 587 P2d 950 (1978).

It is clear from the evidence a reasonable inference may be drawn that defendant accidentally or negligently shot the victim, and therefore it was prejudicial error to refuse to give the jury an instruction on misdemeanor assault. St. v. Bouslaugh, 176 M 78, 576 P2d 261 (1978).

Repetitious Instructions Refused: The court did not err by refusing repetitious instructions regarding self-defense and defense of another or by giving an instruction further defining "knowledge" beyond the language contained in defendant's proposed instruction. The jury was entitled to a complete definition of "knowledge" since the crimes charged require "knowledge" or "purpose" on the part of the accused. St. v. Larson, 175 M 395, 574 P2d 266 (1978).

SUFFICIENCY OF EVIDENCE

Reasonable Apprehension Supported by Prior Inconsistent Statements and Other Evidence Sufficient for Conviction: A victim's statements just after an alleged aggravated assault and independent, reliable evidence corroborating those statements were sufficient to support reasonable apprehension of serious bodily injury even though the victim later retracted those statements. In addition, events occurring around the time of the aggravated assault contributed to the reasonableness of the victim's fear of serious bodily injury but did not result in the charging of a "continuous" offense. Viewed as a whole, the evidence was sufficient for a reasonable jury to find aggravated assault had occurred during a single incident. St. v. Torres, 2013 MT 101, 369 Mont. 516, 299 P.3d 804.

Sufficient Evidence of Defendant's Conscious Intent to Strike Victim — Aggravated Assault Conviction Affirmed: Nick contended that there was inadequate evidence of a conscious object to strike the victim with a screwdriver when Nick was attacked by the victim while sitting in a vehicle. The Supreme Court disagreed. Despite Nick's assertion of self-defense, there was ample evidence for the jury to conclude beyond a reasonable doubt that it was Nick's conscious object to grasp the screwdriver as a weapon and strike the attacker and that Nick was aware that doing so could cause serious bodily injury, thus satisfying the mental state element of aggravated assault. St. v. Nick, 2009 MT 174, 350 M 533, 208 P3d 864 (2009).

Conclusion That Defendant Caused Injuries Based on Quality and Quantity of Circumstantial Evidence — Conviction Affirmed: An infant suffered serious injuries while Allum was babysitting, and Allum was charged with aggravated assault. Evidence offered at trial consisted of the extent of the child's injuries, Allum's inconsistent statements to police, and testimony from relatives concerning Allum's prior abusive conduct with the child. Allum was convicted by a jury based on this circumstantial evidence. On appeal, Allum contended that the state failed to make a connection between the child's injuries and any voluntary act by Allum. The state argued that the totality of the circumstances coupled with the severity of the injuries established that Allum had the requisite mental state of purposely or knowingly and that this mental state led to voluntary actions that caused the serious bodily injury. The Supreme Court affirmed the conviction. The circumstantial evidence was of such a quality and quantity that a jury could decline to accept Allum's assertion that the child's injuries were self-inflicted or accidental and could conclude instead that Allum purposely and knowingly caused the injuries. St. v. Allum, 2009 MT 15, 349 M 49, 201 P3d 776 (2009). See also St. v. Lancione, 1998 MT 84, 288 M 228, 956 P2d 1358 (1998), and St. v. Clausell, 2001 MT 62, 305 M 1, 22 P3d 1111 (2001).

Evidence of Knowing or Purposeful Action Despite Mental Disease or Defect — Aggravated Assault Conviction Affirmed: Meckler was convicted of aggravated assault and committed to the Department of Public Health and Human Services for life. Meckler contended that he could not be found guilty of aggravated assault because he lacked the ability to conform his conduct to the requirements of the law due to a mental disease or defect. It was undisputed that Meckler suffered from paranoid schizophrenia and was not taking his medications at the time he committed the offense; however, the presence of a mental disease or defect does not necessarily preclude that person from acting purposely or knowingly. Evidence showed that Meckler knew that he struck the victim and that the victim suffered serious bodily injury as a result and showed that Meckler was lucid, coherent, and functional prior to and after the attack. Thus, the trial court correctly concluded that Meckler's volitional act was done knowingly or purposely, and the assault conviction was affirmed. The mental disease or defect was properly considered at sentencing rather than as an element of the offense. St. v. Meckler, 2008 MT 277, 345 M 302, 190 P3d 1104 (2008).

No Perjury Based on Inconsistent Testimony in Aggravated Assault Trial: Trull struck Shaw and injured Shaw's eye. Prior to trial, Shaw complained of blurred vision, but at trial, Shaw testified that he experienced double vision accompanied by sharp shooting pain and that attempts to correct the vision problem were unsuccessful. Trull asserted that Shaw lied about the severity of the injury and that Shaw's trial testimony constituted perjury. The Supreme Court disagreed. The jury was faced with conflicting evidence, inconsistent testimony, and allegations of perjury and poor character, but nevertheless concluded that there was sufficient evidence to support a guilty verdict. Much of the evidence that Trull relied on to show perjury was immaterial as to whether Shaw suffered protracted loss or impairment of his eyesight as a result of the injury. Although conflicting, the evidence was adequate to prove aggravated assault, and Trull's conviction was affirmed. St. v. Trull, 2006 MT 119, 332 M 233, 136 P3d 551 (2006).

Conflicting Testimony Regarding Defendant's Involvement in Assault With Weapon and Aggravated Kidnapping — Trial Court to Determine Witness Credibility and Weight of Testimony: In Toulouse's trial for assault with a weapon and aggravated kidnapping, the District Court heard conflicting testimony from 14 witnesses concerning Toulouse's involvement. Following conviction, Toulouse contended that the state failed to present sufficient evidence of guilt beyond a reasonable doubt. The Supreme Court was satisfied that the District Court heard all the conflicting stories, waded through the evidence, and determined that Toulouse was guilty. It was within the District Court's province as fact finder to assess the credibility of all the witnesses and the weight to be afforded their testimony, and the Supreme Court declined to disturb the District Court's findings, conclusions, and verdict. St. v. Toulouse, 2005 MT 166, 327 M 467, 115 P3d 197 (2005).

Sufficient Evidence of Mental State to Support Conviction of Aggravated Assault Despite Claim of Self-Defense: Dunfee contended that because his actions were in self-defense, therefore precluding the mental state required to sustain a conviction for aggravated assault, the trial court should have vacated his conviction because the jury may not have applied the purposely or knowingly mental state to all elements of the offense. However, there was sufficient evidence to support the conviction, given Dunfee's admission that he hit the victim hard several times and that, being an experienced boxer, he knew it was highly probable that the blows would inflict serious bodily injury. The requisite mental state was proved, and the conviction was affirmed. St. v. Dunfee, 2005 MT 147, 327 M 335, 114 P3d 217 (2005).

Evidence of Flight Unacceptable as Sole Corroboration of Inconsistent Statement: After Giant's conviction of aggravated assault for attacking his wife in her home, he moved for dismissal on grounds that the evidence was insufficient to convict him as a matter of law because evidence of flight was the only corroboration of the prior inconsistent statements of the victim identifying him as the assailant. The victim initially identified Giant as the assailant in pretrial statements, but at trial, she identified her son as the attacker. No forensic testing was performed on evidence seized from the home, and there was no other testimony to corroborate either statement. The state argued, and the trial court agreed, that undisputed testimony of Giant's flight behavior was sufficient to corroborate the victim's prior inconsistent statements and that evidence seized from the home matched her statements. When considering a motion for a directed verdict to determine whether any rational trier of fact could find the elements of a crime satisfied beyond a reasonable doubt, the Supreme Court will consider trial testimony and the evidence properly admitted and before the jury according to the criminal rules of evidence, but will not consider potential unintroduced evidence or other evidence outside the trial setting. A criminal conviction cannot be sustained when the only evidence of some essential element of a crime is a prior inconsistent statement. In Montana, all prior inconsistent statements are admissible as substantive evidence under Rule 801(d)(1)(A), M.R.Ev. (Title 26, ch. 10); however, prior inconsistent statements admitted as substantive evidence of guilt must be corroborated in order to sustain a conviction. Evidence of flight is not sufficient in itself to prove guilt or to support a conviction as a matter of law because evidence of flight by itself is as consistent with innocence as it is with guilt. Therefore, evidence of flight cannot be the sole corroboration of a prior inconsistent statement admitted as substantive evidence of guilt. Here, the physical evidence recovered from the home and photographs of the victim's injury, which would normally be sufficient corroborating evidence, were insufficient because they did not corroborate the essential element of identity because the victim identified another possible assailant. Further, the victim's prior inconsistent statements alone were insufficient as a matter of law to support Giant's conviction, in light of evidence that the victim stopped cooperating with the County Attorney's office when Giant was released on bail and asked that the case be dismissed after her divorce proceedings against Giant were voluntarily dismissed—actions that affected the reliability of the prior inconsistent statements but did not independently corroborate the statements. Giant's conviction was reversed. St. v. Giant, 2001 MT 245, 307 M 74, 37 P3d 49 (2001). See also St. v. White Water, 194 M 85, 634 P2d 636 (1981).

Sufficient Circumstantial Evidence to Justify Aggravated Assault Charge — Directed Verdict Properly Denied: At the conclusion of the state's evidence on Hall's aggravated assault charge, Hall moved for a directed verdict of acquittal based on the contention that because only circumstantial evidence had been offered, under 46-16-403, the action should have been dismissed. Under 46-16-403, dismissal of an action based on insufficient evidence is within the discretion of the court. After examining the trial transcript, the Supreme Court found that the evidence, although circumstantial, when viewed in the light most favorable to the prosecution, was sufficient for any rational trier of fact to find that Hall committed the essential elements of the crime beyond a reasonable doubt. The trial court did not err in denying Hall's motion for directed verdict. St. v. Hall, 1999 MT 297, 297 M 111, 991 P2d 929, 56 St. Rep. 1190 (1999), following St. v. Arthun, 274 M 82, 906 P2d 216, 52 St. Rep. 1133 (1995).

Sufficient Evidence That Defendant Responsible for Blow That Caused Injury: Medrano pulled Jenness from a vehicle and kicked and beat him. Jenness's spleen was ruptured in the process. Medrano claimed that he could not be guilty of aggravated assault because he did not strike Jenness in the area of the spleen. Eyewitness testimony was to the contrary, and the attending physician opined that it could not be determined which of the blows suffered by Jenness—being dragged and dropped from the car, being hit and kicked, or a combination of both—resulted in the specific injury to the spleen. All of the evidence was sufficient for a rational trier of fact to find the essential elements of aggravated assault beyond a reasonable doubt. St. v. Medrano, 285 M 69, 945 P2d 937, 54 St. Rep. 1048 (1997).

Aggravated Assault — Sufficiency of Circumstantial Evidence — Extraneous Allegation of Use of Weapon Held Not to Affect Conviction — Instruction Properly Refused: Neary was charged with aggravated assault of a female friend. The evidence at trial consisted of statements by witnesses who placed him, in an angry mood, with the injured woman at the top of some stairs and who heard admissions against interest and inconsistent statements from Neary about the circumstances of the woman's injury. The state also introduced expert medical testimony that the woman's injuries were consistent with a blow to the head with an object or a fall down some stairs onto an object. A neurologist testified for Neary that the woman's injuries could have been caused in the same manner and that the woman's blood showed evidence of alcohol, amphetamines, and a prescription drug, which, in combination, would cause a propensity to fall. Neary contended that the state's case was circumstantial and that the verdict was not supported by the evidence. The Supreme Court held that Neary's inconsistent statements, his other statements, and his actions before, during, and after the incident supported the jury's verdict. The Supreme Court distinguished St. v. Gould, 216 M 455, 704 P2d 20 (1985), and St. v. Gommenginger, 242 M 265, 790 P2d 455 (1990), by pointing out that in Gommenginger, unlike the case before it, testimony came from a drug informant with a motive to lie and that in Gould, the defendant had moved to suppress pretrial admissions, that Neary had not. The Supreme Court also held that the District Court did not err in refusing to amend one of the state's jury instructions to provide that Neary had committed the elements of aggravated assault "with a weapon". The Supreme Court noted that the fact that the text of the state's information alleged that Neary struck the woman "with some type of blunt weapon" did not change the fact that the jury was correctly given the elements of the offense of aggravated assault and that the jury was not required to find that Neary used a weapon to find him guilty of aggravated assault. Distinguishing St. v. Later, 260 M 363, 860 P2d 135 (1993), in which the defendant had been charged under the wrong statute, the Supreme Court held that Neary was not prevented from preparing an adequate defense by the statement in the information that Neary used a weapon. St. v. Neary, 284 M 409, 944 P2d 750, 54 St. Rep. 942 (1997).

Evidence of "Shaken Baby Syndrome" Insufficient to Prove Serious Bodily Injury: On March 2, when defendant's infant child stopped breathing, a call was placed to 9-1-1 requesting an ambulance. Upon examination, defendant was informed that the child did not appear ill enough to require ambulance transportation to the hospital. When the condition worsened, the child was hospitalized on March 8 but released 3 days later with doctors unable to determine the exact cause of the illness. When the child was transported by ambulance to the hospital on March 14, a specialist concluded that earlier examinations had missed "shaken baby syndrome". Following defendant's conviction for felony aggravated assaults occurring March 2 and March 14, defendant appealed, alleging that the state presented insufficient evidence to prove that the required element of "serious bodily injury" occurred during the March 2 alleged offense. The Supreme Court reversed, concluding that the state failed to present testimony or even to imply that the March 2 injuries resulted from shaking or were life-threatening. St. v. Andrews, 274 M 292, 907 P2d 967, 52 St. Rep. 1238 (1995).

Sufficiency of Evidence When Self-Defense Claimed:

The jury was entitled to believe, despite defendant's claims of self-defense, that plaintiff's injuries were not caused by fists, kicks, or falls against objects in the area where a fight took place, but rather by a severe beating by a baseball bat. Testimony and photographs of the victim supported a reasonable conclusion that defendant used excessive and unreasonable force in purposely and knowingly causing the injuries, rather than some reasonable amount of force necessary to effectuate self-defense. St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994), followed in St. v. Richards, 274 M 180, 906 P2d 222, 52 St. Rep. 1176 (1995).

On appeal, defendant convicted of aggravated assault argued that she met her burden of proof of self-defense, which she correctly stated as raising a reasonable doubt as to her guilt. The Supreme Court's function on appeal is not to determine whether she raised a reasonable doubt as to her guilt but whether the evidence was sufficient to support her conviction when viewed in the light most favorable to the state (see St. v. Lamb, 198 M 323, 646 P2d 516, 39 St. Rep. 1021 (1982)). Disputed questions of fact and the credibility of witnesses will not be considered on appeal (see St. v. DeGeorge, 173 M 35, 566 P2d 59 (1977)). Finding substantial evidence in the record, the court held that defendant was not justified in using force likely to cause death or serious bodily harm. St. v. Tonkovich, 221 M 8, 716 P2d 615, 43 St. Rep. 592 (1986).

Serious Bodily Injury — Testimony of Emergency Room Physician: At a trial in which defendant was convicted for aggravated assault, the paramedic and the emergency room physician who first treated the victim testified that the victim had life-threatening injuries. The record contained sufficient evidence to support defendant's conviction. St. v. Devlin, 251 M 278, 825 P2d 185, 48 St. Rep. 1093 (1991).

Voluntary Admission, Accusation of Victim, and Doctor's Description of Injury Sufficient to Convict: Evidence was sufficient to convict a prison inmate of aggravated assault. The inmate victim testified it was defendant that assaulted him. A doctor testified as to the nature of the injury. During a hearing on whether to reclassify defendant because of the alleged assault, defendant was told that charges may be filed, and he responded, "For what? I only used my fist." St. v. DePue, 237 M 428, 774 P2d 386, 46 St. Rep. 923 (1989).

Infer Mental State From Circumstantial Evidence: Although the defendant may have suffered from mental disease, evidence is overwhelming that he acted purposely or knowingly when he committed felony assault (now assault with a weapon). He purchased the gun shortly before he committed the assault, performed all acts necessary to bring him to the victims' trailer, parked his vehicle so he could get away quickly, cut the victims' telephone wire, fled the scene after firing directly at the victims, and then buried the weapon. Mental state may be inferred from circumstantial evidence, including the defendant's actions and evidence surrounding the alleged offense. St. v. Trask, 234 M 380, 764 P2d 1264, 45 St. Rep. 1988 (1988).

Reasonable Apprehension: Defendant went to McQuiston's apartment to borrow a knife. Although the parties' recollections of events differ, both agreed that defendant hit McQuiston in the chest with the hand in which he held the knife. After impact the knife broke in several places. McQuiston suffered a contusion on her chest. Defendant was convicted of aggravated assault. Defendant contended that McQuiston had no fear of him prior to the assault, that she had been attacked previously and was overly sensitive, and that she had her coat on and knew the knife was dull. He contended that these elements prevented reasonable apprehension from being proven at the trial. The Supreme Court held that a knife qualifies as a weapon and that a showing of immediate fear is a permissible means of showing "reasonable apprehension". The evidence presented regarding McQuiston's reaction to the attack clearly showed her immediate fear. St. v. George, 203 M 124, 660 P2d 97, 40 St. Rep. 339 (1983).

No Eyewitness or Weapon — Evidence Sufficient: An aggravated assault appeal was sustained for the state despite the fact that no eyewitness testified that the defendant stabbed the victim and that the weapon was never found because the circumstances surrounding the assault, including the defendant striking the victim in the area in which he was stabbed and the actions of the defendant prior to and following the assault, were sufficient to support a conviction viewed in the light most favorable to the prosecution aided by a strong presumption in favor of the correctness of the judgment. St. v. Lozeau, 200 M 261, 650 P2d 789, 39 St. Rep. 1729 (1982), followed in St. v. Longneck, 201 M 367, 654 P2d 977, 39 St. Rep. 2170 (1982), and in St. v. Bower, 254 M 1, 833 P2d 1106, 49 St. Rep. 586 (1992).

Self-Defense — Jury Function: If the evidence on a claim of self-defense is conflicting, it is the jury's function to weigh the testimony and decide whether a person acted with the belief that the use of force was necessary and whether this belief was reasonable. When presented with these factual issues, the jury has the prerogative to accept or reject defendant's claims. St. v. Reiner, 179 M 239, 587 P2d 950 (1978), followed in St. v. Bower, 254 M 1, 833 P2d 1106, 49 St. Rep. 586 (1992).

"Serious Bodily Injury" — Jury Question: This section requires proof of "bodily injury which creates a substantial risk of death", which is graver and more serious than "bodily injury". Whether or not it has been established by the evidence is generally a question of fact to be determined by the jury and does not depend on whether the victim ultimately lives or dies. St. v. Fuger, 170 M 442, 554 P2d 1338 (1976).

Insufficient Evidence to Establish Reasonable Apprehension or Fear: Where trial record was deficient in providing any credible evidence to support conclusion that defendant's conduct placed police officer in reasonable apprehension or fear, there was no substantial evidence to support trial court's conviction of second-degree assault under 94-602, R.C.M. 1947 (now MCA, 45-5-202), as substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. St. v. Merseal, 167 M 412, 538 P2d 1366 (1975).

SENTENCE

Imposition of Child Custody Change in Criminal Sentence — Moot: After the defendant was convicted of assault on a minor and aggravated assault based on acts committed against her child, the District Court ordered as part of the defendant's criminal sentence that the child be temporarily placed with the father while civil dependency and neglect proceedings progressed against the defendant and stated in its judgment that it should be presumed that the father should have legal custody of the child unless the defendant could demonstrate otherwise. On appeal, the Supreme Court concluded that the defendant's appeal challenging the District Court's temporary placement of the child with the father was moot because the mother had regained custody of the child through the civil dependency and neglect proceedings. However, the District Court's statement regarding the presumption that the father should have custody of the child had no place in the judgment and was ordered stricken. St. v. MacDonald, 2013 MT 105, 370 Mont. 1, 299 P.3d 839.

Plea Bargain Rejected — Imposition of State-Recommended Maximum Sentence Not Violative of Due Process: Killam was charged with felony aggravated assault with a weapon. The state entered into plea negotiations, but Killam rejected the proposed agreement. Killam ultimately pleaded guilty. At sentencing, the state recommended the maximum sentence, which was greater than the sentence offered in the plea agreement, and the sentencing court imposed the maximum statutory sentence. On appeal, Killam contended that the state acted vindictively and violated Killam's due process rights by recommending a more severe sentence than was offered in the plea negotiations, citing N.C. v. Pearce, 395 US 711 (1969), and Blackledge v. Perry, 417 US 21 (1974). The Supreme Court distinguished both federal cases because they dealt with vindictiveness based on harsher sentences imposed following retrial, while Killam argued vindictiveness during initial sentencing. The court noted that a defendant is free to accept or reject a plea offer, but if the offer is rejected, the prosecution may proceed with the case and make any legal sentencing recommendation because there is no agreement to the contrary. When Killam entered a guilty plea, the District Court informed him of the maximum sentence and the state was free to recommend the maximum statutory sentence. Thus, imposition of the maximum sentence did not violate Killam's due process rights. St. v. Killam, 2005 MT 255, 329 M 50, 122 P3d 439 (2005), following Bordenkircher v. Hayes, 434 US 357 (1978).

No Abuse of Discretion: Where defendant was convicted under this section of beating his 2-year-old foster child, the trial court did not abuse its discretion in sentencing him to 15 years imprisonment, even though a psychiatrist testified that defendant was suffering from a treatable neurosis at the time of the beating, had undergone treatment, and was no longer a threat to anyone and even though the court had relied on information concerning the victim's condition which was later contested in defendant's petition to the Sentence Review Division. St. v. Mann, 169 M 306, 546 P2d 515 (1976).

45-5-203. Intimidation.

Criminal Law Commission Comments

Source: Ill. C. C., 1961, Chapter 38, § 12-6.

Intimidation requires a specific purpose to cause another to perform "or to omit" the performance of any act (such as testifying), and the threat must be "communicated" with that purpose. It is also required that the act threatened, if performed, would be "without lawful authority." The section anticipates, therefore, that the accused is apprehended and prosecuted for intimidation before the harm threatened is performed. If the substantive harm occurs, the accused is subject to prosecution and punishment for the more serious offense, or both intimidation and such offense. This section is all inclusive and includes public officials acting without authority.

The maximum penalty is relatively harsh, but since there is no minimum sentence the judge is able to fix the penalty to suit the crime.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1985 Amendment: Near middle of (1) before "a threat", inserted "under circumstances which reasonably tend to produce a fear that it will be carried out"; at end of (1)(a) deleted "or on property"; in (c) substituted "felony" for "criminal offense"; and deleted former (1)(d) through (1)(f) that read: "(d) accuse any person of an offense;

(e) expose any person to hatred, contempt, or ridicule; or

(f) take action as a public official against anyone or anything, withhold official action, or cause such action or withholding".

Preamble: The preamble to Ch. 268, L. 1985, provided: "WHEREAS, section 45-5-203, MCA, provides that a person commits the offense of intimidation when, with the purpose to cause another to perform or omit the performance of any act, he communicates to another a threat to commit an act; and

WHEREAS, the language in section 45-5-203, MCA, is not narrowly drawn to punish only those threats that have a reasonable tendency to produce or instill fear in the victim, which threats traditionally have been punishable; and

WHEREAS, in Wurtz v. Risley, 719 F2d 1438 (9th Cir. 1983), the U.S. Ninth Circuit Court of Appeals held that subsection 45-5-203(1)(c), MCA, is aimed at "pure speech" rather than conduct; has an overbreadth that is real and substantial in relation to the statute's legitimate sweep; has a chilling effect forbidden by the first amendment of the U.S. Constitution; and, in the absence of any narrowing construction or tightly drawn language, is void on its face for overbreadth; and

WHEREAS, in its holding in Wurtz v. Risley, the court said that the statutory language of subsection 45-5-203(1)(c), MCA, applied so broadly to threats of minor infractions, threats not reasonably likely to induce a belief that the threats would be carried out, and threats unrelated to any induced or threatened action, that a great deal of protected speech was brought within the statute; and

WHEREAS, the court in Wurtz v. Risley did not address the issue of overbreadth in the remainder of section 45-5-203, MCA, but in its dicta said that a threat must be distinguished from what is constitutionally protected speech, and that threats punishable without violation of the first amendment must contain the reasonable tendency that the threat will produce or instill in the victim fear that the threat will be carried out; and

WHEREAS, section 45-5-203, MCA, may contain language that defines elements of the offense of intimidation so that the statute applies too broadly or infringes on protected speech.

THEREFORE, the Legislature of the State of Montana finds it appropriate to amend section 45-5-203, MCA."

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: Subsection (1) of this section is drawn almost verbatim from Ill. C.C. 1961, Chapter 38, § 12-6, while subsection (2) is new.

Subsection (1) defines and prohibits as intimidation a wide range of acts and conduct. To constitute the offense of intimidation under subsection (1), there must be the purpose to cause another to perform "or omit the performance" of any act, the threat must be "communicated" with that purpose, and the communication must be under circumstances that reasonably tend to produce a fear that the threat will be carried out. Further, it is also required that the act threatened, if performed, would be "without lawful authority". This section is anticipatory in that it contemplates apprehension of the malefactor before the harm threatened occurs. If the threatened harm has occurred, it would seem that intimidation is not necessarily a lesser included offense, thus the offender could be subject to both the penalty for intimidation and the penalty for the actual offense.

Subsection (2) deals with the problem of terroristic threats. To constitute an offense under this subsection there must be a "knowing" communication of a threat or false report of fire, explosion, or disaster. This subsection differs from subsection (1) in that there need be no showing of attempt to influence the acts of another; mere knowing communication of a threat or false report is sufficient to complete the offense. Accordingly, this subsection reaches such diverse acts as turning in a false fire alarm or threatening to bomb an airliner or public building.

It should be noted the statutory definition of "threat" (§ 45-2-101) is inapplicable to this section since the term as there defined includes various communications that are substantive elements of this offense. Because of the range of conduct dealt with by these two subsections the maximum sentence is relatively harsh to provide adequate punishment for the more severe forms of conduct covered, but since there is no minimum the judge is able to fix the penalty to suit the crime.

Case Notes

Jury Instruction Regarding Effect of Intoxication on Mens Rea Properly Rejected: Following conviction for deliberate homicide, Smith asserted that the trial court erred in refusing to instruct the jury regarding evidence of Smith's intoxication when considering whether Smith acted with intent to commit the crime. Smith contended that 45-2-203 unconstitutionally violated due process by excluding evidence of intoxication in determining mental state. The Supreme Court noted that the due process issue had been decided contrary to Smith's argument in Mont. v. Egelhoff, 518 US 37 (1996), so declining Smith's intoxication instruction was not error. Viewed as a whole, the jury instructions fully and fairly instructed the jury on the applicable law, and Smith's conviction was affirmed. St. v. Smith, 2005 MT 325, 329 M 526, 127 P3d 353 (2005), distinguishing U.S. v. Burdeau, 168 F3d 352 (9th Cir. 1999). See also St. v. Myran, 2012 MT 252, 366 Mont. 532, 289 P.3d 118, and St. v. Ring, 2014 MT 49, 374 Mont. 109, 321 P.3d 800.

Sufficient Evidence to Support Intimidation Conviction: While on probation, McCarthy was issued a temporary travel permit to go to Arizona to look for a job and a residence. When informed by his probation officer by telephone that he had to return to Montana, McCarthy threatened to kill the parole officer, the Deputy County Attorney, and the trial judge. The parole officer feared that McCarthy might return to Montana and carry out the threats. McCarthy contended that the fear was not reasonable for the parole officer because similar threats had been made in the past, none of which had been acted upon, so there was insufficient evidence to sustain the intimidation charge against McCarthy. The Supreme Court disagreed. It did not matter whether McCarthy intended to carry out the threat, but only that the threat was made under circumstances that reasonably tended to produce fear in the victim, and the person who received the threat can be different from the person whom the threat seeks to compel. If a person produces a fear in the intended victims and had the ability to harm a third person, that is enough to constitute intimidation. Further, McCarthy had the resourcefulness to return to Montana to carry out the threats. The jury considered the circumstances and determined that the threat reasonably tended to produce fear. McCarthy's conviction was affirmed. St. v. McCarthy, 2004 MT 312, 324 M 1, 101 P3d 288 (2004).

Defendant Called Complainant and Said He Was Dead and Wouldn't Live Until His Next Birthday — Directed Verdict Properly Denied Defendant: Iverson reported Motarie for alleged elk poaching. Within a month, Motarie called Iverson and said, "You're a dead mother fucker, you'll never live to see your next birthday", and the next day, he called Iverson again but said nothing. In a prosecution for intimidation and tampering with a witness, the lower court did not err when it denied Motarie's motion for a directed verdict. Motarie's intent could be inferred from his conduct. St. v. Motarie, 2004 MT 285, 323 M 304, 100 P3d 135 (2004).

Admission of Allegedly Erroneous Evidence Regarding Charge for Which Defendant Acquitted — Harmless Error: Teters was charged with sexual intercourse without consent and with intimidation. The trial court allowed Teters' wife to testify that Teters was abusive, and Teters asserted on appeal that admitting the testimony was erroneous. The Supreme Court applied the test in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), to determine whether the alleged error was fundamental and automatically reversible or trial error and reversible if found to be prejudicial. The alleged error here was trial error. Part two of the Van Kirk test requires a showing of a reasonable possibility that the erroneously admitted evidence contributed to the conviction. In this case, the wife's testimony related only to the intimidation charge, and Teters was acquitted of intimidation, so any error in allowing the testimony was harmless. St. v. Teters, 2004 MT 137, 321 M 379, 91 P3d 559 (2004).

Possibility That Statements Made During Custodial Interrogation, After Lawyer Requested, Contributed to Conviction — New Trial Warranted: Spang was charged in connection with a double homicide. He made statements to police after being read his rights at arrest and again 2 days later after requesting a lawyer. Spang moved to suppress the statements, but the motion was denied on grounds that Spang waived the right to counsel after voluntarily answering interrogators' questions on both occasions. Transcripts of the interrogations were made available to the jury, and Spang was subsequently convicted on two counts of intimidation by accountability, but appealed based on insufficiency of evidence. The Supreme Court reviewed the denial of the suppression motion to determine whether the trial court's findings of fact were clearly erroneous and whether they were correctly applied as a matter of law. Here, Spang's request for counsel was neither ambiguous nor equivocal, so cessation of questioning was required until Spang either reinitiated conversation with the officers or was provided an attorney. Because neither event occurred, the trial court erred when it denied Spang's motion to suppress the statements. To determine whether the error was prejudicial, the Supreme Court applied the test in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), determining in this case that the error was trial error, because it occurred during presentation of the case to the jury and was amenable to qualitative assessment for prejudicial impact relative to other evidence introduced at trial. Under the cumulative evidence test, the state was required to show admissible evidence that proved the same facts as the tainted evidence. Although there was other sufficient evidence tending to prove that Spang committed intimidation by accountability, qualitatively there existed a reasonable possibility that the statements that Spang made during the second interrogation contributed to his conviction because of the strong emphasis placed on those statements during trial. Therefore, the District Court committed reversible error when it admitted the statements during the state's case in chief. The case was remanded for a new trial, and the District Court was directed not to admit the statements made during the second interrogation. Statements from the first interrogation were admissible, however, because Spang had waived the right to counsel. Spang's argument that the first interrogation statements also be suppressed on unnecessary delay grounds failed, absent evidence that the delay between arrest and initial appearance influenced the voluntariness of those statements. St. v. Spang, 2002 MT 120, 310 M 52, 48 P3d 727 (2002), distinguishing St. v. Brubaker, 184 M 294, 602 P2d 974 (1979), and overruled, to the extent that the right to counsel for self-incrimination purposes may be invoked in custodial interrogation, in St. v. Buck, 2006 MT 81, 331 M 517, 134 P3d 53 (2006).

Proper Denial of Directed Verdict on Charges of Intimidation by Accountability: Spang moved for a directed verdict on charges of intimidation by accountability, contending that there was insufficient evidence to establish his accountability because there was no evidence to show that he aided in communicating any threat to the crime victims. The state asserted that the evidence was sufficient because it showed that Spang was not only present at the crime scene, but also took actions prior to and during the intimidation that aided in the commission of the crimes. The District Court denied a directed verdict, Spang appealed, and the Supreme Court affirmed. Although mere presence at a crime scene is not enough to establish accountability, an accused need not take an active part in any overt criminal acts to be adjudged criminally liable for the acts. Further, although mere presence and the failure to disapprove or oppose another's commission of an offense are insufficient to sustain an accountability charge, those factors may be considered along with other circumstances that might indicate that the accused in some way aided or abetted the principal in the commission of the crime. Here, Spang was not only associated with the principal prior to commission of a double homicide and present at the scene of the crime, but he also unloaded and reloaded a rifle used to intimidate the victims, helped collect items from the victim's garage, pulled telephone wires from the victim's wall, and failed to oppose or disapprove commission of the crimes—sufficient evidence upon which a rational trier of fact could find beyond a reasonable doubt the Spang committed two offenses of intimidation by accountability. St. v. Spang, 2002 MT 120, 310 M 52, 48 P3d 727 (2002). See also St. v. Hart, 191 M 375, 625 P2d 21 (1981), and St. v. Miller, 231 M 497, 757 P2d 1275 (1988).

Challenge to Fight and Threat to Terrorize — No Evidence of Purpose to Cause or Prevent Action: While at a jail, appellant challenged an officer to a fight and told him that he was going to kick his ass and terrorize his family. Conviction of intimidation was reversed for failure to prove a purpose to cause another to perform or omit an act. Appellant was drunk and belligerent from the time that police picked him up and during the time that he was at the jail being examined. There was no evidence in the record that the threats were for any particular purpose or were anything other than a continuation of and part of appellant's ongoing belligerent and uncooperative behavior. St. v. Plenty Hawk, 285 M 183, 948 P2d 209, 54 St. Rep. 1102 (1997).

Intent to Carry Out Threats Not Element of Intimidation: Ross argued that the lower court erred in its instruction to the jury that did not instruct the jury that it needed to find that Ross intended to carry out the threats in letters that he sent the victim. The Supreme Court held that to prove intimidation, it is only necessary to show that the threats were communicated in such a way that the victim reasonably feared that they would be carried out and that it is not necessary to prove that the defendant intended to carry out the threats. St. v. Ross, 269 M 347, 889 P2d 161, 52 St. Rep. 22 (1995), clarifying St. v. Lance, 222 M 92, 721 P2d 1258 (1986).

Jury Instruction Concerning Statements in Letters as Constituting True Threats and Producing Fear in Victim Upheld: Ross argued that the lower court erred in giving a certain jury instruction because the instruction blurred two distinct elements of the crime, ultimately confusing the jury's deliberation. The Supreme Court held that the instruction properly stated the law as to what constituted "true threats" and the manner in which the threats have to be communicated to the victim. The fact that the two were combined in the same instruction did not render the instruction confusing. St. v. Ross, 269 M 347, 889 P2d 161, 52 St. Rep. 22 (1995).

No Right to Instruction That Stalking Is Lesser Included Offense of Intimidation That Occurred Before Enactment of Stalking Statute: Ross argued that he was entitled to an instruction to the jury indicating that stalking is a lesser included offense of intimidation. The Supreme Court held that since 59 of his 62 letters to the victim were written prior to the enactment of the stalking statute, the essential part of his offense had occurred prior to the enactment of the statute and he was not entitled to the requested jury instruction. The Supreme Court also stated that the issue of whether stalking is a lesser included offense would have to be decided in a future case. St. v. Ross, 269 M 347, 889 P2d 161, 52 St. Rep. 22 (1995).

Statute Not Overbroad — Person May Be Tried for Felony Intimidation Based Upon Threats of Misdemeanor Assault: Ross was convicted of felony intimidation based upon threats in numerous letters to a doctor who performed abortions. Ross argued that this section is unconstitutionally broad in that it allows conviction for felony intimidation based upon physical threats that if carried out would only amount to misdemeanors. The Supreme Court stated that the former version of the statute had been declared unconstitutional because a person could be charged with felony intimidation for a variety of threatened actions, such as sit-ins, marches, and mass picketing, that were not limited to threats of physical harm or that were victimless crimes. The Supreme Court held that the current version of the statute is not overbroad because it is limited to physical threats in which there would be a victim. St. v. Ross, 269 M 347, 889 P2d 161, 52 St. Rep. 22 (1995), distinguishing Wurtz v. Risley, 719 F2d 1438 (9th Cir. 1983), and following the overbreadth test in St. v. Lilburn, 265 M 258, 875 P2d 1036 (1994).

Fear That Threats Would Be Carried Out — Intimidation Conviction Affirmed: Defendant's communication of threats to burn down a neighbor's house and cause her personal bodily harm, made at the culmination of several days of harassment by defendant, caused fear in the neighbor, sufficient to constitute intimidation, that defendant's threats would be carried out. St. v. Felando, 248 M 144, 810 P2d 289, 48 St. Rep. 359 (1991).

Circumstances Producing Fear That Threat of Criminal Mischief Would Be Carried Out — Conviction Not Violative of Free Speech: Cleland stole a saxophone and threatened the owner with felony criminal mischief by intimating he would damage or destroy the horn unless he received money. The circumstances under which Cleland voiced his threats reasonably tended to produce a fear that the threats would be carried out, including his: (1) demand for more money; (2) possession of the saxophone, which made the threats more plausible; and (3) forceful manner. Given these circumstances, Cleland's conviction for intimidation was justified and did not violate constitutional principles of free speech. St. v. Cleland, 246 M 165, 803 P2d 1093, 47 St. Rep. 2311 (1990), following St. v. Lance, 222 M 92, 721 P2d 1258 (1986).

Elements of Intimidation Present in Threat to Third Party — Probable Cause for Search: Defendant intimidated victims by pointing a gun at them in his car. Defendant also indicated the presence of another weapon in the trunk of the car and indicated his intention to use it to harm a third party. Victims viewed a second gun in the trunk but were not directly threatened with it. The District Court suppressed evidence found in the trunk after finding a sufficient nexus did not exist for probable cause because defendant gave no indication he intended to use the gun in the trunk to intimidate victims and because the second gun was not alleged to be contraband. The Supreme Court reversed, holding that defendant produced a fear in the victims that he intended and had the ability to harm the third party, constituting intimidation, and that viewing of the gun in the trunk established sufficient probability to authorize a search of the trunk. St. v. Hembd, 235 M 361, 767 P2d 864, 46 St. Rep. 55 (1989).

Jury Instruction on Intimidation: An instruction to the jury that it may consider intimidation as evidence of consciousness of guilt is appropriate when evidence of intimidation exists. St. v. Smith, 232 M 156, 755 P2d 569, 45 St. Rep. 955 (1988).

Elements of Intimidation — Nonspecified Victim: Appellant was convicted of intimidation for writing five letters threatening to take a hostage to compel the state of Montana or the Montana judiciary to return his ranch and children. Appellant appealed on the grounds that the information failed to include all the necessary elements of a crime because it did not state that the threats were made to a "victim". The Supreme Court held that the definition of the elements of intimidation given in an earlier case, St. v. Wurtz, 195 M 226, 636 P2d 246, 38 St. Rep. 1808 (1981), gave too narrow a reading of the statute. The person who receives the threat can be different from the person whom the threat seeks to compel. St. v. Lance, 222 M 92, 721 P2d 1258, 43 St. Rep. 1086 (1986).

Threats in Letters Punishable as Intimidation: In divorce proceedings, appellant lost custody of his children and valuable property. After filing numerous unsuccessful lawsuits in state and federal courts, appellant wrote five separate letters to two judges and others threatening to take a hostage for the purpose of focusing nationwide media attention on his plight and for the purpose of negotiating for the return of his ranch and children and for damages. Appellant was convicted of intimidation under this section and appealed, alleging that the statute, as it read before 1985 amendments, was unconstitutionally overbroad and unconstitutional as applied to him. On appeal, the Supreme Court held that the statute was not unconstitutionally overbroad or unconstitutional as applied to appellant. The statute punishes only threats of physical confinement and physical restraint. Such threats are not speech protected by the first amendment to the U.S. Constitution. Only serious threats are punishable, and the question of intent and what constitutes a true threat is to be determined by the trier of fact. Appellant's statements constituted threats punishable under the statute. St. v. Lance, 222 M 92, 721 P2d 1258, 43 St. Rep. 1086 (1986), followed in St. v. Ross, 269 M 347, 889 P2d 161, 52 St. Rep. 22 (1995).

Constitutionality of Intimidation Statute: After the ranch bookkeeper's employment was terminated, she demanded $500, the value of the garden she had put in, and withheld ranch income until she was paid. She was charged and convicted of intimidation. The Supreme Court reversed the conviction, following Wurtz v. Risley, 719 F2d 1438 (9th Cir. 1983), which held 45-5-203(1)(c) to be unconstitutional for overbreadth. The 9th Circuit left open the possibility that the validity of 45-5-203(1)(c) might be partially saved by a narrow construction of its application. This case did not afford such an opportunity. (See the 1985 amendments to (1) and (1)(c).) St. v. Ferrel, 208 M 456, 679 P2d 224, 41 St. Rep. 463 (1984).

Elements of Intimidation: There are three elements (the 1985 amendment added a fourth element) the State must prove in order to sustain a charge of intimidation: (1) that the defendant communicated to the victim a threat to commit one of the acts enumerated in this section; (2) that the defendant was without the legal authority to perform the threatened act; and (3) that the defendant had the purpose to cause the victim to perform or omit the performance of any act. The State alleged that defendant's purpose was to cause the victim to engage in sexual intercourse with him. Defendant followed the victim in his car, invited her to have sex with him, and threatened to rape her. He attempted to block her path with his car. He continued to drive through her neighborhood after she fled from him. The State also introduced evidence of a similar sexual assault committed by the defendant. The Supreme Court held that the totality of the evidence supported defendant's conviction. St. v. Wurtz, 195 M 226, 636 P2d 246, 38 St. Rep. 1808 (1981), overruled, to the extent inconsistent, in St. v. Lance, 222 M 92, 721 P2d 1258, 43 St. Rep. 1086 (1986).

Evidence of Other Crimes — Similarity: Defendant was convicted of intimidation for trying to force the victim to engage in sex with him. The District Court admitted evidence of a previous sexual assault committed by the defendant in a similar manner. St. v. Just, 184 M 263, 602 P2d 957 (1979), established the substantive and procedural requirements to be met before such evidence may be admitted. In order for evidence of other crimes to be admissible, a court must first determine: (1) whether the previous crimes are sufficiently similar; (2) whether they are near enough in time; (3) whether the evidence is offered for one of the purposes permitted by Rule 404(b), Montana Rules of Evidence; and (4) whether the probative value of the evidence is substantially outweighed by its inherently prejudicial nature. The testimony admitted described a sexual assault committed by defendant in a manner very similar to the crime charged. The incident had occurred 9 months before. The evidence was presented to prove motive, intent, or common scheme or plan. The evidence was highly probative and outweighed its prejudicial nature. It was properly admitted. St. v. Wurtz, 195 M 226, 636 P2d 246, 38 St. Rep. 1808 (1981).

Constitutionality: In ruling on the constitutionality of the Illinois statute on which subsection (1) of this section is based, a three-judge U.S. District Court has held that the Illinois equivalent of subsection (1)(c), making it an offense to threaten to commit any "criminal offense", is an overbroad restriction on freedom of speech and is invalid. The remainder of this statute was held not to deny substantive due process and was therefore upheld as valid. Landry v. Daley, 280 F. Supp. 938 (N.D. Ill. 1968), probable jurisdiction noted Boyle v. Landry, 89 S Ct 442, 393 US 974 (1968), appeal dismissed, Landry v. Boyle, 393 US 220 (1968), reversed on other grounds (1971). Fifteen years later, Wurtz v. Risley, 719 F2d 1438 (9th Cir. 1983), held that subsection (1)(c) is aimed at "pure speech" rather than conduct, has an overbreadth that is real and substantial in relation to the subsection's legitimate sweep, has a chilling effect forbidden by the first amendment to the United States Constitution, and, in absence of an appropriate narrowing construction by the Montana courts, is void on its face for overbreadth. (But see the 1985 amendments to (1) and (1)(c).)

Instructions to Jury: The giving of an instruction defining the word "extortion" in the language of 94-1602, R.C.M. 1947 (a forerunner of this section), was not objectionable in an action to recover money paid under duress, it not being error to give instructions containing abstract statements of statutory law where the facts are few and simple. Edquest v. Tripp & Dragstedt Co., 93 M 446, 19 P2d 637 (1933).

Threat to Discharge Worker: The right of an employee to work is not property, and therefore a complaint charging a foreman with extorting money from an employee by a threat to discharge him did not charge the crime of extortion under 94-1602, R.C.M. 1947 (a forerunner of this section). In re McCabe, 29 M 28, 73 P 1106 (1903).

45-5-204. Mistreating prisoners.

Criminal Law Commission Comments

Source: New.

This section replaces R.C.M. 1947, sections 94-3917, "Inhumanity to prisoners," and 94-3918, "Confessions obtained by duress or inhuman practices." The purpose of the section is to provide more concise terminology for offenses against prisoners. Thus, the terms assault, intimidation, threat, endanger and withhold are clearer and more meaningful than "inhumanity" or "inhuman practices."

The maximum punishment provided in the provision is ten (10) years and removal from office. The severe punishment is based on two premises: (1) the relatively helpless circumstance of a prisoner subjected to such treatment, and (2) the policy that a sentence to imprisonment should be rehabilitative in nature. Clearly, little rehabilitation or reorientation to social norms can be accomplished when those responsible for the custody and care of prisoners mistreat them.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: While including all conduct that was prohibited by prior law, this section is both more concise and more comprehensive. Prior law, § 94-3917, R.C.M. 1947, condemned "willful inhumanity or oppression" toward prisoners. While those terms are undoubtedly included within the law's terms "assault", "otherwise injures", "intimidates", "threatens", "endangers" and "withholds reasonable necessities", they may not have been as inclusive and were in any event so unclear as to offer no real indication as to exactly what conduct was prohibited. By increasing the clarity of the terms describing the conduct prohibited the new section should both more effectively deter the objectionable conduct and provide for a surer application of sanctions in the event of a violation.

Case Notes

Juvenile Held at Parents' Request for Assistance with Transport to Residential Treatment a Prisoner Under Plain Meaning of Statute: A juvenile was detained by law enforcement at her parents' request for assistance in transferring her to a residential treatment facility. The juvenile was being held at the Gallatin County Law & Justice Center in an interview room with her hands cuffed to a waist belt and shackles on her legs when a sheriff's deputy grabbed her by the neck and pushed her against a wall, banging her head. The District Court dismissed subsequent charges against the deputy under this section because the court held that the term "prisoner" extended only to a person serving a sentence in a state facility after a conviction. On appeal, the Supreme Court reversed and held that under the ordinary and common understanding of the word, "prisoner" includes a person who is detained, confined, and shackled, even if the person has not been convicted and is not serving a sentence. St. v. Madsen, 2013 MT 281, 372 Mont. 102, 317 P.3d 806.

Waiver of Right to Counsel by Defendant Claiming Mental Defect — When Confession Suppressed: Defendant, convicted of aggravated assault, appealed based on issues related to his confession. The Supreme Court on review said the real issue is whether the defendant knowingly and voluntarily waived the right to counsel. The question of waiver was inextricably interwoven with the question of the voluntariness of the accused's confession. That was especially true because the defendant alleged incapacity because of mental illness. Whether a confession should have been suppressed depends on its voluntariness, and that depends on the "totality of the circumstances". The Supreme Court found that the evidence showed that Miranda warnings were given before confession, that the defendant was capable of understanding the warnings, that the defendant waived his rights to counsel and against self-incrimination knowingly and voluntarily, and that the defendant was not improperly induced into confession. St. v. Mercer, 191 M 418, 625 P2d 44, 38 St. Rep. 312 (1981).

45-5-205. Negligent vehicular assault — penalty.

Compiler's Comments

2021 Amendment: Chapter 498 in (1) near end substituted "61-8-1002" for "61-8-401(1)". Amendment effective January 1, 2022.

Applicability: Section 48, Ch. 498, L. 2021, provided: "[This act] applies to DUI incidents taking place on or after [the effective date of this act]." Effective January 1, 2022.

Saving Clause: Section 45, Ch. 498, L. 2021, was a saving clause.

2005 Amendment: Chapter 542 in (1) near beginning substituted reference to 61-8-102 for reference to 61-1-123. Amendment effective January 1, 2006.

2001 Amendments — Composite Section: Chapter 17 in (2) near middle substituted "or incarcerated in a county jail" for "or shall be imprisoned in the county jail"; near end of (3) increased maximum term of incarceration from 5 years to 10 years; in (4) near beginning inserted reference to subsections (2) and (3); and made minor changes in style. Amendment effective October 1, 2001.

Chapter 563 in (1) near beginning after "operates a" substituted "vehicle, other than a bicycle as defined in 61-1-123" for "motor vehicle". Amendment effective October 1, 2001.

1997 Amendment: Chapter 317 in (2), at beginning, inserted "Subject to subsection (3)" and at end inserted "and shall be ordered to pay restitution as provided in 46-18-241"; inserted (3) increasing the penalty for a convicted person who caused serious bodily injury and providing that incarceration may be suspended upon the condition of payment of any fine and restitution imposed; and made minor changes in style.

1991 Amendment: In (1) substituted reference to dangerous or other drugs or combination of drugs and alcohol for "or drugs"; and made minor changes in style.

1987 Amendment: Near end of (1) substituted "the cause of bodily injury" for "the proximate cause of serious bodily injury".

Case Notes

Error in Failing to Dismiss Charge for Failure to Prove Elements of Crime: The defendant was charged with several crimes, including negligent vehicular assault. The District Court admitted the testimony of the investigating officer as nonhearsay for the purpose of showing the officer's next steps in the investigation. However, the prosecution used this evidence, consisting in part of out-of-court statements by the victim regarding his injuries, to prove the victim was injured, which was a necessary element of the crime charged. This type of evidence cannot be admitted to establish the truth of the matter asserted as was done here, and thus the necessary injury element of negligent vehicular assault was unproven. St. v. Butler, 2021 MT 124, 404 Mont. 213, 487 P.3d 18.

Amount of Restitution Properly Based on Information in Life Care Plan: After pleading guilty to negligent vehicular assault, the defendant was ordered by the District Court to pay more than $600,000 in restitution to the couple he had seriously injured. In support of their requested amount of restitution in excess of $1 million, the plaintiffs offered a life care plan authored by a certified life care planner. On appeal, the defendant argued that the District Court had erred because the calculations offered by the plaintiffs were too speculative and amounted to uncorroborated hearsay. The Supreme Court disagreed, finding that the District Court had sufficient information on which to base the award of restitution. St. v. Passwater, 2015 MT 159, 379 Mont. 372, 351 P.3d 382.

Independently Obtained Blood Alcohol Test Result Admissible in Prosecution of Negligent Vehicular Assault, Negligent Homicide, and Criminal Endangerment: Following a vehicle accident in which a person was killed, Schauf was charged with and convicted of negligent homicide, negligent vehicular assault, and criminal endangerment, but Schauf was not charged with DUI. At the hospital, a blood alcohol sample was taken at the direction of the investigating officer under the implied consent law and without advising Schauf of the right to an independent blood test. A second blood sample was drawn at the request of Schauf's treating physician in the emergency room. Schauf moved for suppression of the sample results, which showed that Schauf was intoxicated at the time of the accident. The District Court dismissed the results of the first test but admitted the results of the second test, and Schauf appealed, but the Supreme Court affirmed. The Supreme Court noted that the implied consent law applies when a person is charged with negligent vehicular assault, because that offense specifically relates to statutes governing DUI. However, proof of DUI is not an element of negligent homicide or criminal endangerment, so failure to advise Schauf of the right to an independent blood test provided no basis for dismissal of those charges. Additionally, to the extent that the negligent vehicular assault conviction rested upon the results of the second blood test, those results were obtained independently of state action and of the implied consent law. Thus, suppression of the law enforcement test was proper, but dismissal of all charges would have been an extreme measure given additional substantial evidence of Schauf's intoxication before and after the accident. St. v. Schauf, 2009 MT 281, 352 M 186, 216 P3d 740 (2009).

Statutory Right to Plead Guilty to DUI and Related Misdemeanor Citations Not Violated by City Court's Refusal to Accept Pleas: There was no prejudice and any error was harmless when the state dismissed DUI charges prior to the District Court trial on one felony count and two misdemeanor charges of negligent vehicular assault. St. v. Milligan, 2008 MT 375, 346 M 491, 197 P3d 956 (2008).

No Abuse of Discretion in Imposing Sentence Greater Than Sentence Suggested in Plea Agreement — Sentence Adequately Explained: Wells was charged with DUI, negligent vehicular assault, operation of a motor vehicle without insurance, and driving with a revoked license. Wells entered a plea agreement in which he pleaded guilty to negligent vehicular assault and driving with a revoked license and agreed to pay restitution, and the prosecution agreed to recommend a 5-year sentence with all but 18 months suspended. At the sentencing hearing, Wells' probation officer disagreed with the recommended sentence, stating that 18 months was an insufficient time for Wells to deal with his alcohol and drug problems and that restitution was unlikely given Wells' work and drug abuse history. The sentencing court considered the testimony and the evidence and imposed a 5-year sentence without any time suspended. Wells appealed on grounds that the sentence was not adequately explained and was erroneous. Under St. v. Stumpf, 187 M 225, 609 P2d 298 (1980), the sentencing court has the discretion to impose the maximum sentence allowed by law but should provide any rationale for the sentence. Here, the court provided a rationale, explaining the nature of the offense and the degree of harm done by Wells and describing Wells' history of drug abuse and inability to pay restitution as well as a concern for future harm to society. Wells was informed that the judge was not bound by the terms of the plea agreement and retained the authority to impose a greater or lesser sentence than recommended, within the statutory limits for the offense. The sentence was adequately explained and within statutory limits and was thus affirmed. St. v. Wells, 2001 MT 112, 305 M 303, 27 P3d 47 (2001).

Negligent Vehicular Assault — Blood Sample Evidence Drawn in Violation of Statute Not Admissible: Defendant was arrested for negligent vehicular assault and refused to give a blood sample for determination of blood alcohol content. The sample was forcibly taken. The District Court suppressed the blood alcohol evidence, and the Supreme Court affirmed. Because the DUI offense set forth in 61-8-401 (now repealed and content reorganized in Title 61, chapter 8, part 10) is a specific element of and is subsumed in the negligent vehicular assault offense, defendant was "arrested by a peace officer for driving or for being in actual physical control of a vehicle while under the influence of alcohol". Therefore, 61-8-402 (now repealed and content reorganized in Title 61, chapter 8, part 10) prohibited the state from forcibly giving the blood test after refusal to submit to it, and the blood sample evidence was drawn in violation of the statute and was inadmissible. St. v. Stueck, 280 M 38, 929 P2d 829, 53 St. Rep. 1288 (1996), followed in St. v. Schauf, 2009 MT 281, 352 M 186, 216 P3d 740 (2009).

45-5-206. Partner or family member assault — penalty.

Compiler's Comments

2017 Amendments — Composite Section: Chapter 104 in (4)(b) near end after "violent or controlling behavior must" inserted "meet the standards established pursuant to 44-7-210 and". Amendment effective October 1, 2017.

Chapter 394 inserted (3)(b)(v) concerning conviction for strangulation of partner or family member; and made minor changes in style. Amendment effective May 19, 2017.

2013 Amendments — Composite Section: Chapter 161 in (3)(b) substituted current language concerning determining number of convictions for former language that read: "(b) (i) For the purpose of determining the number of convictions under this section, a conviction means a conviction, as defined in 45-2-101, in this state, conviction for a violation of a similar statute in another state, or a forfeiture of bail or collateral deposited to secure the defendant's appearance in court in this state or in another state for a violation of a similar statute, which forfeiture has not been vacated. A prior conviction for domestic abuse under this section is a prior conviction for purposes of subsection (3)(a).

(ii) A conviction for assault with a weapon under 45-5-213, if the offender was a partner or family member of the victim, constitutes a conviction for the purpose of calculating prior convictions under this section." Amendment effective April 5, 2013.

Chapter 228 in (2)(b) after "relationship" deleted "with a person of the opposite sex." Amendment effective April 18, 2013.

Applicability: Section 3, Ch. 228, L. 2013, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective April 18, 2013.

2003 Amendment: Chapter 438 in (4)(a) near middle of first sentence after "violence" inserted "controlling behavior"; in (4)(b) in sixth sentence near end of introductory clause after "counseling" inserted "that holds the offender accountable for the offender's violent or controlling behavior"; in (4)(c) in first sentence and third sentence before "conduct" inserted "or controlling"; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 503 in (2) in introductory clause inserted "45-5-231 through 45-5-234"; inserted (3)(a)(v) requiring a sentencing judge to consider a minor's presence at a crime; in (4)(a) inserted second through fourth sentences requiring an investigative criminal justice report to be sent to the offender intervention program and protecting confidential information in the report; in (4)(b) in first sentence substituted "complete" for "follow through on" and inserted "for counseling, referrals, attendance at psychoeducational groups, or treatment, including any indicated chemical dependency treatment", in third sentence substituted "a preliminary assessment for counseling, as defined in 45-5-231" for "a counseling assessment", in fourth sentence increased counseling period from 25 to 40 hours, inserted beginning of fifth sentence concerning attendance at psychoeducational groups, and in sixth sentence in introductory clause inserted "preliminary"; in (4)(c) in first sentence substituted "minimum counseling and attendance at psychoeducational groups" for "counseling" and in second sentence substituted "40 hours" for "25 hours"; in (8) inserted "or within 2 weeks of sentencing if the copy is sent electronically or by mail"; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 432 in (3)(b)(ii) substituted "assault with a weapon under 45-5-213" for "felony assault under 45-5-202". Amendment effective October 1, 1999.

1997 Amendments — Composite Section: Chapter 245 inserted (3)(b)(ii) regarding conviction for felony assault under 45-5-202; and made minor changes in style.

Chapter 484 inserted second sentence in (3)(b) providing that prior conviction for domestic abuse is prior conviction for partner or family assault; at beginning of second sentence in (4)(a) substituted "counseling provider" for "counselor"; and made minor changes in style. Amendment effective July 1, 1997.

Style changes in the chapters were slightly different. In each case, the codifier chose the more appropriate.

Severability: Section 11, Ch. 484, L. 1997, was a severability clause.

1995 Amendments: Chapter 18 in (3), near middle of second sentence after "imprisoned", deleted "in the county jail or in the state prison" and at end, after "5 years", deleted "or both" and inserted third and fourth sentences clarifying place of imprisonment if the term of imprisonment is less or more than 1 year; in second sentence of (4)(c), after "additional counseling or", inserted "additional"; and made minor changes in style. The amendment in (4)(c) was rendered void by Ch. 350.

Chapter 350 throughout section substituted "partner or family member assault" for "domestic abuse"; in (1)(b), at end, deleted "during or in connection with a quarrel, fight, or abusive behavior"; in (1)(c) deleted second sentence that read: "The purpose to cause reasonable apprehension or the knowledge that reasonable apprehension would be caused must be presumed in any case in which a person knowingly points a firearm at or in the direction of a family member or partner, whether or not the offender believes the firearm to be loaded"; in (2), in introductory clause, inserted reference to Title 40, chapter 15; in (2)(a), in second sentence, inserted "in-laws"; in (2)(b), after "former spouses", inserted "persons who have a child in common"; in (3)(a) substituted first sentence establishing a penalty for first offense for former penalty language that read: "A person convicted of domestic abuse for the first or second time shall be fined not to exceed $1,000 or be imprisoned in the county jail not to exceed 1 year, or both", inserted second and third sentences regarding second offense penalties and applicable probation, and in fourth sentence increased minimum imprisonment from 10 days to 30 days; inserted (3)(b) defining conviction; in (4)(a) substituted current language outlining counseling assessment and other counseling requirements for former language that read: "A person convicted of domestic abuse shall be required to pay for and complete at least 6 months of counseling, totaling at least 25 hours"; in (4)(a)(i) deleted reference to Title 37, chapter 3; in (4)(b) inserted second sentence regarding issues requiring additional counseling; deleted (4)(c) that read: "(c) Upon completion of the minimum counseling requirements, the counselor shall notify the court that the defendant has completed the minimum counseling requirements and shall provide the court with a recommendation as to whether or not the defendant requires additional counseling. Upon recommendation of the counselor and direction of the court, the defendant may be required to pay for and complete additional counseling or treatment, such as chemical dependency treatment, or both"; substituted (5) and (6) regarding payment of associated costs for former (5) that read: "(5) Willful failure to obtain or pay for counseling ordered under this section is a civil contempt of court"; inserted (7) regarding the use of firearms; inserted (8) requiring the court to provide the offender with a written copy of the sentence; and made minor changes in style.

Severability: Section 31, Ch. 350, L. 1995, was a severability clause.

1993 Amendment: Chapter 425 in (1)(a) and in two places in (1)(c) substituted "partner" for "household member"; inserted (1)(b) concerning negligent bodily injury with a weapon; substituted (2) defining family member and partner for former (2) that read: "For the purposes of 46-6-311 and this section, "family member or household member" means a spouse, former spouse, adult person related by blood or marriage, or adult person of the opposite sex residing with the defendant or who formerly resided with the defendant"; in (3), in first sentence, increased maximum fine from $500 to $1,000 and maximum jail term from 6 months to 1 year and in second sentence inserted minimum fine of $500, after "$50,000" substituted "and" for "or", after "imprisoned" inserted "in the county jail or", and at end inserted minimum term of 10 days; in (4)(a), after "domestic abuse", deleted "for the first or second time"; inserted (4)(c) requiring notice and recommendation concerning counseling; and made minor changes in style.

1991 Amendment: Near beginning of (2) substituted "46-6-311" for "46-6-401"; and made minor changes in style.

1989 Amendment: Inserted (4) requiring counseling for person convicted of domestic abuse for first or second time, stating with whom or in what type of program counseling must occur, and stating that counseling must be directed to violent conduct of convicted person; and inserted (5) providing that willful failure to obtain or pay for counseling is civil contempt of court.

Case Notes

PFMA — Juror Statements That Defendant Should be Punished Even if Partner Element Not Proven — Reversal Warranted for Failure to Grant Challenge for Cause: During voir dire, a member of the jury was questioned about whether she would convict the defendant of partner or family member assault even if the state did not prove he was a partner, which is an element of the offense. The juror responded several times that if the defendant had assaulted the woman, it did not matter if he was her partner or not, and that he needed to be punished. After the prosecution attempted to rehabilitate the juror with leading questions, the District Court denied the defendant's challenge to remove her for cause. Following his conviction, the defendant appealed. The Supreme Court concluded that the District Court had made a structural error in denying the challenge for cause because the totality of the juror's statements raised a serious question of her ability to be impartial. St. v. Johnson, 2019 MT 68, 395 Mont. 169, 437 P.3d 147.

Victim Not Family Member — Defendant's Household: The defendant was convicted of partner or family member assault for striking his niece, who did not live in the same household with the defendant. The defendant appealed, arguing that the niece did not qualify under the statute as a family member. The Supreme Court agreed with the defendant, stating that the definition of "family member" references the defendant's household and not that of a separate victim. St. v. Gregori, 2014 MT 169, 375 Mont. 367, 328 P.3d 1128.

Creating Reasonable Apprehension of Bodily Injury — Defendant's Subjective Intent to Create Apprehension Not Relevant: The defendant was convicted of partner or family member assault, in violation of 45-5-206. On appeal, the defendant argued that the District Court should have instructed the jury that the state was required to prove that the defendant intended his actions to cause his mother and brother a reasonable apprehension of bodily injury. The Supreme Court disagreed and held that the defendant was not entitled to a jury instruction regarding his subjective intent to cause a reasonable apprehension of bodily injury. Instead, the state was required to prove only that the defendant acted purposely or knowingly with regard to his conduct, not to the results of his conduct. St. v. Birthmark, 2013 MT 86, 369 Mont. 413, 300 P.3d 1140, following St. v. Martin, 2001 MT 83, 305 Mont. 123, 23 P.3d 216.

Failure to Object to Proper Jury Instructions Not Ineffective Assistance of Counsel: The defendant was convicted of partner or family member assault (PFMA) against his mother and his brother, in violation of 45-5-206. On appeal, the defendant argued that his trial counsel was ineffective by failing to object to the jury instructions given by the District Court. The defendant asserted that his counsel should have offered instructions requiring the state to prove that the defendant intended his actions to cause his mother and his brother to have a reasonable apprehension of bodily injury. The Supreme Court disagreed, noting that the District Court's jury instructions properly described the law on mental state for PFMA, considering whether a reasonable person in circumstances similar to those of the victims would have a reasonable apprehension of bodily injury instead of considering the defendant's subjective intent. Because the District Court could properly have refused the defendant's proposed jury instruction regarding his intent, the defendant could not show that his counsel's assistance was ineffective. St. v. Birthmark, 2013 MT 86, 369 Mont. 413, 300 P.3d 1140.

Jury Instructions Properly Reflecting Law — Plain Error Review Declined: The Supreme Court declined to invoke plain error review of the District Court's jury instructions when the Supreme Court had already concluded the jury instructions properly reflected the law regarding the requisite mental state for partner or family member assault in violation of 45-5-206, and thus there was no error. St. v. Birthmark, 2013 MT 86, 369 Mont. 413, 300 P.3d 1140.

Sentencing — District Court Departure from Persistent Felony Offender Statute — Sentence to Department of Corrections Instead of State Prison Considered Proper Departure: The defendant was convicted of felony partner or family member assault, designated as a persistent felony offender (PFO), and committed to the Department of Corrections (DOC) for the statutory minimum period of 5 years under 46-18-502. On appeal, the defendant argued that the District

Court misinterpreted 46-18-222, which allows the court to forego restrictions when there is "no serious bodily injury" to the victim. The Supreme Court affirmed the sentence and determined that regardless of whether the prosecution proved "serious bodily injury", the District Court correctly departed from the PFO statute by sentencing the defendant to the DOC rather than the state prison. Moreover, the District Court based its sentence on the defendant's likelihood of reoffending and the court's desire to rehabilitate him. St. v. Thompson, 2012 MT 208, 366 Mont. 260, 286 P.3d 581.

Evidence of Reasonable Apprehension of Bodily Injury Sufficient When Reasonable Person Would Have Realized Injury Could Result: The elements of a criminal offense can be established by circumstantial evidence alone. A victim's statements at the time of the incident and observations by police officers regarding her demeanor were sufficient to establish a reasonable apprehension of bodily injury even though the victim recanted at trial. St. v. Finley, 2011 MT 89, 360 Mont. 173, 252 P.3d 199.

Term "Dating" as Used in Statute Not Ambiguous: The legislature is not required to define every term used in a statute if the term is one of common usage and can be readily understood. Where the testimony of the defendant and the victim was that the incident took place on their first date and there was sufficient evidence at trial to show they were in a "dating or ongoing intimate relationship", the parties were "partners" within the meaning of 45-5-206. St. v. Ankeny, 2010 MT 224, 358 Mont. 32, 243 P.3d 391.

Alford Plea to Partner or Family Member Assault Not Precluding Subsequent Prosecution for Assault on Minor: After beating his girlfriend's 2-year-old son, Weatherell was charged with assault on a minor, criminal endangerment, and partner or family member assault. Weatherell entered an Alford plea to the partner or family member assault and endangerment charges and moved to dismiss the remaining charges on double jeopardy grounds, but the motion was denied. On appeal, the Supreme Court held that under 46-11-410(2)(a) and (2)(d), Weatherell's Alford plea to partner or family member assault did not foreclose a subsequent prosecution for assault on a minor. Denial of the dismissal motion was affirmed. St. v. Weatherell, 2010 MT 37, 355 Mont. 230, 225 P.3d 1256.

Proper Exclusion of Evidence Offered to Impeach Partner or Family Member Assault Victim — Expert Testimony Regarding Battered Woman Syndrome Properly Admitted: Following conviction for partner or family member assault, Bonamarte appealed on grounds that the trial court erred by improperly limiting evidence related to the general health of the parties' business and by allowing expert testimony by a state witness regarding battered woman syndrome. The Supreme Court affirmed. The trial court properly limited evidence concerning the parties' business, which Bonamarte asserted was relevant to the victim's credibility, while allowing Bonamarte to cross-examine the victim and introduce evidence on that point through Bonamarte's own testimony. Further evidence on the issue might have created undue prejudice, confused the issue, misled the jury, or been cumulative. Likewise, the expert testimony was properly limited to general testimony about the dynamics of an abusive relationship, and the expert did not opine about whether the victim was a battered woman, properly leaving to the jury the decision about whether the victim was credible and a victim of abuse. St. v. Bonamarte, 2009 MT 243, 351 M 419, 213 P3d 457 (2009).

Applicability of Speedy Trial Statute to Potential Misdemeanor Partner or Family Member Assault Charge: Martz was convicted of partner or family member assault in 2002. In January 2006, Martz was charged with misdemeanor second offense and felony third offense partner or family member assault, and in May 2006 Martz was charged with felony fourth offense partner or family member assault. The second and third offense charges were dismissed in August 2006 and were subsequently refiled in September 2006. The refiling had the effect of Martz being tried for the felony fourth offense before trial for the misdemeanor second and felony third offenses. Martz contended that the order in which the charges came to trial meant that the fourth offense charge was in fact the second offense tried and that because second offense partner or family member assault is a misdemeanor, the speedy trial provisions of 46-13-401 should apply. The state argued that because Martz was charged with felony partner or family member assault, the speedy trial statute did not apply. The District Court held that if Martz was convicted on the fourth charge but not on the second and third charges, the fourth offense would be treated as a misdemeanor for sentencing purposes, and denied the speedy trial motion. Martz was subsequently convicted on the fourth charge and, the following day, on the second charge. On appeal, the Supreme Court noted that although Martz was first found guilty of the fourth offense, he was not convicted of that charge and sentenced until March of the following year, after sentence for the second offense was imposed, which made the charged fourth offense a felony conviction, so the speedy trial provisions did not apply. However, the state's argument that the speedy trial provisions could never apply was clarified by the Supreme Court. The speedy trial statute could have applied because the fourth offense had the potential of being reduced to a misdemeanor depending on the outcome of the trial on the second and third offenses. Because that contingency did not occur, dismissal of the speedy trial motion was affirmed. St. v. Martz, 2008 MT 382, 347 M 47, 196 P3d 1239 (2008).

Original Court Jurisdiction Over Partner or Family Member Assault Charges, Misdemeanor or Felony: District Courts have original jurisdiction over felony partner or family member assault charges. District Courts and Justices' Courts have concurrent jurisdiction over misdemeanor partner or family member assault charges. St. v. Martz, 2008 MT 382, 347 M 47, 196 P3d 1239 (2008).

Sentencing When Felony Charge Tried Before Misdemeanor Charge — Sentence Lawful: Martz was convicted of partner or family member assault in 2002. In January 2006, Martz was charged with misdemeanor second offense and felony third offense partner or family member assault, and in May 2006 Martz was charged with felony fourth offense partner or family member assault. The second and third offense charges were dismissed in August 2006 and were subsequently refiled in September 2006. The refiling had the effect of Martz being tried for the felony fourth offense before trial for the misdemeanor second and felony third offenses. Martz was subsequently convicted on the fourth charge and, the following day, on the second charge. At sentencing several months later, the District Court first imposed a sentence for the second charge, which was treated as a misdemeanor, and then sentenced Martz to 2 years at the Department of Corrections with 1 year suspended on the fourth charge, which was treated as a felony. Martz asserted on appeal that the felony sentence for the fourth charge was unlawful because the trial on that charge occurred first, so it should have been treated as a misdemeanor. The Supreme Court disagreed, noting that although Martz was first found guilty of the fourth offense, he was not convicted of that charge and sentenced until months later, after sentence for the second offense was imposed, which made the charged fourth offense a felony conviction for which the sentence imposed was lawful. St. v. Martz, 2008 MT 382, 347 M 47, 196 P3d 1239 (2008).

Motion to Dismiss for Lack of Evidence Properly Denied: Tuomala moved to dismiss a charge of partner or family member assault on grounds that there was insufficient evidence to sustain the charge. The motion was denied, and on appeal Tuomala argued that the state failed to prove that the victim suffered bodily injury in the form of pain or impairment of physical condition. The Supreme Court held that the definition of bodily injury encompasses physical pain or impairment of physical condition. Multiple witnesses testified that Tuomala struck the victim and pinned the victim against the wall. Photographic evidence showed scratches and other injuries on the victim's face and neck. Viewed in a light most favorable to the state, the evidence was sufficient for a rational trier of fact to find that Tuomala's actions caused physical pain or impairment. The Supreme Court affirmed. St. v. Tuomala, 2008 MT 330, 346 M 167, 194 P3d 82 (2008).

Nonrecord-Based Assertion of Ineffective Counsel for Failure to Raise Parental Discipline Defense at Trial for Partner or Family Member Assault Appropriate for Postconviction Proceedings, Not Direct Appeal: At her trial for partner or family member assault, Fender's counsel did not raise a parental discipline defense. Fender asserted that she was entitled to a new trial because failure of counsel to raise the defense constituted ineffective assistance of counsel, but the District Court denied the motion for a new trial. On appeal, the Supreme Court was unable to determine from the record whether counsel's action was strategic, but because the alleged error was nonrecord-based, the question of whether there was merit to the parental discipline defense was more appropriate for postconviction proceedings, so the denial of a new trial was affirmed. St. v. Fender, 2007 MT 268, 339 M 395, 170 P3d 971 (2007).

Plea Colloquy to Include Admission of Elements of Offense: A court must solicit admission from a defendant regarding what acts the defendant committed that constitute the offense charged. The court need not extract an admission of every element of the crime in order to establish a factual basis for a guilty plea, but the court must ascertain, from admissions made by the defendant at the plea colloquy, that the defendant's acts satisfy in a general sense the requirements of the crime. If the defendant is unwilling to admit any element of the crime, the court must reject the guilty plea or treat the plea as an Alford plea and apply the stricter standards of 46-12-212(2) that require strong evidence of guilt. In this case, the Justice's Court's interrogation of defendant was inadequate to determine whether there was a factual basis for defendant's guilty plea to partner or family member assault, and on appeal, the District Court should have resolved any doubt as to the voluntariness of the plea by allowing withdrawal of the plea. Failure to do so was reversible error, and the Supreme Court remanded for further proceedings. St. v. Frazier, 2007

MT 40, 336 M 81, 153 P3d 18 (2007), followed in St. v. Wise, 2009 MT 32, 349 M 187, 203 P3d 741 (2009). See also St. v. Muhammad, 2005 MT 234, 328 M 397, 121 P3d 521 (2005).

Failure of Counsel to Perfect Direct Appeal — Remand: Following conviction in Municipal Court for partner or family member assault, Woeppel's trial counsel filed a notice of appeal to District Court. Woeppel obtained new counsel, but counsel failed to file a brief to perfect the appeal, and the appeal was dismissed. The new counsel ultimately withdrew because of a conflict of interest, and Woeppel's next new counsel filed a petition for postconviction relief on grounds that Woeppel was denied effective assistance of counsel and was denied the right to confront witnesses in the underlying case because the conviction was based on hearsay testimony. The petition was denied, and Woeppel appealed. The Supreme Court noted that trial counsel's notice of appeal objectively indicated Woeppel's intent to appeal and that it was only because appellate counsel failed to file a brief that the appeal was dismissed, resulting in prejudice to Woeppel. Denial of the petition for postconviction relief was reversed, and the case was remanded for consideration of any claims that Woeppel could have made on direct appeal, including the claim that because the conviction was based on hearsay, Woeppel's right to confront witnesses was violated. Woeppel v. Billings, 2006 MT 283, 334 M 306, 146 P3d 789 (2006).

Assault Not Lesser Included Offense of Partner or Family Member Assault: A charge of assault under 45-5-201 is not a lesser included offense of partner or family member assault under this section. St. v. Aune, 2006 MT 113, 332 M 211, 136 P3d 529 (2006).

Admissibility of Hearsay Statements Made in Emergency Following Family Member Assault: During Mizenko's trial for partner or family member assault, the trial court admitted several hearsay statements made by the victim, Mizenko's wife, who did not testify. Mizenko contended that admitting the hearsay statements violated his constitutional right to confront witnesses against him, even though Mizenko had the opportunity to cross-examine the witnesses who related the hearsay statements, including a neighbor whom the wife had gone to for help, the emergency dispatcher who received the 9-1-1 call, and the investigating deputy. The dispatcher's testimony regarding the contents of the call was admitted without objection, and the deputy's testimony verified that the acts related on the call had occurred, so their testimony, even if objectionable, was cumulative and therefore harmless. The neighbor's testimony related statements that the wife made while in distress and while addressing a nongovernmental agent. The wife's cursory statements describing the circumstances, though evidence, were not created by the judicial process, and the wife had no reason to believe that her excited utterances would be used in court, so the statements were considered nontestimonial and properly admitted under the excited utterance exception of Rule 803, M.R.Ev. (Title 26, ch. 10). St. v. Mizenko, 2006 MT 11, 330 M 299, 127 P3d 458 (2006), followed in St. v. Paoni, 2006 MT 26, 331 M 86, 128 P3d 1040 (2006). See also St. v Cameron, 2005 MT 32, 326 M 51, 106 P3d 1189 (2005).

Testimonial Versus Nontestimonial Hearsay — Crawford Rule for Admissibility in Criminal Trial — Use of Emergency Calls: In Crawford v. Wash., 541 US 36 (2004), the U.S. Supreme Court bifurcated hearsay law from the constitutional confrontation clause (sixth amendment, U.S. Const.; Art. II, sec. 24, Mont. Const.) by allowing hearsay against criminal defendants in only two instances: (1) if hearsay is testimonial, a defendant must have had an opportunity to cross-examine the declarant and the prosecution must show that the declarant is unavailable to appear at trial; or (2) if hearsay is nontestimonial, the hearsay must bear adequate indicia of reliability or particularized guarantees of trustworthiness. However, the Crawford court declined to define what constitutes testimonial hearsay. The Montana Supreme Court noted that the sixth amendment itself defines the indicia of reliability or particularized guarantees of trustworthiness necessary to admit testimonial hearsay by establishing confrontation through cross-examination as the minimally adequate index. Crawford characterizes a casual remark to an acquaintance as nontestimonial hearsay, and the word "casual" modifies the declarant's assumption as to what use, if any, the listener might make of the statement. When an objective declarant would reasonably expect the state to use a statement at trial, the sixth amendment demands that courts exclude such statements absent an opportunity for confrontation. When speaking to government agents or officials, a declarant should reasonably expect the government to seek to use those statements at trial, and when a declarant signs an affidavit or gives a recorded statement, the declarant should likewise expect the state to make use of those statements, so those statements are considered testimonial. However, a declarant who is alerting law enforcement of imminent and immediate danger, such as through a 9-1-1 emergency call, has much less of an expectation that the state will seek to make prosecutorial use of the statements at trial, depending on the content of the conversation and the particular circumstances that led to the call. If the declarant has objective reason to believe that an emergency statement would serve only to avert or mitigate imminent or immediate danger and the agent who receives the statement had no intent to create evidence, then the statement is presumed to be nontestimonial. Alternatively, if a declarant has clear reason to believe that the statement would be used in court as substantive evidence against a defendant, statements to a nongovernmental agent are nontestimonial. St. v. Mizenko, 2006 MT 11, 330 M 299, 127 P3d 458 (2006), followed in St. v. Paoni, 2006 MT 26, 331 M 86, 128 P3d 1040 (2006), and followed, with regard to the admissibility of a child victim's nontestimonial statements, in St. v. Spencer, 2007 MT 245, 339 M 227, 169 P3d 384 (2007).

Claim That Prior Convictions Could Not Serve as Basis for Charging Current Crime as Felony Considered Nonjurisdictional — Guilty Plea as Waiver of Nonjurisdictional Claims — Postconviction Relief Denied for Failure to Raise Legality of Sentence on Direct Appeal: Slavin was convicted of partner or family member assault in 1992 and 1993. In 2001, Slavin pleaded guilty to a third charge of the same crime, which was considered a felony because of the two prior convictions, and was sentenced. Slavin did not appeal, but later filed a pro se petition for postconviction relief on grounds that the two prior convictions were constitutionally infirm. The District Court denied the petition because Slavin failed to provide direct evidence overcoming the presumption of regularity attached to the prior convictions. On appeal, the Supreme Court held that Slavin's claim was a nonjurisdictional claim involving whether the District Court had statutory authority to impose the sentence, not whether the court had the power or capacity to impose the sentence. Slavin's knowing and voluntary guilty plea constituted a waiver of all nonjurisdictional defects and defenses that arose prior to the plea. Additionally, because Slavin failed to appeal the legality of the sentence, postconviction consideration of the sentence-related claim was precluded. The District Court was affirmed. Slavin v. St., 2005 MT 306, 329 M 424, 127 P3d 350 (2005), following Pena v. St., 2004 MT 293, 323 M 347, 100 P3d 154 (2005), and overruling St. v. LaPier, 1998 MT 174, 289 M 392, 961 P2d 1274 (1998).

Exclusion of Assault Victim's Prior Assault Record — Probative Value Outweighed by Prejudicial Effect: Grixti was arrested for family member assault against his wife. At trial, Grixti sought to introduce evidence of the wife's prior family member assault against Grixti, but the trial court granted the state's motion in limine excluding evidence of the wife's prior assault. On appeal, the Supreme Court noted that evidence of a witness's prior crimes and wrongs is inadmissible to show action in conformity with the prior crime under Rule 403, M.R.Ev. (Title 26, ch. 10), but may be admissible under Rule 404, M.R.Ev., to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident and under Rule 608, M.R.Ev., to attack a witness's character if probative of truthfulness or untruthfulness. However, in this case, the trial court found that the potential prejudicial effect of the wife's prior arrest record likely outweighed any probative value regarding the wife's character for truthfulness or untruthfulness. The Supreme Court deferred to the trial court's discretion in making evidentiary character determinations and affirmed the grant of the motion in limine. St. v. Grixti, 2005 MT 296, 329 M 330, 124 P3d 177 (2005).

Concurrent Justice's Court and District Court Jurisdiction Over Misdemeanor Family Assault No Right to Trial De Novo From Court of Record: Brockway was charged with two misdemeanor and two felony counts of family member assault. Brockway moved to sever the misdemeanor counts and have them tried first in Justice's Court so that he would have the opportunity to appeal to District Court. The District Court concluded that it lacked jurisdiction to try the misdemeanor charges, so the misdemeanor charges were severed and remanded for trial in Justice's Court. The state appealed. The Supreme Court held that the District Court's conclusion that it did not have jurisdiction to try the misdemeanors was erroneous. Under 3-10-303, District Courts have concurrent jurisdiction with Justices' Courts over misdemeanor charges of partner or family member assault. Additionally, under 46-17-311, there is no right to a trial de novo from District Court or from a Justice's Court that is a court of record, so Brockway was entitled to one jury trial in a court of record—in this case, the District Court—and if convicted, Brockway could then appeal to the Supreme Court. The case was remanded for trial in District Court on all charges. St. v. Brockway, 2005 MT 179, 328 M 5, 116 P3d 788 (2005).

Ambiguous Statements Concerning Prior Family Member Assaults Nonprejudicial in Light of Evidence: Prior to Hofeldt's trial for family member assault, Hofeldt was granted a motion in limine precluding testimony regarding prior family member assaults. At trial, the victim and the investigating officer made comments that Hofeldt asserted violated the motion in limine, and Hofeldt moved for mistrial. However, the trial court denied the motion, and Hofeldt was convicted. On appeal, the Supreme Court affirmed. The statements were not elicited by the prosecution and did not reference prior incidents specifically involving Hofeldt. In light of the strong evidence against Hofeldt and the fact that he did not request a curative instruction, the ambiguous statements could not be considered prejudicial, and denial of the mistrial motion was not an abuse of discretion. St. v. Hofeldt, 2005 MT 178, 328 M 1, 116 P3d 810 (2005).

No Violation of Defendant's Substantial Rights by Filing Amended Information on Day of Trial to Include Reference to Statutorily Mandated Sentencing Range for Repeat Offender: Gardipee was charged by information with misdemeanor partner abuse. On the morning of trial, the District Court granted the state's request to amend the information to include a reference to the statutorily mandated sentencing range for repeat offenders in subsection (3) of this section because of Gardipee's prior domestic abuse convictions. Following conviction, Gardipee appealed on grounds that allowing the amended information on the day of trial violated his substantial rights. The Supreme Court disagreed. The elements of the charged crime were not changed, and the only difference between the informations was the recognition that pursuant to the statute, a persistent offender was subject to an enhanced sentence for a third or subsequent conviction, so the amendment did not violate Gardipee's substantial rights. St. v. Gardipee, 2004 MT 250, 323 M 59, 98 P3d 305 (2004).

Circumstantial Evidence Supporting Conclusion That Victim Sustained Reasonable Apprehension of Bodily Injury: Defendant contended that a directed verdict motion should have been granted requesting dismissal of a partner or family member assault charge because no evidence was presented that the victim had sustained reasonable apprehension of bodily injury, which the state had to prove in order to meet its burden of proof. The standard for determining whether a person sustained reasonable apprehension of bodily injury is that of a reasonable person under similar circumstances. Direct evidence is not necessary to establish the elements of the offense. A conviction may be based entirely on circumstantial evidence, and direct proof of other facts may give rise to an inference that a victim sustained reasonable apprehension of bodily injury. In this case, the victim: (1) fled from her apartment with her dog over concern about defendant's past behavior; (2) locked herself in a neighbor's bathroom; (3) heard defendant scream that he was going to kill her; (4) observed knife holes that defendant was making in her apartment door; and (5) ultimately fled the building. From these facts a jury could find that the victim sustained reasonable apprehension of bodily injury, and denial of defendant's directed verdict motion was not an abuse of discretion. St. v. Vukasin, 2003 MT 230, 317 M 204, 75 P3d 1284 (2003). See also St. v. Birthmark, 2013 MT 86, 369 Mont. 413, 300 P.3d 1140.

Use of Prior Convictions to Enhance Offense When Defendant Waived Right to Counsel During Prior Convictions: In 1989 and 2001, Markuson was charged with misdemeanor partner or family member assault. In both cases, he waived the right to counsel and pleaded guilty. In 2002, Markuson was again charged with partner or family member assault, and based on the two prior convictions, the third charge was designated as a felony. Markuson contended that the use of the alleged constitutionally infirm prior convictions to enhance the 2002 charge was improper because the Justice's Court in the prior cases failed to advise of the dangers and disadvantages of self-representation when the right to counsel was waived. In this case, the Supreme Court disagreed. Although the state may not use constitutionally infirm prior convictions to enhance a subsequently charged offense, a rebuttable presumption of regularity attaches to prior convictions. However, Markuson failed to demonstrate that the prior waivers of the right to counsel were not knowing and voluntary. Markuson's affidavit was insufficient to demonstrate that the prior convictions were constitutionally infirm, and the felony conviction was affirmed. St. v. Markuson, 2003 MT 206, 317 M 43, 75 P3d 298 (2003), distinguishing U.S. v. Akins, 276 F3d 1141 (9th Cir. 2001).

Failure of Counsel to Suppress Letters Absent Showing That Letters Written Within Forty-Eight Hours of Arrest Considered Ineffective Assistance of Counsel: In Hope's trial for assault, Hope's counsel failed to move to suppress four letters written by Hope regarding Hope's relationship with the victim. The state did not show that any of the letters were written within 48 hours of Hope's arrest, so the District Court erred when it did not conclude that the letters should be suppressed, and counsel's failure to move to suppress the evidence resulted in the introduction of evidence that negated Hope's overall defense that he did not have an intimate relationship with the victim and did not assault her, constituting ineffective assistance of counsel. Counsel's failure was prejudicial reversible error, and the Supreme Court remanded for a new trial. Hope v. St., 2003 MT 191, 316 M 497, 74 P3d 1039 (2003).

Criminal Endangerment, Negligent Endangerment, and Partner or Family Member Assault Not Considered Lesser Included Offenses of Aggravated Assault: At trial for aggravated assault, the District Court refused Hoffman's request of lesser included offense instructions on the offenses of criminal endangerment, negligent endangerment, and partner or family member assault, and Hoffman appealed. The Supreme Court affirmed. Under 46-1-202(8)(a), a lesser included offense is one that is established by proof of the same or less than all the facts required to establish commission of the offense charged, while under 46-1-202(8)(c), a lesser included offense is one that differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission. Although Hoffman made prefatory reference to both subsections, the substance of Hoffman's argument focused entirely on subsection (8)(c), and the Supreme Court declined to address arguments related to subsection (8)(a) that were raised for the first time on appeal. It is incumbent on counsel to specify at trial which subsection is being relied upon. Subsection (8)(c) does not support a conclusion that criminal endangerment, negligent endangerment, or partner or family member assault is a lesser included offense of aggravated assault. The District Court's properly concluded that the offenses were too dissimilar to warrant a lesser included offense instruction. St. v. Hoffman, 2003 MT 26, 314 M 155, 64 P3d 1013 (2003), following St. v. Fisch, 266 M 520, 881 P2d 626 (1994).

No Requirement That Defendant Be Informed of Federal Firearms Prohibitions Resulting From State Conviction of Partner Assault — Direct Versus Collateral Consequences of Plea — Denial of Motion to Withdraw Guilty Plea Affirmed: Liefert pleaded guilty in Justice's Court to charges of partner assault and was subsequently charged under federal law 18 U.S.C. 922 with unlawfully possessing a firearm, following a hunting investigation. After federal charges were filed, Liefert moved to withdraw the guilty plea, contending that good cause existed because the Justice's Court did not inform him of the federal prohibition on possessing a firearm as a result of the plea under Montana law. The motion was denied in Justice's Court and in District Court, which cited St. v. Reynolds, 253 M 386, 833 P2d 153 (1992), and held that Liefert did not need to be informed of the federal prohibition because it was a collateral consequence of Liefert's sentence. Liefert appealed to the Supreme Court, which affirmed. Although the Supreme Court has previously held that there is no appeal to District Court from the denial of a motion to withdraw a guilty plea in Justice's Court, in this case, Liefert's appeal was treated as a motion for postconviction relief, and the Supreme Court proceeded to determine whether Liefert had good cause to withdraw the plea. The court determined whether the District Court erred in disallowing withdrawal of the plea by applying the factors in St. v. Bowley, 282 M 298, 938 P2d 592 (1997). The only applicable Bowley factor was the adequacy of the plea colloquy. Liefert did not assert that a judge must inform every defendant of the effect of a guilty plea on gun possession, but presented only the issue of whether a defendant must be informed when charged with partner assault and contended that state sentencing statutes require a judge to inform a defendant of the punishment that can result from a violation. Although never explicitly adopted, the Supreme Court has previously applied the prevailing rule in Torrey v. Estelle, 842 F2d 234 (9th Cir. 1988), that because it is impossible for a judge to inform a defendant of every possible consequence of a guilty plea, judges are required to inform defendants of direct consequences, but are not required to inform of collateral consequences. A consequence is considered direct if it has a definite, immediate, and largely automatic effect and is considered collateral if a defendant has control over whether or not the consequence occurs, if it is not under the control of the sentencing judge, or if it is a procedure under the control of a different sovereign or agency. Notwithstanding Liefert's due process, federal preemption, and negative implication arguments, Liefert had discretionary control over whether he would be in violation of federal law upon entry of a guilty plea for partner assault, and the consequence in this case was under the control of the federal government and thus collateral. Further, the guilty plea was not involuntary simply because it may have been entered to avoid the possibility of a greater punishment at trial or because Liefert may have viewed punishment under the guilty plea as lesser than his immediate personal consequences. Therefore, the District Court did not err in denying Liefert's motion to withdraw the plea. (See 2003 amendment to 46-7-102.) St. v. Liefert, 2002 MT 48, 309 M 19, 43 P3d 329 (2002), followed in Duffy v. St., 2005 MT 228, 328 M 369, 120 P3d 398 (2005).

Defendant's Exclusion From In-Chambers Individual Voir Dire Proceedings Violative of Right to Be Present at Critical Stages of Trial: Bird was accused of felony partner or family member assault. Prior to trial, the District Court conducted in-chambers voir dire specifically to elicit prospective jurors' personal feelings and experiences regarding domestic violence. Both the prosecutor and defense counsel were present, but Bird was not. Once the jury panel was passed for cause, the court recessed and met with counsel in chambers to allow the exercise of peremptory challenges, but again Bird was not included in the meeting. At the close of the meeting, the prosecutor noticed that Bird was not present and questioned whether the defendant's presence was necessary. The judge said that it was assumed that defense counsel wished to waive Bird's presence, and defense counsel stated that Bird had expressed no feelings about it one way or another. Bird was convicted and appealed on several grounds, including whether: (1) certain jurors should have been removed for cause; (2) defense counsel rendered deficient performance; (3) Bird should have been present during the individual voir dire; (4) Bird was prejudiced by certain testimony; and (5) the burden of proof was improperly shifted to Bird. The Supreme Court found the third issue to be dispositive. The court disagreed with the state's contention that Bird's presence at voir dire had been waived. The right of a defendant to be present at all critical stages of trial, including in-chambers individual voir dire, is a fundamental right that can be waived only if the trial court obtains an on-the-record personal waiver by the defendant, acknowledging that the defendant voluntarily, intelligently and knowingly waives that right. There can be no waiver by a person who does not know the person's rights or what is being waived. Bird was not informed of the constitutional right to be present during voir dire and was not given the opportunity to choose whether to participate, so not only did Bird not waive the constitutional right, he was never afforded the opportunity to waive it. Bird's exclusion from voir dire was a structural error that undermined the integrity of the entire trial, and constituted reversible error. St. v. Bird, 2002 MT 2, 308 M 75, 43 P3d 266 (2002), distinguished in St. v. Wilson, 2013 MT 70, 369 Mont. 282, 297 P.3d 1208, following St. v. Reed, 65 M 51, 210 P 756 (1922), and St. v. Allison, 116 M 352, 153 P2d 141 (1944), and distinguishing U.S. v. Gagnon, 470 US 522 (1985). See also St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000).

Recorded Present Sense Impression of Partner Assault Victim Properly Admitted: At Hope's trial for partner assault, the District Court admitted into evidence a note that the victim wrote prior to the assault, describing Hope's angry mood and the victim's apprehension about further problems that might arise. Hope contended error in admission of the note because the note did not meet the requirements of the recorded exception to the hearsay rule in Rule 803, M.R.Ev. (Title 26, ch. 10). The state argued that the note was properly admitted under the recorded present sense impression exception to the hearsay rule. The Supreme Court agreed with the state. A recorded present sense impression is a written assertion describing or explaining an event or condition while the declarant was perceiving the event or condition or immediately thereafter. Further, the note did not impermissibly provide the jury with testimonial material regarding Hope's general character, or give undue emphasis to the critical elements of the state's case, because it described the victim's perception of Hope's anger rather than the assault itself. The trial court correctly advised the jury that it could give the note whatever weight that it considered appropriate, and the note was properly admitted. St. v. Hope, 2001 MT 207, 306 M 334, 33 P3d 629 (2001).

Failure to Show That but for Negligent Legal Advice, Deportation Could Have Been Successfully Defended — Professional Negligence Claim Properly Dismissed: Fang, a Chinese citizen and lawful permanent United States resident employed by Montana State University-Bozeman, was involved in a domestic dispute with his wife that resulted in charges of assault. Fang consulted Bock, who worked at the university legal services offices, regarding the possibility of deportation. Bock in turn consulted Rice, an attorney who had made a presentation on immigration law at a seminar that Bock had attended, and asked if a misdemeanor domestic abuse charge was grounds for deportation. Rice informed Bock that the federal Immigration and Naturalization Service (INS) would not initiate deportation proceedings until the commission of two misdemeanors. Bock relayed that information to Fang, who relied at least in part on the information and pleaded guilty to family member assault. However, in 1996, Congress enacted a new immigration statute (see 8 U.S.C. 1227(a)(2)(E)(i)) that provides that domestic violence convictions are deportable offenses. Several weeks after pleading guilty, Fang received a notice to appear and face deportation. After hiring new counsel, Fang moved to withdraw the guilty plea. The District Court granted the motion on grounds that the failure of Bock to inform Fang of the possibility of removal to China constituted ineffective assistance of counsel, and the INS agreed to suspend further proceedings until the resolution of charges against Fang. Based on the advice of his new counsel, Fang reached a plea agreement with the Gallatin County Attorney to plead guilty to an amended charge of assault. Following conviction, the INS again moved to deport Fang, and based on the fact that assault also constitutes a crime of violence against a protected person pursuant to federal immigration law, Fang was ordered to be deported. Fang then filed a complaint against Bock, seeking damages for professional negligence and negligent supervision and treble damages under 37-61-406. The District Court applied Lorash v. Epstein, 236 M 21, 767 P2d 1335 (1989), and determined that Fang could not satisfy the last element of the test for a prima facie case of professional negligence, which requires a showing that but for such negligence, Fang would have successfully defended against the offense. The court then summarily dismissed the case. Fang appealed, contending that because of Bock's advice, he was exposed to the possibility of removal from this country and had to spend substantial amounts of money to avoid that exposure. Pursuant to Lorash, the Supreme Court had to determine whether Fang would have been exposed to the possibility of removal from this country with or without Bock's advice, in light of the offenses to which Fang pleaded guilty, the statutory basis for deportation, and the immigration judge's explanation for the deportation order. Under either charge, Fang was guilty of an offense of violence against a protected person—his wife. The title of the offense was irrelevant because for purposes of immigration law, misdemeanor assault is considered just as much a crime of violence against a spouse as family member assault. Further, Fang's argument that a different result was compelled by the fact that the assault conviction was subsequently expunged based on a deferred prosecution also failed because under federal case law, no effect is to be given to a state action that purports to remove a guilty plea or conviction by operation of a state rehabilitative statute. Thus, Fang's situation was a result of the conduct that he admitted and was the same following correct legal advice as it was following Bock's incorrect advice. Although Bock misinformed Fang, that advice did not lead to Fang's predicament, nor would the money that he spent to have the first conviction set aside have changed the result. Fang could not prove that but for negligent legal advice he could have avoided deportation, and Bock was entitled to judgment as a matter of law. Fang v. Bock, 2001 MT 116, 305 M 322, 28 P3d 456 (2001).

Justifiable Use of Force Not Raised at Trial — Character Evidence of Victim Inadmissible: Nelson was charged with partner assault after striking his wife several times in the face and breaking her jaw. At trial, he sought to introduce evidence of his wife's prior convictions for assault to show that he used reasonable force against her. On appeal, the Supreme Court noted that Nelson had not relied on the defense of justifiable use of force, claiming instead that the contact was accidental, and that evidence of his wife's prior convictions lacked relevance because Nelson never asserted that he knew of the convictions when he struck her. Nelson's mere mention of self-defense in his notice of intent to rely on the defense of self-defense, in his trial brief, and in response to the city's motion in limine did not place the matter at issue in the trial. Thus, evidence of his wife's prior convictions was not relevant to the defense of accident upon which Nelson relied and was properly disallowed. Red Lodge v. Nelson, 1999 MT 246, 296 M 190, 989 P2d 300, 56 St. Rep. 955 (1999).

Prior Uncounseled Misdemeanor Used to Convert Later Misdemeanor Charge to Felony: In 1992, Hansen pleaded guilty to a first charge of domestic abuse. He was not represented by counsel in that proceeding. Later in 1992, Hansen pleaded guilty to a second charge of domestic abuse for which he was represented. In 1994, Hansen was arrested for another domestic abuse offense. Because this was the third offense, the state filed an information charging Hansen with felony domestic abuse. The District Court held that the first misdemeanor could not be counted to enhance the charge because Hansen did not knowingly waive his right to counsel. Citing Nichols v. U.S., 511 US 738, 128 L Ed 2d 745, 114 S Ct 1921 (1994), the Supreme Court held that a prior uncounseled misdemeanor may be used to provide a higher penalty upon a third offense and that because Hansen did not have a right to counsel for the first misdemeanor, whether he knowingly waived such a right was irrelevant. St. v. Hansen, 273 M 321, 903 P2d 194, 52 St. Rep. 993 (1995).

Distinction of Elements of Domestic Abuse and Felony Assault (now Assault With a Weapon): In cases in which bodily injury is inflicted on a family member or household member, the distinction between felony assault (now assault with a weapon) and domestic abuse is that felony assault (now assault with a weapon) requires use of a weapon. In cases involving reasonable apprehension of bodily injury in a family member or household member, felony assault (now assault with a weapon) requires two additional elements in comparison to domestic abuse: (1) there is use of a weapon; and (2) the bodily injury apprehended is of a serious nature. St. v. Brown, 239 M 453, 781 P2d 281, 46 St. Rep. 1825 (1989).

Law Review Articles

State v. Carter: Rejecting Crawford v. Washington's Third Formulation as a Per Se Definition of Testimonial, McKelvey, 67 Mont. L. Rev. 121 (2006).

State v. Mizenko: The Montana Supreme Court Wades Into the Post-Crawford Waters, King-Ries, 67 Mont. L. Rev. 275 (2006).

45-5-207. Criminal endangerment — penalty.

Compiler's Comments

2021 Amendment: Chapter 498 in (2) after "concentration" deleted "as provided in 61-8-407"; inserted (4) defining alcohol concentration; and made minor changes in style. Amendment effective January 1, 2022.

Applicability: Section 48, Ch. 498, L. 2021, provided: "[This act] applies to DUI incidents taking place on or after [the effective date of this act]." Effective January 1, 2022.

Saving Clause: Section 45, Ch. 498, L. 2021, was a saving clause.

2017 Amendment: Chapter 321 inserted (2) concerning a high blood alcohol concentration's insufficiency to support a criminal endangerment charge; and made minor changes in style. Amendment effective July 1, 2017.

Applicability: Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

1989 Amendment: Inserted second sentence of (1) that read: "This conduct includes but is not limited to knowingly placing in a tree, log, or any other wood any steel, iron, ceramic, or other substance for the purpose of damaging a saw or other wood harvesting, processing, or manufacturing equipment."

Case Notes

Sufficiency of Information That Does Not Allege Specific Victim: A man fired a shotgun out his hotel window toward the hotel parking lot. The state filed an information charging the man with felony criminal endangerment. The man filed a motion to dismiss, arguing that the information does not allege that there were people in the parking lot and no specific victim is alleged. The District Court granted the motion to dismiss. The Supreme Court reversed on the state's appeal, explaining that for the information, the state only had to establish a probability that the man committed the offense, and firing a gun into a parking lot commonly used by people clearly could endanger a person in the parking lot. St. v. Giffin, 2021 MT 190, 405 Mont. 78, 491 P.3d 1288.

Physician Convicted Over Prescriptions of Dangerous Drugs — Actions Outside Course of Professional Practice — Affirmed in Part, Reversed in Part: The defendant, a general physician who practiced in Montana, was convicted of 2 counts of negligent homicide, 9 counts of criminal endangerment, and 11 counts of criminal distribution of dangerous drugs, all relating to pain medication prescriptions he administered. On appeal, the defendant raised multiple issues relating to his prosecution, including arguing that 45-9-101 did not prohibit "prescribing" of dangerous drugs and that 45-5-207 was unconstitutionally vague. The Supreme Court held that the plain language of 45-9-101 did not prohibit the defendant from being prosecuted, that 45-5-207 was not unconstitutionally vague, and that the District Court properly instructed the jury as to the offense of criminal distribution. However, the Supreme Court reversed and vacated the defendant's conviction for two counts of negligent homicide because the state did not meet its burden that the defendant was the cause-in-fact of the victims' deaths. St. v. Christensen, 2020 MT 237, 401 Mont. 247, 472 P.3d 622.

High Probability Providing 18-Year-Old With Half-Gallon of Whiskey Would Create Substantial Risk of Death or Serious Bodily Injury to Another: A defendant bought a half-gallon of whiskey for an 18-year-old, who became so intoxicated he required hospitalization. The defendant appealed his conviction for criminal endangerment, arguing that the state did not prove he was aware of a high probability his action would create a substantial risk of death or serious bodily injury. The Supreme Court ruled that, based on the quantity of alcohol and other facts, a rational jury could have concluded the defendant had actual knowledge there was a substantial risk, but remanded the case on other grounds. St. v. Fleming, 2019 MT 237, 397 Mont. 345, 449 P.3d 1234.

Car Speeding up to 150 MPH — Criminal Endangerment — Jury Instruction on Negligent Endangerment Properly Denied: The defendant was driving up to 150 miles an hour on the interstate and passing numerous vehicles. Ultimately, the defendant stopped after his car ran over spike strips and he was charged with criminal endangerment. At trial, the defendant proposed a jury instruction to the lesser included offense of negligent endangerment, which the District Court did not permit. Following his conviction, the defendant appealed, arguing that the District Court abused its discretion in not allowing the instruction because a rational jury could have found that he had acted negligently. The Supreme Court examined the record and agreed it did not support the finding that the defendant had acted negligently and affirmed the ruling. St. v. Jensen, 2019 MT 60, 395 Mont. 119, 437 P.3d 117.

Defendant Properly Deemed Ineligible for Deferred Sentence — "Threat" Not Synonymous With "Risk": The defendant entered into a plea agreement under which he would receive a deferred sentence on his felony criminal endangerment charge. Afterward, the prosecutor learned that the defendant had been previously convicted of a felony and was therefore not eligible for a deferred sentence under 46-18-201. The defendant argued that he was eligible under an exception to 46-18-222 because the term "threat" in 46-18-222 means the same as "risk" in the criminal endangerment section, 46-5-207. The District Court disagreed and imposed a suspended sentence. On appeal, the Supreme Court affirmed, agreeing with the District Court that the terms are not synonymous and that the defendant was not eligible for a deferred sentence. St. v. Cleveland, 2014 MT 305, 377 Mont. 97, 338 P.3d 606.

Negligent Endangerment Lesser Included Offense of Criminal Endangerment — District Court Erred by Not Giving Jury Instruction on Negligent Endangerment: The defendant was charged with criminal endangerment for driving his daughter while allegedly under the influence of alcohol and prescription painkillers. At trial, his counsel offered a jury instruction on negligent endangerment as a lesser included offense of criminal endangerment, which the District Court declined to give. The jury convicted him of criminal endangerment. On appeal, the defendant argued that the District Court had erred in not giving the jury the instruction on negligent endangerment. The Supreme Court agreed, concluding that the only difference between criminal endangerment and negligent endangerment is the state of mind of the accused and that there were facts that would allow a jury to infer either state of mind. The Supreme Court held that negligent endangerment is a lesser included offense of criminal endangerment and reversed and remanded the matter to the District Court for further proceedings. St. v. Shegrud, 2014 MT 63, 374 Mont. 192, 320 P.3d 455.

Sufficient Evidence to Support Criminal Endangerment Conviction: The defendant argued there was insufficient evidence to support the charge of criminal endangerment that resulted after she stopped a small bus on an interstate in the dark without deploying hazard lights or warning signs, ultimately causing the death of another driver. Despite the defendant's arguments that she warned approaching vehicles by turning on and off the lights inside the bus, a jury could have reasonably concluded that the defendant's conduct created a substantial risk of death or serious bodily injury. St. v. Bekemans, 2013 MT 11, 368 Mont. 235, 293 P.3d 843.

Actual Knowledge of Facts Supporting Criminal Endangerment Charge — Motion to Dismiss Properly Denied: The state charged the defendant with criminal endangerment after the defendant allegedly swung her boyfriend's 6-month-old child headfirst against the child's crib, causing serious bodily injury to the child. At trial, the defendant moved to dismiss the charge, arguing the state did not provide adequate notice of the theories surrounding the charge. The District Court denied the motion. The Supreme Court affirmed, concluding that the defendant had actual notice of the state's theories regarding the charge: when the defendant appeared at a change of plea hearing 6 months before trial (the defendant later withdrew her guilty plea), the defendant articulated sufficient facts that supported either of the state's theories. St. v. Hocter, 2011 MT 251, 362 Mont. 215, 262 P.3d 1089.

Criminal Endangerment and Failure to Act — Parent-Child Duty Applicable to Children in Cohabiting Households: A jury convicted the defendant of criminal endangerment for swinging her boyfriend's 6-month-old child headfirst against the child's crib, causing serious bodily injury to the child. On appeal, the defendant argued that the District Court erred in instructing the jury on criminal endangerment predicated on the defendant's failure or omission to act because the defendant had no legal duty to aid the child. Following the rationale of St. ex rel. Kuntz v. District Court, 2000 MT 22, 298 Mont. 146, 995 P.2d 951, which recognized a mutual reliance duty owed between two people who were not closely related but lived together, the Supreme Court held that the parent-child duty applies to children present in households of cohabiting adults. Because the defendant established a personal relationship similar to that of a parent with the victim, a common-law duty to protect the victim from harm existed, and the defendant's breach of that duty constituted an appropriate basis for her conviction of criminal endangerment. St. v. Hocter, 2011 MT 251, 362 Mont. 215, 262 P.3d 1089.

Criminal Endangerment — Bodily Injury — Restitution for Lost Wages: A defendant entered a guilty plea to felony criminal endangerment after he crashed into a car driven by a minor, who suffered multiple injuries. The District Court imposed on the defendant a 10-year commitment to the Department of Corrections with all but 180 days suspended and ordered him to pay the minor's wages for the summer, her father's lost wages, and her unpaid medical expenses. The defendant appealed, contending that the District Court had improperly awarded restitution for lost wages and had abused its discretion in imposing the maximum sentence. The Supreme Court affirmed, holding that the District Court was reasonable in including the minor's lost wages for summer employment as part of restitution and that the District Court properly considered the defendant's prior drunk-driving infractions in imposing the maximum sentence. St. v. Dodson, 2011 MT 302, 363 Mont. 63, 265 P.3d 1254.

Proposed Instruction on Lesser Included Offense Properly Denied: In a Youth Court proceeding in which the defendant was charged with felony criminal endangerment, the defendant's proposed jury instruction on a lesser included negligent endangerment instruction was properly denied when the evidence established that the defendant knowingly took aim and fired a gun at moving vehicles and a pedestrian. In re T.J.B., 2010 MT 116, 356 Mont. 342, 233 P.3d 341.

Failure to Prove Unconstitutional Statutory Vagueness: G'Stohl challenged the constitutionality of 45-5-207 on grounds that the statute was unconstitutionally vague as applied to G'Stohl's conduct of driving while intoxicated and crashing his vehicle into an occupied vehicle because the section failed to give notice of prohibited conduct and failed to establish guidelines to prevent arbitrary enforcement. The Supreme Court disagreed. The statute gives a person of ordinary intelligence fair notice that the contemplated conduct was forbidden, and G'Stohl should have known that the conduct he engaged in was unlawful. G'Stohl also failed to point out any language in the statute that was ambiguous or to develop legal analysis supporting the position that any person arrested for DUI could also be charged with criminal endangerment. G'Stohl's vagueness arguments failed and the District Court was affirmed. St. v. G'Stohl, 2010 MT 7, 355 Mont. 43, 223 P.3d 926.

Independently Obtained Blood Alcohol Test Result Admissible in Prosecution of Negligent Vehicular Assault, Negligent Homicide, and Criminal Endangerment: Following a vehicle accident in which a person was killed, Schauf was charged with and convicted of negligent homicide, negligent vehicular assault, and criminal endangerment, but Schauf was not charged with DUI. At the hospital, a blood alcohol sample was taken at the direction of the investigating officer under the implied consent law and without advising Schauf of the right to an independent blood test. A second blood sample was drawn at the request of Schauf's treating physician in the emergency room. Schauf moved for suppression of the sample results, which showed that Schauf was intoxicated at the time of the accident. The District Court dismissed the results of the first test but admitted the results of the second test, and Schauf appealed, but the Supreme Court affirmed. The Supreme Court noted that the implied consent law applies when a person is charged with negligent vehicular assault, because that offense specifically relates to statutes governing DUI. However, proof of DUI is not an element of negligent homicide or criminal endangerment, so failure to advise Schauf of the right to an independent blood test provided no basis for dismissal of those charges. Additionally, to the extent that the negligent vehicular assault conviction rested upon the results of the second blood test, those results were obtained independently of state action and of the implied consent law. Thus, suppression of the law enforcement test was proper, but dismissal of all charges would have been an extreme measure given additional substantial evidence of Schauf's intoxication before and after the accident. St. v. Schauf, 2009 MT 281, 352 M 186, 216 P3d 740 (2009).

Defendant's Fathering of Child Following Assault of Child — Sentencing Condition That Defendant Not Engage in Contact With Children Under 15 Years of Age Affirmed: Rowe was convicted of felony criminal endangerment and misdemeanor negligent endangerment after assaulting a 2-year-old child whom Rowe was babysitting. As a condition of sentence, the District Court prohibited Rowe from having contact with any child under 15 years of age unless supervised by an approved adult. Rowe appealed the sentencing condition on grounds that because he married and fathered a child following conviction, the sentencing condition effectively precluded him from contact with his own child and violated his fundamental right to parent. Nevertheless, the Supreme Court affirmed. Citing In re A.M., 2001 MT 60, 304 M 379, 22 P3d 185 (2001), the court noted that the child abuse and neglect statutes reflect the tension between the need to protect family unity whenever possible and the need to provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for their care and protection, including a parent. Undisputedly, Rowe had an anger problem, and he participated in anger management for several years before the assault but voluntarily stopped taking his medications 2 to 3 weeks prior to the assault. Rowe also committed other incidents of violence in addition to the assault and posed a substantial risk of harm to his own child, so the District Court did not abuse its discretion by imposing a sentencing condition precluding Rowe's contact with his own child. St. v. Rowe, 2009 MT 225, 351 M 334, 217 P3d 471 (2009).

Criminal Endangerment Not Requiring Registration as Violent Offender: Upon conviction for felony criminal endangerment, Perkins was required to register as a violent offender. On appeal, the Supreme Court noted that criminal endangerment is not an offense that requires registration as a violent offender. The court ordered that the registration condition be stricken from Perkins' sentence. St. v. Perkins, 2009 MT 150, 350 M 387, 208 P3d 386 (2009).

Restitution Proper for Felony Criminal Endangerment: As part of Perkins' plea agreement on a charge of felony criminal endangerment, the state was allowed to seek restitution, and the sentencing court assessed $5,947 in restitution. Perkins appealed. The state conceded that $78.44

was not supported by documentation, but the Supreme Court held that there was sufficient legal authority for the sentencing court to impose restitution as part of the sentence. Therefore, the restitution award was affirmed but was reduced by $78.44. St. v. Perkins, 2009 MT 150, 350 M 387, 208 P3d 386 (2009).

Criminal Endangerment — Sufficient Proof of Mental State and Jurisdiction: Cybulski contended that the state failed to prove criminal endangerment because there was insufficient proof that Cybulski acted knowingly or that the alleged offense occurred in Custer County. The Supreme Court disagreed with both arguments. Under 45-2-103, the existence of a mental state may be inferred from the acts of the accused and the facts and circumstances connected with the offense. Here, Cybulski drove at a high rate of speed for nearly 50 miles on the wrong side of the interstate while intoxicated. A rational trier of fact could conclude beyond a reasonable doubt that Cybulski either was aware of her conduct and the risk it was creating or was unaware solely because of her intoxicated condition, so the element of knowingly was proven. Under 46-3-112, if two or more acts are requisite to the commission of an offense, the charge may be filed in any county in which any of the acts occurred. Cybulski admitted that she drove on the wrong side of the interstate in Custer County and made no objection to charges being filed in Custer County, so venue in Custer County was proper. St. v. Cybulski, 2009 MT 70, 349 M 429, 204 P3d 7 (2009).

Jury Instruction on Criminal Endangerment Not Prejudicial to Defendant — Additional Language Not Relevant to Case Properly Excluded From Instruction: At Cybulski's trial for DUI and criminal endangerment, the District Court gave the following jury instruction: "A person commits the offense of criminal endangerment if the person knowingly engages in conduct that creates a substantial risk of death or serious bodily injury to another. A person acts knowingly when the person is aware there exists the high probability that the person's conduct will cause a specific result." Cybulski requested additional language from 45-5-207 regarding endangerment caused by tree spiking, but the request was denied. Cybulski also requested additional language regarding the definition of "knowingly", but that request was denied as well. On appeal, Cybulski contended that the District Court erred by not including the requested language in the jury instruction. The Supreme Court disagreed. The language regarding tree spiking had no application to Cybulski's case and was properly refused. The District Court's definition language was shorter and clearer and properly stated the law. Cybulski was not prejudiced by the jury instruction because she was still able to argue her defense theory that she was not aware that her conduct would cause a substantial risk of death or serious bodily injury. The District Court was affirmed. St. v. Cybulski, 2009 MT 70, 349 M 429, 204 P3d 7 (2009).

Exigent Circumstances Sufficient to Justify Warrantless Search to Avoid Possible Destruction of Drug Evidence: Law enforcement officers were tipped off that defendant was transporting one-half pound of methamphetamine into the state and tracked defendant to another person's apartment in Corvallis. Officers began surveillance of the apartment and observed two individuals who appeared to be watching the officers. Within a minute, two persons left the apartment, and the officers concluded that their presence was known to persons in the apartment. Shortly thereafter, the officers received a call from an officer in Butte informing them that defendant had called an informant in Butte and told the informant that defendant knew he was being watched and asked the informant to come to Corvallis to help get rid of the drugs. The officers then discussed the possibility that defendant could destroy the drugs before a valid search warrant could be issued in 4 to 7 hours and decided to call for backup and enter the apartment. Upon entering, the officers found defendant and a woman present. Defendant had no drugs on his person, but had $1,500 in his wallet and appeared to be under the influence of methamphetamine. When the warrant eventually arrived, officers found 3 1/2 grams of methamphetamine packaged for sale. Defendant was charged with felony conspiracy to commit criminal distribution of dangerous drugs, felony criminal possession with intent to distribute, felony criminal endangerment, and misdemeanor criminal possession of drug paraphernalia. Defendant pleaded not guilty to all charges and moved to suppress the fruits of the warrantless search. The motion was denied, and defendant was convicted on one confessed count of intent to distribute. On appeal, defendant contended that the warrantless search was unlawful, but the Supreme Court affirmed. The facts that the officers had already witnessed one suspect flee the scene, knew that defendant was aware of the officers' presence, and knew that a third party had been contacted to help defendant get rid of the drugs, combined with the knowledge that procurement of a search warrant would take 4 to 7 hours, established the presence of exigent circumstances sufficient to justify warrantless entry into the apartment to avoid destruction of the alleged one-half pound of methamphetamine. St. v. Ruggirello, 2008 MT 8, 341 M 88, 176 P3d 252 (2008), applying the exigent circumstances test set out in St. v. Stone, 2004 MT 151, 321 M 489, 92 P3d 1178 (2004).

Evidence of Defendant's Conduct Prior to Accident Not Considered Irrelevant or Character Evidence — Failure of Counsel to Object Not Ineffective Assistance: Defendant contended that defense counsel erred by failing to object to evidence that defendant was driving erratically and aggressively for 10 miles prior to a fatal accident, asserting that the evidence was improper character evidence and irrelevant to and separate from the collision. The Supreme Court disagreed. The events preceding the accident were clearly relevant and closely related to the charged offenses of negligent homicide and criminal endangerment. An objection on grounds of improper character evidence and relevance would have been groundless, and defense counsel did not render ineffective assistance in failing to object. St. v. Tennell, 2007 MT 266, 339 M 381, 170 P3d 965 (2007).

Deliberate Homicide by Accountability — Instruction on Criminal Endangerment and Negligent Homicide Not Required: At Doyle's trial for deliberate homicide by accountability, Doyle contended that the trial court should have offered instruction on the lesser included offenses of criminal endangerment and negligent homicide. The Supreme Court disagreed. Criminal endangerment is not a lesser included offense of deliberate-homicide by accountability based on the defendant's failure to act under 45-5-201(2)(b). St. v. Doyle, 2007 MT 125, 337 M 308, 160 P3d 516 (2007).

Sufficiency of Charging Documents — Probability, Not Prima Facie Showing, That Defendant Committed Crime of Theft Sufficient: Harlson allegedly stole a pickup and drove it 60 miles an hour through downtown Billings. Harlson was charged with theft, criminal endangerment, and DUI. Harlson moved to dismiss on grounds that the charging documents failed to show probable cause or allege a specific location, a substantial risk of death or serious bodily injury, a speed limit, or the presence of people in the area. The motion was denied, and on appeal, the Supreme Court affirmed. Citing St. v. Elliott, 2002 MT 26, 308 M 227, 43 P3d 279 (2002), the court noted that the sufficiency of the charging documents is established by reading the information together with the affidavit in support of the motion for leave to file the information. The affidavit need not make out a prima facie case that defendant committed an offense. A mere probability that the offense was committed is sufficient. In addition, the charging documents made clear that Harlson allegedly committed theft of a vehicle and drove the vehicle at high speed through downtown Billings, exceeding the speed limit and endangering any pedestrians in the area. Harlson was acquitted of the DUI charge, so the sufficiency of the charging document as to DUI was not at issue. The theft and endangerment charges were thus supported by the charging documents, and the motion to dismiss was properly denied. St. v. Harlson, 2006 MT 312, 335 M 25, 150 P3d 349 (2006).

No Affirmative Defense of Renunciation to Charge of Solicitation: Lynch was charged with solicitation to commit deliberate homicide. At trial, Lynch sought to introduce a defense of renunciation or withdrawal to the charge, but the trial court denied the defense, and Lynch appealed. The Supreme Court affirmed. Lynch conceded that the Legislature has not codified renunciation as an affirmative defense to a solicitation charge, but contended that because the defense is allowed with respect to some other crimes, he should have been able to assert that defense. The Supreme Court declined to extend the renunciation defense to solicitation, noting that the fact that a renunciation defense is statutorily available for other possible charges is irrelevant. The state has broad discretion in making charging decisions when facts support more than one possible charge, and the trial court did not err in disallowing Lynch's renunciation defense in this case. St. v. Lynch, 2005 MT 337, 330 M 74, 125 P3d 1148 (2005), distinguishing St. v. Bullock, 272 M 361, 901 P2d 61 (1995).

Failure of Counsel to Request Unanimity Instructions on Two Counts of Criminal Endangerment Not Considered Ineffective Assistance: Gallagher was convicted of two counts of criminal endangerment and asserted on appeal that failure of defense counsel to request specific unanimity instructions on the two charges constituted ineffective assistance and denied Gallagher the right to a fair trial. Based on the record, the Supreme Court disagreed. Both defense and prosecution counsel argued each count to the jury in closing arguments, linking appropriate facts and specific victims to each count, so juror confusion was extremely unlikely, nor could the court conclude that the trial outcome was prejudiced by the lack of a specific unanimity instruction on the endangerment charges that denied Gallagher a fair trial. Gallagher's convictions were affirmed. St. v. Gallagher, 2005 MT 336, 330 M 65, 125 P3d 1141 (2005).

Sufficient Evidence of Criminal Endangerment to Child During Domestic Disturbance: When officers responded to a domestic disturbance, they found Weigand holding his child in one arm and a knife in the other hand. Despite repeated demands to put down the knife and the child, Weigand refused and challenged the officers to shoot him. Eventually Weigand released the child and surrendered to a SWAT team. Weigand was convicted of criminal endangerment and appealed on grounds that the elements of the crime were not proved because: (1) Weigand never threatened his wife, the child, or the officers with the knife; and (2) there was no substantial risk of death or serious bodily injury to the child because the officers testified that they would not have shot Weigand while he was holding the child. The Supreme Court disagreed. Weigand's behavior throughout the altercation created a highly stressful, volatile, and dangerous encounter that in turn created a risk of death or serious bodily injury to the child. Weigand could not have known at the time of the incident that the officers would restrain themselves, given Weigand's extreme and unreasonable behavior, and one officer did in fact testify that he would have shot Weigand had the situation merited it. The criminal endangerment conviction was affirmed. St. v. Weigand, 2005 MT 201, 328 M 198, 119 P3d 74 (2005).

Jury Rejection of Impossibility Defense — Sufficient Evidence to Support Conviction of Assault and Criminal Endangerment: York was charged with assault and criminal endangerment for ramming a vehicle from behind at 50 miles an hour. The deputy who responded saw York going the opposite direction on the same highway. York's defense was that it would have been impossible for him to commit the assault as reported and then arrive at the location where he was observed by the deputy because of the time and distance involved. The jury was instructed that it could reject any portion of a witness's testimony that it considered to be false. York presented his impossibility defense, and the jury rejected it. Although it could not be determined precisely why the jury convicted York, there were plausible theories as to how the jury could have reconciled the witness's testimony with York's theory. The conviction was supported by sufficient evidence and thus affirmed. St. v. York, 2003 MT 349, 318 M 511, 81 P3d 1277 (2003).

Proper Venue for Prosecution of Common Scheme to Manufacture Methamphetamine in Several Counties — Possession Charge Dismissed for Improper Venue: Following arrest in Sanders County, Galpin was charged in Ravalli County with possession of methamphetamine in Sanders County, operating a methamphetamine lab in Ravalli County, possessing methamphetamine precursors in Ravalli and Missoula Counties, and criminal endangerment in Ravalli County. Citing venue grounds, Galpin questioned the evidence on the endangerment charge and moved to dismiss the possession charge and the Missoula County precursor charge because there was no evidence that the crimes were committed in Ravalli County where the charges were filed. The Supreme Court agreed that possession has but one requisite act, which is possession of the drug itself, and because neither the state's information nor trial testimony established that Galpin possessed methamphetamine anywhere but Sanders County, Ravalli County was not the proper venue for the possession charge, so it was dismissed. However, in pursuit of the common scheme to manufacture methamphetamine, Galpin kept precursors in storage facilities in both Ravalli and Missoula Counties and knowingly or purposely prepared, processed, or manufactured the drug as he traveled between Ravalli and Missoula Counties, so venue was proper in Ravalli County for the precursor charges. Ravalli County was also a proper venue for the criminal endangerment charges based on witness testimony that Galpin manufactured methamphetamine on at least three occasions at the witness's home in Ravalli County when children were present. St. v. Galpin, 2003 MT 324, 318 M 318, 80 P3d 1207 (2003).

Criminal Endangerment, Negligent Endangerment, and Partner or Family Member Assault Not Considered Lesser Included Offenses of Aggravated Assault: At trial for aggravated assault, the District Court refused Hoffman's request of lesser included offense instructions on the offenses of criminal endangerment, negligent endangerment, and partner or family member assault, and Hoffman appealed. The Supreme Court affirmed. Under 46-1-202(8)(a), a lesser included offense is one that is established by proof of the same or less than all the facts required to establish commission of the offense charged, while under 46-1-202(8)(c), a lesser included offense is one that differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission. Although Hoffman made prefatory reference to both subsections, the substance of Hoffman's argument focused entirely on subsection (8)(c), and the Supreme Court declined to address arguments related to subsection (8)(a) that were raised for the first time on appeal. It is incumbent on counsel to specify at trial which subsection is being relied upon. Subsection (8)(c) does not support a conclusion that criminal endangerment, negligent endangerment, or partner or family member assault is a lesser included offense of aggravated assault. The District Court's properly concluded that the offenses were too dissimilar to warrant a lesser included offense instruction. St. v. Hoffman, 2003 MT 26, 314 M 155, 64 P3d 1013 (2003), following St. v. Fisch, 266 M 520, 881 P2d 626 (1994).

Elements of Criminal Endangerment Satisfied: Porter was convicted of criminal endangerment and appealed on grounds that the state failed to prove that Porter was aware of the high probability that his conduct would cause a substantial risk of death or serious bodily injury to others. The Supreme Court disagreed and affirmed the conviction. Porter shot his rifle five times at night, while angry and intoxicated, from a county road adjacent to an occupied public campground and then admittedly "beaded down" on the human occupants of the campground. One of the campers testified that Porter's admission of taking aim at the campground occupants was frightening. Even though it was never proved that the safety was off on the rifle or that Porter's finger was on the trigger, it was reasonable for a jury to assume that Porter was capable of discharging the rifle when aiming at the campers and that Porter was aware of the high probability that his conduct would cause a substantial risk of death or serious bodily injury. Thus, Porter's motion for a directed verdict on grounds of insufficient evidence was properly denied. Porter v. St., 2002 MT 319, 313 M 149, 60 P3d 951 (2002).

Admissibility of Expert Testimony on Munchausen Syndrome by Proxy: In her trial for criminally endangering her child by leaving her medicine where the child could access it, the District Court found that the proper foundational requirement had been satisfied to allow expert testimony regarding Hocevar's possible affliction with Munchausen Syndrome by Proxy (MSBP), also known as factitious disorder by proxy, which is a pattern of behavior wherein a caretaker, usually a mother, fabricates or causes illness in another, usually a preverbal child, to gain attention. The expert characterized MSBP as a form of child abuse in the field of pediatrics, rather than a psychiatric disorder. Hocevar appealed the admissibility of the MSBP evidence. The Supreme Court found that expert testimony regarding MSBP was neither novel nor scientific and thus not subject to the standard in Daubert v. Merrell Dow Pharmaceuticals, 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), which only applies to the admissibility of novel scientific evidence, so the court applied the conventional Rule 702, M.R.Ev. (Title 26, ch. 10), analysis of admissibility. Testimony about MSBP is beyond the range of ordinary training or intelligence and is therefore a subject matter requiring expert testimony. The state established sufficient foundation to show that the expert was qualified to testify on MSBP and had adequate knowledge upon which to base an opinion, and the District Court did not abuse its discretion in allowing the testimony into evidence. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000). See also Calif. v. Phillips, 175 Cal. Rep. 703 (1981).

Allowing Child Access to Medication Considered Criminal Endangerment: A mother left her child's headache medicine on the table with her own allergy medication, instructing the child to take his headache medicine and then leaving the room. The child took the allergy medicine instead and overdosed. The mother was subsequently convicted of criminal endangerment. On appeal, she contended that there was insufficient evidence to support the conviction because her conduct did not actually create a substantial risk of death or serious bodily injury and that the state had failed to prove that she knowingly made the medication available to her son, resulting in his injury. However, the state did not have to prove actual bodily injury, but rather that there was a high probability that the mother's conduct created a substantial risk of death or serious bodily injury. A rational jury could have found that substantial risk existed, and the state presented sufficient evidence that the mother knowingly made the medication available by leaving it in an open bottle on the table with the same medication that she instructed her son to take. The criminal endangerment conviction was affirmed. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Error in Refusing to Classify Defendant as First-Time, Nonviolent Offender Following Conviction for Criminal Endangerment: Hocevar was convicted of criminal endangerment, which required a finding that her conduct created a substantial risk of death or serious bodily injury. The District Court refused Hocevar's request to be treated as a first-time, nonviolent felony offender because she committed a crime of violence. However, the definition of crime of violence in 46-18-104 means a crime in which an offender causes a serious bodily injury or death. Given the various options that were available to the jury, it could not be determined on appeal whether the jury found that Hocevar actually caused a substantial risk of death or merely caused a risk of serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ. In light of the uncertainty, the District Court committed reversible error in concluding that Hocevar committed an act of violence and in refusing to classify Hocevar as a first-time, nonviolent felony offender. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Application of Weapon Enhancement Statute to Conviction for Criminal Endangerment Not Violative of Double Jeopardy Protection: Keith was sentenced to 10 years in prison plus 10 years for use of a weapon, with 15 years suspended, for criminal endangerment. Keith argued that application of the weapon enhancement statute to the felony conviction for criminal endangerment violated the right to be free from multiple punishments for the same offense, pursuant to St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999). The Supreme Court distinguished Guillaume, noting that unlike the felony assault (now assault with a weapon) statute in that case, the definition of criminal endangerment does not require proof of the use of a weapon nor did Keith's use of a weapon raise the crime from a misdemeanor to a felony as in Guillaume. Because the offense of criminal endangerment, by its own terms, does not specifically increase a defendant's punishment for use of a weapon, application of the weapon enhancement statute to a criminal endangerment violation is not a double jeopardy violation. St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966, 57 St. Rep. 120 (2000), followed in St. v. Dunnette, 2000 MT 33, 298 M 208, 996 P2d 379, 57 St. Rep. 141 (2000), and St. v. Charlo, 2000 MT 192, 300 M 435, 4 P3d 1201, 57 St. Rep. 761 (2000).

Evidence of Voluntary Mental Impairment Insufficient to Trigger Waiver of Mandatory Minimum Sentence — Hearing Not Required: Keith was sentenced to 10 years in prison plus 10 years for use of a weapon, with 15 years suspended, for criminal endangerment. At the sentencing hearing, the District Court noted that evidence of Keith's reduced mental capacity was based on Keith's voluntary ingestion of alcohol and prescription drugs and that under 46-18-222(2), the court could not waive the mandatory minimum sentence. Citing numerous cases, the Supreme Court held that the statute does permit the sentencing court to reject the mandatory minimum sentence if the court determines that defendant's mental capacity was significantly impaired during the commission of the offense but that the statute does not apply in cases when the maximum sentence or any sentence greater than the mandatory minimum is imposed. Here, there was no indication that the sentencing court ever intended to sentence Keith to either the 2-year mandatory minimum or to a period less than the 2-year mandatory minimum, so the exceptions did not apply. Further, because the exceptions were not an issue, Keith was not entitled to a hearing pursuant to 46-18-223. Nevertheless, in this case, the sentencing court did hold a hearing on its own motion but did not then abuse its discretion by denying Keith's request for a continuance of the sentencing hearing to allow evidence of Keith's mental capacity. St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966, 57 St. Rep. 120 (2000).

Reckless Driving Not Lesser Included Offense of Criminal Endangerment: Reckless driving is a distinct offense and not an included offense of criminal endangerment. St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371, 56 St. Rep. 1035 (1999), following Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932).

Sufficient Evidence of Criminal Endangerment — Instruction on Negligent Endangerment Not Required: Martinosky was charged with felony criminal endangerment. During settlement of jury instructions, Martinosky offered a proposed instruction on negligent endangerment as a lesser included offense of criminal endangerment, but the instruction was refused. On appeal, without reaching the question of whether negligent endangerment was a lesser included offense of criminal endangerment, the Supreme Court found that the evidence established that Martinosky was fully aware of his actions and the probable outcome of those actions and thus acted knowingly, so an instruction on negligent endangerment was not warranted. St. v. Martinosky, 1999 MT 122, 294 M 427, 982 P2d 440, 56 St. Rep. 495 (1999), following St. v. Martinez, 1998 MT 265, 291 M 306, 968 P2d 705, 55 St. Rep. 1093 (1998), and St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998). In St. v. Shegrud, 2014 MT 63, 374 Mont. 192, 320 P.3d 455, the Supreme Court ruled that negligent endangerment is a lesser included offense of criminal endangerment.

Culpability for Criminal Endangerment Created by Appreciation of Probable Risks Posed by One's Conduct — "Knowingly" Misapplied: The mental state element of "knowingly" in criminal endangerment contemplates a defendant's awareness of the high probability that the conduct in which the defendant is engaging, whatever that conduct might be, will cause a substantial risk of death or serious bodily injury to another. Because there is no particularized conduct that gives rise to criminal endangerment, it is incorrect to apply to that offense's mental element the definition of knowingly—that an accused need only be aware of the accused's conduct. It is the appreciation of the probable risks to others posed by one's conduct that creates culpability for criminal endangerment. Pursuant to 45-2-103, "knowingly" applies in this case to both conduct and the result of that conduct. Therefore, the District Court's application of the definition of knowingly—that an accused need only be aware of the accused's conduct—as the offense's mental element constituted reversible error. St. v. Lambert, 280 M 231, 929 P2d 846, 53 St. Rep. 1379 (1996). See also St. v. Crisp, 249 M 199, 814 P2d 981 (1991), St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998), and St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Proof That Specific Identified Person Was Placed at Risk: The second sentence of this section, making it an offense to knowingly place any steel, iron, ceramic, or other substance in a tree, log, or any other wood for the purpose of damaging a saw or other wood-harvesting, processing, or manufacturing equipment is an example of criminal endangerment with no particular identifiable victim. In the present case, in which defendant drove down a narrow city street in the middle of the morning at up to 80 miles an hour past houses and buildings open to the public, ignoring traffic signs, the state was not required to prove that one or more particular identified persons were placed in substantial risk of death or serious bodily injury or that defendant intended to injure another. The legislative history of this section provides examples of acts that do not necessarily require identified possible victims. St. v. Bell, 277 M 482, 923 P2d 524, 53 St. Rep. 792 (1996).

Plea to Lesser Included Offense — Introduction at Sentencing of Evidence of Commission of Charged Offense — Language of Plea Agreement: Collier was arrested and charged with solicitation of deliberate homicide, which was reduced to criminal endangerment by a plea bargain. At the District Court level and on appeal, Collier challenged the state's introduction of evidence tending to prove her commission of the originally charged offense. The Supreme Court upheld the introduction of the evidence, noting not only that the rules of evidence do not apply in sentencing, but also that the plea agreement provided that "counsel for the State may make any recommendation and may introduce ... evidence in support thereof at the time of sentencing". St. v. Collier, 277 M 46, 919 P2d 376, 53 St. Rep. 534 (1996).

Criminal Endangerment Properly Charged in Arrest for Driving Under Influence — Constitutionality: Smaage had a history of seven DUI arrests when he was arrested again while driving with a blood alcohol level of 0.250. After review of his record of drinking and driving, Smaage was charged with criminal endangerment under this section, which Smaage contended was improper, rather than DUI under 61-8-401 or 61-8-722 (both sections now repealed and content reorganized in Title 61, chapter 8, part 10). Smaage also asserted that the criminal endangerment statute was unconstitutionally vague as applied to him because he was not given fair notice that driving after drinking was a felony crime. The Supreme Court found that the statutes were not conflicting, but rather were alternative charging statutes. The legislative history of the criminal endangerment statute indicated legislative intent in allowing use of that statute in prosecutions for DUI. Because the elements of criminal endangerment were present in this case due to Smaage's mental state of acting "knowingly", the conviction was affirmed. Further, with a history of DUI and negligent vehicular homicide, Smaage should have understood that his drunk driving created a substantial risk of bodily injury to others and was therefore proscribed. In light of Smaage's conduct, this section is not unconstitutionally vague as applied to this case. St. v. Smaage, 276 M 94, 915 P2d 192, 53 St. Rep. 294 (1996), following U.S. v. Mazurie, 419 US 544, 42 L Ed 2d 706, 95 S Ct 710 (1975).

Statute Not Unconstitutionally Vague: A defendant commits the crime of criminal endangerment when he is aware that there is a high probability that his conduct may cause a substantial risk of death or serious bodily injury to another. By incorporating the intent element of knowingly, a mental state that is adequately defined by statute, the Legislature has given fair warning of the mental state required in order to be convicted of felony criminal endangerment. The term "substantial risk of death" is not ambiguous and does not need to be defined. St. v. Crisp, 249 M 199, 814 P2d 981, 48 St. Rep. 640 (1991). See also St. v. Lancione, 1998 MT 84, 288 M 228, 956 P2d 1358, 55 St. Rep. 344 (1998).

Substantial Risk of Death — Definition Not Required: The jury need not be instructed on words or phrases of common understanding or meaning. The District Court did not err in refusing jury instruction that indicated that the victim must sustain an injury that poses a substantial risk of death. St. v. Crisp, 249 M 199, 814 P2d 981, 48 St. Rep. 640 (1991).

Instruction on Criminal Endangerment Unnecessary Absent Evidence: Defendant convicted of deliberate homicide contended that the District Court erred in refusing to give a proposed instruction on criminal endangerment as a lesser included offense. However, defendant presented no evidence at trial, neither testifying himself nor calling a single defense witness. Evidence must be presented at trial to warrant an instruction on criminal endangerment. A court's refusal to instruct on criminal endangerment is proper when a purposeful or knowing act causes death or when the failure to act results in accountability for deliberate homicide. St. v. Olivieri, 244 M 357, 797 P2d 937, 47 St. Rep. 1668 (1990).

No Implied Repeal of Attempted Deliberate Homicide Law by Enactment of Criminal Endangerment Statute: Criminal endangerment is clearly distinguishable from attempted deliberate homicide because the purpose of the behavior itself is different even if the result of the behavior is the same. Therefore, the Legislature did not impliedly repeal the offense of attempted deliberate homicide by enacting the offense of criminal endangerment. St. v. Clawson, 239 M 413, 781 P2d 267, 46 St. Rep. 1792 (1989).

45-5-208. Negligent endangerment — penalty.

Case Notes

Citizen's Arrest Authority — Evidence Relevant to Criminal Charges Against Arresting Citizen — Conviction Reversed, New Trial Granted: The defendant was driving a truck with a trailer attached when he saw a motorcycle being chased by police in his rearview mirror. He turned into the oncoming lane of traffic to block the road, which led to the capture of the motorcyclist. As a result, the defendant was charged with negligent endangerment and reckless driving. At his trial, the defendant sought to introduce evidence and a jury instruction related to a citizen's arrest authority, which the Municipal Court denied and the District Court upheld. Following conviction, the defendant appealed. In a 4-3 decision, the Supreme Court reversed, holding that the defendant's asserted authority to make a citizen's arrest was a materially relevant factual consideration and that the Municipal Court had erred in not allowing evidence on the subject. The court remanded the matter for a new trial. Helena v. Parsons, 2019 MT 56, 395 Mont. 84, 436 P.3d 710.

Negligent Endangerment Lesser Included Offense of Criminal Endangerment — District Court Erred by Not Giving Jury Instruction on Negligent Endangerment: The defendant was charged with criminal endangerment for driving his daughter while allegedly under the influence of alcohol and prescription painkillers. At trial, his counsel offered a jury instruction on negligent endangerment as a lesser included offense of criminal endangerment, which the District Court declined to give. The jury convicted him of criminal endangerment. On appeal, the defendant argued that the District Court had erred in not giving the jury the instruction on negligent endangerment. The Supreme Court agreed, concluding that the only difference between criminal endangerment and negligent endangerment is the state of mind of the accused and that there were facts that would allow a jury to infer either state of mind. The Supreme Court held that negligent endangerment is a lesser included offense of criminal endangerment and reversed and remanded the matter to the District Court for further proceedings. St. v. Shegrud, 2014 MT 63, 374 Mont. 192, 320 P.3d 455.

Proposed Instruction on Lesser Included Offense Properly Denied: In a Youth Court proceeding in which the defendant was charged with felony criminal endangerment, the defendant's proposed jury instruction on a lesser included negligent endangerment instruction was properly denied when the evidence established that the defendant knowingly took aim and fired a gun at moving vehicles and a pedestrian. In re T.J.B., 2010 MT 116, 356 Mont. 342, 233 P.3d 341.

Criminal Endangerment, Negligent Endangerment, and Partner or Family Member Assault Not Considered Lesser Included Offenses of Aggravated Assault: At trial for aggravated assault, the District Court refused Hoffman's request of lesser included offense instructions on the offenses of criminal endangerment, negligent endangerment, and partner or family member assault, and Hoffman appealed. The Supreme Court affirmed. Under 46-1-202(8)(a), a lesser included offense is one that is established by proof of the same or less than all the facts required to establish commission of the offense charged, while under 46-1-202(8)(c), a lesser included offense is one that differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission. Although Hoffman made prefatory reference to both subsections, the substance of Hoffman's argument focused entirely on subsection (8)(c), and the Supreme Court declined to address arguments related to subsection (8)(a) that were raised for the first time on appeal. It is incumbent on counsel to specify at trial which subsection is being relied upon. Subsection (8)(c) does not support a conclusion that criminal endangerment, negligent endangerment, or partner or family member assault is a lesser included offense of aggravated assault. The District Court's properly concluded that the offenses were too dissimilar to warrant a lesser included offense instruction. St. v. Hoffman, 2003 MT 26, 314 M 155, 64 P3d 1013 (2003), following St. v. Fisch, 266 M 520, 881 P2d 626 (1994).

Failure to Stop at Scene of Automobile Accident Not Cause of Death of Another — Elements of Negligent Homicide Not Proved: It was a dark and stormy night. Schipman was on his way home from a Dillon bar, through open range, when a dark horse lunged out of the barrow pit and hit the side of his vehicle. Schipman did not stop but, looking back, did not see the horse on the highway and, assuming it was dead, proceeded home. Two other vehicles did stop. The driver of one vehicle found the horse, dead, in the southbound lane, so he parked in the northbound lane and turned on his flashers in an attempt to warn oncoming traffic. About the same time, two recent high school graduates, Keller and Dorvall, were returning home after an evening with friends in Virginia City. They noticed the two vehicles in the northbound lane and slowed down but could not see any reason why the two men were standing by the road, so they made a conscious decision to proceed. They swerved into the barrow pit to avoid the horse, and Dorvall was killed. When Schipman called authorities the following day to report the accident, he was charged with felony negligent homicide and misdemeanor negligent endangerment for leaving the scene of the accident, was convicted, and subsequently appealed. As a material element of either offense, the state was required to prove that Schipman's conduct was criminally negligent. Schipman argued that had he stayed at the accident scene instead of proceeding home to tend to his own injuries, the actual result would not have been any different. He contended that the jury should not have been allowed to speculate as to whether the graduates would have slowed down or stopped had there been three men and three vehicles instead of two and that the death of Dorvall should not be allowed to influence his criminal culpability. The Supreme Court held that cause in fact was not sufficiently established to sustain the negligent homicide conviction. The court assumed, without deciding, that Schipman's actions were criminally negligent by definition, but there was no basis to speculate that the road hazard would have been avoided had there been three men instead of two alongside the road that night. Absent evidence that Schipman's negligent act did, in fact, cause Dorvall's death, the conviction for negligent homicide was reversed. St. v. Schipman, 2000 MT 102, 299 M 273, 2 P3d 223, 57 St. Rep. 409 (2000).

Sufficient Evidence of Criminal Endangerment — Instruction on Negligent Endangerment Not Required: Martinosky was charged with felony criminal endangerment. During settlement of jury instructions, Martinosky offered a proposed instruction on negligent endangerment as a lesser included offense of criminal endangerment, but the instruction was refused. On appeal, without reaching the question of whether negligent endangerment was a lesser included offense of criminal endangerment, the Supreme Court found that the evidence established that Martinosky was fully aware of his actions and the probable outcome of those actions and thus acted knowingly, so an instruction on negligent endangerment was not warranted. St. v. Martinosky, 1999 MT 122, 294 M 427, 982 P2d 440, 56 St. Rep. 495 (1999), following St. v. Martinez, 1998 MT 265, 291 M 306, 968 P2d 705, 55 St. Rep. 1093 (1998). In St. v. Shegrud, 2014 MT 63, 374 Mont. 192, 320 P.3d 455, the Supreme Court ruled that negligent endangerment is a lesser included offense of criminal endangerment.

Risk to and Testimony by Identified Individual Not Necessary to Prove Negligent Endangerment: This section does not require proof of a substantial risk of death or serious bodily injury to an identified individual, nor is the personal trial testimony of the individual put at risk necessary. St. v. Brown, 270 M 454, 893 P2d 320, 52 St. Rep. 266 (1995).

Included Offense Based Upon Less Risk, Injury, or Culpability — Negligent Endangerment Not Lesser Included Offense of Aggravated Assault: Fisch was convicted of aggravated assault after the District Court refused to accept a jury instruction on negligent endangerment, which Fisch argued was a lesser included offense of aggravated assault. Citing St. v. Sheppard, 253 M 118, 832 P2d 370 (1992), the Supreme Court held that a person is entitled to an instruction on a lesser included offense only if, based upon the evidence, the jury could rationally find the person guilty of the lesser offense and if that entitlement is based upon one offense being, in law, an included offense of the other. Because the definition of "included offense" is written in the disjunctive with the qualifier "only", a lesser included offense may differ in one and only one way from that of the offense charged. Fisch's argument fails because at least two of the variations in degree exist between the offense charged and negligent endangerment. Moreover, Fisch's "less serious risk", "less serious injury", and "lesser kind of culpability" arguments under 46-1-202(8)(c) also fail. As a result, the Supreme Court held that no amount of evidence as to negligent endangerment would entitle Fisch to the instruction he sought. St. v. Fisch, 266 M 520, 881 P2d 626, 51 St. Rep. 907 (1994).

Included Offense Based Upon Similar Proof — Failure to Raise in District Court: Fisch was convicted of aggravated assault after the District Court refused to accept a jury instruction on negligent endangerment, which Fisch argued was a lesser included offense of aggravated assault. Citing St. v. Henderson, 265 M 454, 877 P2d 1013, 51 St. Rep. 606 (1994), the Supreme Court noted that Fisch's argument for a lesser included offense based upon 46-1-202(8)(a) was not raised in the District Court and that Fisch could not change his theory on appeal from that argued in the District Court. St. v. Fisch, 266 M 520, 881 P2d 626, 51 St. Rep. 907 (1994).

Admissibility of Evidence of Intoxication in Trial for Negligent Endangerment: Larson contended that it was error to allow the prosecution's introduction of evidence comparing his alcohol consumption with the level that the scientific community has determined will impair a person's ability to drive a motor vehicle, even though the incident was not a DUI-related case. Noting that there is no longer a presumption of intoxication under Montana law, the District Court properly admitted as relevant evidence Larson's blood alcohol level, which allowed the jury to apply its experience and logic to determine whether Larson's alcohol consumption clouded his judgment and impaired his reactions. St. v. Larson, 255 M 451, 843 P2d 777, 49 St. Rep. 1077 (1992), distinguishing St. v. Morgan, 198 M 391, 646 P2d 1177 (1982), and St. v. Leverett, 245 M 124, 799 P2d 119 (1990).

Sufficient Evidence of Negligent Endangerment: Larson mounted a high-spirited and inexperienced horse after being warned not to tug back on the reins or give rides to children. Nevertheless, having consumed at least four cans of beer and two shots of whiskey, Larson allowed a 5-year-old child on the horse with him and, when the horse began to jump, reined the horse back. The horse fell over, fatally crushing the child. Larson's conduct constituted a gross deviation from the ordinary care a reasonable person would observe in a similar situation and justified a finding beyond a reasonable doubt of negligent endangerment. St. v. Larson, 255 M 451, 843 P2d 777, 49 St. Rep. 1077 (1992).

45-5-209. Partner or family member assault — no contact order — notice — violation of order — penalty.

Compiler's Comments

2017 Amendment: Chapter 394 in (1), (2), (3), (4), and (7) inserted references to 45-5-215. Amendment effective May 19, 2017.

2015 Amendment: Chapter 328 throughout section after "charged with" inserted "or arrested for" and after "45-5-206" inserted "or, if the victim is a partner or family member of the defendant, a violation of 45-5-202 or 45-5-213"; and in (1) near beginning of first sentence substituted "a defendant" for "all defendants". Amendment effective October 1, 2015.

2007 Amendment: Chapter 44 in (8)(b) at end of third sentence substituted "a no contact order" for "this offense". Amendment effective October 1, 2007.

Preamble: The preamble attached to Ch. 411, L. 2005, provided: "WHEREAS, the Legislature has reviewed and considered the report filed by the Montana Domestic Violence Fatality Review Commission, which conducted case reviews of domestic violence homicides of spouses, partners, and children; and

WHEREAS, victims of domestic violence are at high risk for additional threats, violence, and homicide; and

WHEREAS, a victim's participation in a prosecution is jeopardized when a domestic violence assault is followed by intimidation in the form of threats and coercion; and

WHEREAS, courts have the authority to impose conditions on defendants charged with partner or family member assault when conditions will improve victim safety; and

WHEREAS, a court order restricting contact between the offender and the victim will improve victim safety."

Effective Date: This section is effective October 1, 2005.

Case Notes

Insufficient Evidence — Violation of No-Contact Order: The defendant was convicted of violating a no-contact order under this section on the basis that the defendant contacted a person whom the defendant was prohibited from contacting pursuant to a Municipal Court's order of release and order setting omnibus hearing, which stated that the defendant have no contact with the person and that failure to comply with the prohibition would be cause for the defendant's bond or release on own recognizance being revoked or an arrest warrant being issued. On appeal, the Supreme Court vacated the conviction, concluding that the Municipal Court's order did not constitute a no-contact order issued under this section and did not include the mandatory notice that violating the contact prohibition would constitute a criminal offense under this section. The state should have pursued revocation of the defendant's release instead of pursuing a criminal charge under this section. St. v. Ritesman, 2018 MT 55, 390 Mont. 399, 414 P.3d 261.

Law Review Articles

State v. Carter: Rejecting Crawford v. Washington's Third Formulation as a Per Se Definition of Testimonial, McKelvey, 67 Mont. L. Rev. 121 (2006).

State v. Mizenko: The Montana Supreme Court Wades Into the Post-Crawford Waters, King-Ries, 67 Mont. L. Rev. 275 (2006).

45-5-210. Assault on peace officer or judicial officer.

Compiler's Comments

2021 Amendment: Chapter 436 inserted (1)(b)(ii) regarding the use of what reasonably appears to be a weapon; inserted (2)(b)(ii) concerning the term of imprisonment for use of what reasonably appears to be a weapon; and made minor changes in style. Amendment effective October 1, 2021.

Applicability: Section 4, Ch. 433, L. 1997, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective April 29, 1997.

Effective Date: Section 5, Ch. 433, L. 1997, provided that this act is effective April 29, 1997.

Case Notes

Broken BB Gun Not Actual Weapon — Insufficient Evidence to Support Conviction: A man who enjoyed occasionally shooting his friend with a BB gun mistook police officers for the friend and brandished a broken BB gun when police approached his house. The man was charged with and later convicted of assault on a peace officer. On appeal, the Supreme Court reversed, finding that use of an actual weapon is required for conviction pursuant to 45-5-210(1)(b) and that a nonoperational BB gun does not qualify as a weapon under the facts of the case: an offense that requires the use of a "weapon", by its plain language, must be committed with a "weapon". St. v. Stillsmoking, 2020 MT 154, 400 Mont. 256, 470 P.3d 183.

State Required to Establish Defendant's Knowledge of Peace Officers During Stop — Assault on Peace Officer: The defendant had an argument with his girlfriend and left his residence. While his car was running in the road, two deputies approached him. The deputies did not use their emergency lights and approached the defendant with flashlights. The deputies did not identify themselves. The defendant attempted to speed off, almost hitting the deputies. The defendant was convicted of two counts of assault on a peace officer. On appeal, the defendant argued that he was not aware that the deputies were officers and that the state was required to establish this knowledge. The Supreme Court agreed, holding that the statute requires a person to act purposely or knowingly with respect to all elements of the offense, including the peace officer element. St. v. Carnes, 2015 MT 101, 378 Mont. 482, 346 P.3d 1120.

Officers' Apprehension of Injury From Unseen Weapon Reasonable — Assault on Peace Officer Affirmed: When police arrived at the defendant's apartment in response to a noise complaint, the defendant answered the door and admitted them, although he appeared to the officers to be distinctly agitated and belligerent. After pushing one officer and being repeatedly warned not to touch the officers, the defendant stated they would "see about" that and stepped into another room. On returning, he faced the officers in a stance that obscured his right hand. When the officers drew their weapons and ordered him to drop they gun they believed he had retrieved and was concealing, the defendant dropped a loaded shotgun from his right hand; he was subsequently charged with assault on a police officer. At the end of the prosecution's case, the defendant moved to dismiss for insufficient evidence, arguing that the police could not have had a reasonable apprehension of serious bodily injury because they had not seen the shotgun he had been holding until after he dropped it. The District Court denied the motion, and the defendant was convicted. On appeal, the Supreme Court affirmed the District Court's denial of the motion to dismiss, noting that an officer need not see a weapon to feel threatened by it. St. v. Kirn, 2012 MT 69, 364 Mont. 356, 274 P.3d 746.

Lesser Included Offense Instruction on Resisting Arrest Not Warranted When Defendant Under Arrest at Time of Assault: Pittman was arrested for disorderly conduct, and Pittman assaulted an officer and attempted to assault other officers while at the detention center. At the trial for felony assault and felony attempted assault, Pittman contended that the jury should be given an instruction on the lesser included offense of resisting arrest, but the instruction was denied. On appeal, the Supreme Court affirmed. Pittman was already under arrest when the felony assaults took place. Absent evidence in the record that would permit the jury to find Pittman guilty of resisting arrest and acquit on the felony charges, it was not error to deny Pittman's request for the lesser included offense instruction. St. v. Pittman, 2005 MT 70, 326 M 324, 109 P3d 237 (2005).

Sufficient Evidence to Sustain Convictions of Felony Assault on Peace Officer and Felony Attempted Assault on Peace Officer: During an altercation at a detention center following Pittman's arrest, Pittman threw a chair at one officer, breaking his finger, and spit in another officer's face and attempted to bite her, but caused no physical injury. This evidence, corroborated by a videotape of the incident, was sufficient to sustain Pittman's conviction of the charges of felony assault on a peace officer and felony attempted assault on a peace officer. St. v. Pittman, 2005 MT 70, 326 M 324, 109 P3d 237 (2005).

Assault With Weapon Not Lesser Included Offense of Assault on Peace Officer — No Double Jeopardy in Convicting of Both Offenses: Matt was charged with assault with a weapon and with assault on a peace officer. Matt pleaded guilty to assault on a peace officer and moved to dismiss the assault with a weapon charge, contending that it was a lesser included offense of assault on a peace officer and that prosecution for assault with a weapon therefore violated Matt's double jeopardy rights. The Supreme Court noted that each offense requires proof of an element not included in the other offense, so assault with a weapon is not a lesser included offense of assault on a peace officer. Thus, prosecution of both offenses did not violate Matt's constitutional or statutory double jeopardy protections, and both convictions were affirmed. St. v. Matt, 2005 MT 9, 325 M 340, 106 P3d 530 (2005), following St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371 (1999).

Failure to Object to Jury Instruction — Ineffective Assistance of Counsel Claim Unfounded — Plain Error Doctrine Inapplicable: The trial court instructed the jury that Gray could be convicted of assault on a peace officer if the state proved that Gray caused a reasonable apprehension of bodily harm in any of three police officers. Gray contended that the instruction erroneously allowed the jury to convict for assault of one or more of the officers without agreeing to one specific set of facts, in violation of the unanimity requirement that the jury must be in agreement as to the principal factual elements underlying the offense. Even though Gray's counsel acquiesced to the instruction, Gray contended that the fundamental right to a unanimous jury verdict is inviolate, so plain error review was appropriate. However, Gray not only failed to contemporaneously object to the instruction, but specifically asked the trial court to add the language that he argued on appeal was insufficient. The Supreme Court declined to apply the doctrine, refusing to put the trial court in error for an action in which Gray acquiesced and actively participated. Additionally, Gray's claim of ineffective assistance of counsel based on his attorney's acquiescence and participation in the jury instruction for strategic purposes also failed. In light of the overwhelming evidence of guilt, Gray could not show that the trial outcome was prejudiced because of the lack of a specific unanimity instruction or that the result would have been different if the attorney had not engaged in the legal strategy. The conviction was affirmed. St. v. Gray, 2004 MT 347, 324 M 334, 102 P3d 1255 (2004), followed in St. v. Gallagher, 2005 MT 336, 330 M 65, 125 P3d 1141 (2005).

Officer's Reasonable Apprehension of Injury From Unseen Weapon — Peace Officer Assault Conviction Affirmed: With officers in pursuit, Steele had one hand at the back of his waistband and one hand in front. Based on prior knowledge of Steele, Officer Baumann believed Steele might have a gun. As the officer approached, Steele turned and raised his arms from his waistband, and the officer thought that Steele was acquiring the officer as a target. The officer then heard a shot and saw Steele drop a pistol that Steele was holding behind his back, and during that interval, the officer testified that he was worried about his physical safety and feared for his life. Based on the officer's knowledge and observations, the officer did not actually have to see the gun in order to feel threatened by the weapon. There was sufficient evidence to uphold Steele's conviction of assault on a peace officer, and the Supreme Court affirmed. St. v. Steele, 2004 MT 275, 323 M 204, 99 P3d 210 (2004), following St. v. Misner, 234 M 215, 763 P2d 23 (1988), and St. v. Hagberg, 277 M 33, 920 P2d 86 (1996). See also St. v. Kirn, 2012 MT 69, 364 Mont. 356, 274 P.3d 746.

Admission by Counsel That Defendant Resisted Arrest When Defendant Charged With Assaulting Peace Officer — Not Ineffective Assistance of Counsel: Audet was charged with assaulting a peace officer and resisting arrest. At the time of trial, Audet told the court that he wished to plead guilty to the resisting arrest charge but to go to trial on the assault charge, even though his attorney had advised otherwise. The court entered not guilty pleas for both counts. Counsel informed the jury in opening and closing statements that Audet was not contesting the resisting arrest charge, but lacked the purposeful and knowing elements required to commit officer assault. The prosecutor then convinced the jury that Audet had essentially conceded the mental state by conceding guilt for resisting arrest, and Audet was convicted on both counts. On appeal, Audet contended that counsel's conduct constituted ineffective assistance, warranting reversal. The Supreme Court applied the Strickland test and dismissed the claim. The record did not reveal why counsel chose to concede the resisting arrest charge to the jury, so the court was unable to determine whether the decision constituted an unreasonable defense strategy that would overcome the presumption that counsel's actions fell within the range of reasonable professional conduct. Pursuant to St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), Audet's direct appeal was dismissed without prejudice to the ineffective assistance issue being raised in a postconviction relief proceeding. St. v. Audet, 2004 MT 224, 322 M 415, 96 P3d 1144 (2004). See also St. v. Hendricks, 2003 MT 223, 317 M 177, 75 P3d 1268 (2003), and St. v. Greene, 2015 MT 1, 378 Mont. 1, 340 P.3d 551.

Sufficient Evidence to Support Conviction of Assault of Police Officer: Bay appeared in District Court on a bench warrant, was held in contempt, and, upon attempting to leave the courtroom, had an altercation with a police officer who attempted to restrain Bay, resulting in injury to the officer. Bay was subsequently convicted of assault of a police officer and appealed on grounds of insufficient evidence. However, there was sufficient evidence that Bay was aware of the high probability that shoving the officer hard enough to knock the officer backward would result in physical pain to the officer and thus acted knowingly. The conviction was affirmed. St. v. Bay, 2003 MT 224, 317 M 181, 75 P3d 1265 (2003).

Use of Force in Resisting Arrest Committed After Investigative Stop — Exclusionary Rule Inapplicable: Courville was stopped by an officer who had reports of underage drinking in the area. When the officer tried to arrest Courville, Courville assaulted the officer. Courville moved to suppress the evidence under the exclusionary rule because the officer did not have a particularized suspicion to make the stop in the first place. The motion was denied, and Courville appealed, but the Supreme Court affirmed. An officer must have a particularized suspicion to conduct an investigatory stop, and if no particularized suspicion exists, the exclusionary rule precludes introduction of evidence gathered from the illegal stop. However, the rule does not apply in every case. If the evidence is so attenuated or dissipated from the government's constitutional violation that the evidence loses its primary constitutional taint, then the evidence is admissible. To allow a person whose right to be free from unreasonable searches and seizures was allegedly violated to respond with unlimited violence would create intolerable results. Here, the evidence of Courville's criminal conduct committed against the officer was so attenuated from the claimed improper investigatory stop that it lost its primary constitutional taint, if any existed. Thus, the exclusionary rule did not apply, and the motion to suppress was properly denied. St. v. Courville, 2002 MT 330, 313 M 218, 61 P3d 749 (2002), following St. v. Ottwell, 240 M 376, 784 P2d 402 (1989).

Assault on Peace Officer Not Lesser Included Offense of Attempted Deliberate Homicide: Assault on a peace officer requires proof of an additional fact not necessary for attempted deliberate homicide, namely that the victim is a peace officer. Thus, assault on a peace officer is not a lesser included offense of attempted deliberate homicide. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001), distinguishing St. v. Castle, 285 M 363, 948 P2d 688 (1997).

Negligent Endangerment Not Lesser Included Offense of Assault on Peace Officer: This section provides that criminal endangerment, negligent endangerment, and assault are not included as offenses of assault on a peace officer. Fuqua was convicted of assault on a peace officer and argued that this section unconstitutionally eliminated consideration of his claim of negligent endangerment as a lesser included offense. The Supreme Court noted that negligent endangerment differs from assault on a peace officer by requiring a lesser kind of culpability and by requiring proof of different conduct; thus, negligent endangerment is not a lesser included offense of assault on a peace officer. Having so concluded, the court declined to address the constitutional question of whether the Legislature can specifically eliminate consideration of an offense as a lesser included offense. St. v. Fuqua, 2000 MT 273, 302 M 99, 13 P3d 34, 57 St. Rep. 1141 (2000).

No Sentence Enhancement for Use of Weapon in Assault on Police Officer: Because a conviction for assault on a police officer requires proof of use of a weapon, an additional sentence for use of a weapon under 46-18-221 violates the double jeopardy provision of the Montana Constitution. St. v. Smith, 2000 MT 57, 299 M 6, 997 P2d 768, 57 St. Rep. 272 (2000), following St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999).

45-5-211. Assault upon sports official.

Case Notes

Payment of Justice's Court Cost Imposed as Judgment of District Court Held Improper — Smith Reaffirmed: Morales was charged with assaulting a sports official, in violation of this section, after striking a basketball referee. Upon his conviction in Justice's Court, Morales appealed to District Court. Upon his conviction, the District Court ordered Morales to pay the costs of the trial in Justice's Court. The Supreme Court reaffirmed its holding in Billings v. Smith, 281 M 133, 932 P2d 1058 (1997), and held that a trial de novo in District Court has the effect of erasing any debt for costs in Justice's Court incurred before the appeal to District Court. St. v. Morales, 284 M 238, 943 P2d 1286, 54 St. Rep. 862 (1997), followed in St. v. Bustle, 2010 MT 68, 355 Mont. 487, 228 P.3d 1150.

45-5-212. Assault on minor.

Compiler's Comments

2013 Amendment: Chapter 378 in (2)(a) at beginning inserted exception clause; inserted (2)(b) and (2)(c) regarding assault on a minor; inserted (3) regarding offender counseling assessment and recommendations by counseling provider; and made minor changes in style. Amendment effective October 1, 2013.

Applicability: Section 3, Ch. 378, L. 2013, provided: "[This act] applies to proceedings begun after [the effective date of this act]." Effective October 1, 2013.

Effective Date: This section is effective October 1, 1999.

Case Notes

Imposition of Child Custody Change in Criminal Sentence — Moot: After the defendant was convicted of assault on a minor and aggravated assault based on acts committed against her child, the District Court ordered as part of the defendant's criminal sentence that the child be temporarily placed with the father while civil dependency and neglect proceedings progressed against the defendant and stated in its judgment that it should be presumed that the father should have legal custody of the child unless the defendant could demonstrate otherwise. On appeal, the Supreme Court concluded that the defendant's appeal challenging the District Court's temporary placement of the child with the father was moot because the mother had regained custody of the child through the civil dependency and neglect proceedings. However, the District Court's statement regarding the presumption that the father should have custody of the child had no place in the judgment and was ordered stricken. St. v. MacDonald, 2013 MT 105, 370 Mont. 1, 299 P.3d 839.

Assault on Minor Sufficient as Felony-Murder Predicate Offense: The defendant was charged with felony murder under 45-5-102 for pushing a 3-year-old into a wall, an injury from which she was later declared brain dead. Assault on a minor, the predicate offense prosecutors alleged when charging the defendant with felony murder, incorporates misdemeanor assault elements. Because the incorporated elements could not support a felony-murder charge, the defendant argued that, likewise, assault on a minor could not support a felony-murder charge and the charges should be dismissed. However, assault on a minor includes additional provisions concerning the age of the individuals involved and a penalty of up to 5 years in a state prison. The Supreme Court held that since the Legislature enhanced the penalty for assault on a minor, the offense is a felony. In addition, the defendant's assault on the child used physical force or violence, qualifying it as a forcible felony. St. v. Hicks, 2013 MT 50, 369 Mont. 165, 296 P.3d 1149.

Alford Plea to Partner or Family Member Assault Not Precluding Subsequent Prosecution for Assault on Minor: After beating his girlfriend's 2-year-old son, Weatherell was charged with assault on a minor, criminal endangerment, and partner or family member assault. Weatherell entered an Alford plea to the partner or family member assault and endangerment charges and moved to dismiss the remaining charges on double jeopardy grounds, but the motion was denied. On appeal, the Supreme Court held that under 46-11-410(2)(a) and (2)(d), Weatherell's Alford plea to partner or family member assault did not foreclose a subsequent prosecution for assault on a minor. Denial of the dismissal motion was affirmed. St. v. Weatherell, 2010 MT 37, 355 Mont. 230, 225 P.3d 1256.

Imposition of Sexual Offender Treatment for Assault of Minor Affirmed: As part of a plea agreement, Leitheiser pleaded guilty to felony assault of a minor, hoping to avoid sexual offender treatment related to the initial charge of sexual assault. However, upon recommendation of the probation officer, Leitheiser was nevertheless sentenced to undergo sexual offender treatment upon conviction of assault of a minor. On appeal, Leitheiser contended that the sentencing court lacked authority to require sexual offender treatment because Leitheiser had not pleaded guilty to a sex offense. The Supreme Court disagreed. A sentencing court may consider any relevant evidence relating to the nature and circumstances of the crime, and the sentencing court in this case properly considered the facts underlying the plea of assault of a minor and did not abuse its discretion in imposing sexual offender treatment as a condition of the sentence. St. v. Leitheiser, 2006 MT 70, 331 M 464, 133 P3d 185 (2006).

45-5-213. Assault with weapon.

Compiler's Comments

Offense Renamed: This offense was, prior to its creation in 1999, entitled "felony assault" and was contained in 45-5-202, from which it was deleted in 1999.

Effective Date: This section is effective October 1, 1999.

Case Notes

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ELEMENTS

Transaction Rule — Evidence of Defendant's Gang Affiliations Properly Admitted — Evidence of Outstanding Warrant Not Grounds for Mistrial: The defendant was convicted of aggravated burglary and four counts of assault with a weapon. The crimes related to the defendant's attempts to recruit a former gang member to commit gang-related crimes. The defendant appealed the conviction, arguing that the District Court should not have admitted evidence relating to his gang affiliation because the prejudicial effect outweighed its probative value. The defendant also argued that the District Court should have granted his motion for a mistrial, following disclosure by a law enforcement witness that the defendant had an active warrant. The Supreme Court upheld the conviction, holding that evidence of the defendant's gang affiliation was central to the jury's understanding of what transpired, was allowed under the transaction rule, and was inextricably linked to and explanatory of the state's charges against him and the danger of unfair prejudice was not outweighed by its probative value. The court further held that the mention of the defendant's outstanding warrant was properly cured by an instruction from the District Court and there was no reasonable possibility that inadmissible evidence contributed to the defendant's conviction. St. v. Michelotti, 2018 MT 158, 392 Mont. 33, 420 P.3d 1020.

Hot, but Unlit, Cigarette Lighter Considered Weapon — Fear of Being Burned With Hot Lighter Sufficient to Sustain Assault With Weapon Charge: A minor was convicted of assault with a weapon after burning his younger sister six times with the heated end of an unlit cigarette lighter and threatening his other siblings with the same treatment. On appeal, defendant contended that the charge was erroneous because an unlit lighter could not be considered a weapon and because no serious bodily injury was inflicted. The Supreme Court disagreed with both arguments. By definition, a weapon is an instrument, article, or substance that is readily capable of producing death or serious bodily injury. Thus, even though unlit, the hot lighter was used as a device to inflict pain or injury and satisfied the definition of a weapon. Further, assault with a weapon does not require actual infliction of serious bodily injury, but only a showing that a person knowingly and purposely caused a victim a reasonable apprehension of serious bodily injury with a weapon or with what appeared to be a weapon. The victims in this case were in reasonable apprehension of what they rightfully considered to be serious bodily injury, and the conviction was affirmed. St. v. R.B."J."C., 2004 MT 254, 323 M 62, 97 P3d 1116 (2004).

Sufficient Evidence to Support Assault Convictions — Motion to Dismiss for Insufficient Evidence Properly Denied: Following the close of the state's case against McCaslin for aggravated assault and assault with a weapon, McCaslin moved to dismiss both counts on grounds of insufficient evidence, asserting that the state failed to prove that he purposely or knowingly caused bodily harm to another and that because he was not the aggressor, a self-defense argument was justified. The motion was denied, and the jury subsequently convicted McCaslin on both counts. On appeal, the Supreme Court reviewed the record and concluded that, with deference to the jury and in a light most favorable to the prosecution, a reasonable trier of fact could have found the essential elements of both crimes beyond a reasonable doubt. McCaslin's convictions were affirmed. St. v. McCaslin, 2004 MT 212, 322 M 350, 96 P3d 722 (2004).

Charge of Assault With Weapon Limited to Intended Victim: After threatening to shoot his estranged wife's boyfriend during a telephone call, Smith was charged with one count of assault with a weapon for causing reasonable apprehension in the wife that the boyfriend would be shot and a second count for causing reasonable apprehension in the boyfriend that he would be shot. As part of a plea agreement, the second count was dismissed. Smith then moved to dismiss the first count on grounds that use of the word "another" in the statute meant that reasonable apprehension of serious bodily injury was apprehension experienced by the intended victim, not by a third-party victim who suffers apprehension of reasonable harm to the intended victim. The Supreme Court agreed. Thus, to convict Smith of assault with a weapon required that Smith caused reasonable apprehension of serious bodily injury in the boyfriend. Although that crime was properly charged in the second count, that count was dismissed. The first count was not a proper charge and should have been dismissed, and the District Court erred in not doing so. St. v. Smith, 2004 MT 191, 322 M 206, 95 P3d 137 (2004).

Elements of Assault With Weapon — Use of Weapon Not Requisite Element of Assault With Weapon: After threatening to shoot his estranged wife's boyfriend during a telephone call, Smith was charged with assault with a weapon. Smith contended that the affidavit supporting the charge failed to state the required elements to establish the offense, asserting that the victim was required to see a weapon or to reasonably believe that a weapon was being used by the perpetrator in order to cause the requisite reasonable apprehension of bodily injury. The Supreme Court disagreed with both arguments. In St. v. Misner, 234 M 215, 763 P2d 23 (1988), and St. v. Hagberg, 277 M 33, 920 P2d 86 (1996), it was held that it was unnecessary for the victim to actually see a weapon for there to be sufficient evidence of reasonable apprehension of serious bodily injury with a weapon, so it is technically not correct that use of a weapon is a requisite element of the offense. Rather, the crime may be established if a person: (1) uses a weapon, or what reasonably appears to be a weapon, to cause reasonable apprehension of serious bodily injury in the victim; or (2) causes reasonable apprehension that the victim will sustain serious bodily injury from a weapon if it reasonably appears to the victim that a weapon is involved, whether actually seen or not. St. v. Smith, 2004 MT 191, 322 M 206, 95 P3d 137 (2004), clarifying St. v. Brown, 239 M 453, 781 P2d 281 (1989), and followed in St. v. Swann, 2007 MT 126, 337 M 326, 160 P3d 511 (2007), and St. v. Kirn, 2012 MT 69, 364 Mont. 356, 274 P.3d 746.

Fear Not Required to Prove Reasonable Apprehension of Serious Bodily Injury: McMahon was convicted of assault with a weapon but contended that the state failed to prove the offense because the victim testified that he was not afraid during the attack and thus had no reasonable apprehension of serious bodily injury. Citing St. v. Lamere, 190 M 332, 621 P2d 462 (1980), the Supreme Court noted that fear is not required to prove reasonable apprehension. The victim testified that although he was not afraid during the actual attack, he realized later that he or another person in the room could have been shot. This reaction, coupled with the struggle to subdue McMahon because she would probably shoot the victim or someone else, sufficiently established that the victim reasonably apprehended serious bodily injury. The conviction was affirmed. St. v. McMahon, 2003 MT 363, 319 M 77, 81 P3d 508 (2003).

Conviction of Robbery but Acquittal of Assault With Weapon Not Considered Inconsistent Verdict — Sufficient Evidence of Robbery to Affirm Verdict: Bailey was acquitted of felony assault with a weapon, but was convicted of felony robbery and misdemeanor theft, and appealed on grounds that it was inconsistent to convict someone of robbery and acquit the same person of assault with the same evidence. The Supreme Court noted that the elements of the two crimes are not identical and that the verdict was not really inconsistent because robbery does not require a weapon. Further, the court declined to speculate about the jury's intention, citing U.S. v. Powell, 469 US 57 (1984), in holding that a criminal defendant is already afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by trial and appellate courts. Thus, the question is not whether a criminal verdict is inconsistent, but whether the verdict is supported by sufficient evidence. In this case, there was sufficient evidence for a rational trier of fact to find the essential elements of robbery, and the court affirmed. St. v. Bailey, 2003 MT 150, 316 M 211, 70 P3d 1231 (2003). See also St. v. Merrick, 2000 MT 124, 299 M 472, 2 P3d 242 (2000).

Manipulation of Snake Considered Use of Weapon: When officers entered Roullier's apartment, they were confronted by Roullier with a snake in his arms. Despite repeated orders to put the snake down, Roullier advanced toward the officers with the snake extended, in an effort to make them move away, telling them that a bite from the snake would be deadly. One of the officers testified that he was fearful for his life. On appeal, Roullier contended that the state may have shown that he was in possession of the snake, but failed to prove that he actually used the snake to cause reasonable apprehension of bodily injury, and that possession alone was insufficient to prove use. Roullier's manipulation of the snake in this manner amounted to more than mere possession; its use knowingly caused the officer reasonable apprehension of bodily harm, and the felony assault (now assault with a weapon) conviction was affirmed. St. v. Roullier, 1999 MT 37, 293 M 304, 977 P2d 970, 56 St. Rep. 157 (1999).

Interpretation of Weapon as Device Capable of Producing Death or Serious Bodily Injury — Fake Bomb Not Considered Weapon for Purposes of Charging Felony Assault (now Assault With a Weapon): R.L.S. placed a device that appeared to be a bomb under the sink of a middle school, which R.L.S. contended was a fake bomb intended as a practical joke. Five people saw the device, believed it was a bomb, and were frightened or concerned for their safety. The device was destroyed by a bomb squad before it was ascertained whether the device actually was a bomb.

R.L.S. was charged with five counts of felony assault (now assault with a weapon) and convicted of one count, which was appealed on grounds that the petition alleged that the device appeared to be a bomb but never alleged the use of a weapon, which is key to the charge of felony assault (now assault with a weapon). The state contended that a device meets the definition of weapon in 45-2-101 if it appears and is perceived to be capable of inflicting death or serious bodily injury from the victim's perspective, regardless of whether the device is capable of actually inflicting such injury. The Supreme Court disagreed, holding that the clear and unambiguous language in the definition requires that a weapon must be readily capable of producing death or serious bodily injury and that the definition is not susceptible to any reasonable interpretation that would include a victim's subjective view of the device at issue. The petition failed to allege that R.L.S. used a weapon and thus failed to state facts constituting felony assault (now assault with a weapon). The case was reversed with instructions to dismiss the charges. In re R.L.S., 1999 MT 34, 293 M 288, 977 P2d 967, 56 St. Rep. 149 (1999), distinguishing St. v. Herron, 12 M 230, 29 P 819 (1892), and St. v. Weinberger, 206 M 110, 671 P2d 567, 40 St. Rep. 1539 (1983).

Tennis Shoe a Weapon: Mummey alleged that the lower court erred in refusing to overturn his assault conviction on the basis that the state had failed to prove that his footwear was a weapon under the felony assault (now assault with a weapon) statute. The Supreme Court ruled that a tennis shoe could not as a matter of law be found to not be a weapon; rather, it was a question for the jury to determine whether under the circumstances of the assault, the shoe was used in such a manner as to constitute a weapon. St. v. Mummey, 264 M 272, 871 P2d 868, 51 St. Rep. 198 (1994).

Statement to Victim Not Conditional Threat — Assault Conviction Affirmed: Dean pulled a loaded gun from his pocket, pointed it at the victim, stated that the victim was lucky that Dean was not shooting the weapon, then lowered the weapon and left the scene. Dean contended that his statement constituted a conditional threat that demonstrated that he did not have the requisite mental state to complete the crime of felony assault (now assault with a weapon). However, his statement contained no conditions whatever. The victim was not given a condition with which she could comply in order not to be shot, nor was she assured that her luck might not run out before Dean lowered the gun and left. Following St. v. Cope, 250 M 387, 819 P2d 1280 (1991), the Supreme Court noted that is not necessary for an assailant to intend to cause apprehension when committing felony assault (now assault with a weapon)—a person need only be aware that such conduct would probably cause that result. The victim's testimony that she was extremely fearful was sufficient to support the application for leave to file an information. The motion to dismiss it was properly denied. St. v. Dean, 262 M 189, 864 P2d 781, 50 St. Rep. 1508 (1993).

Pistol Brandished — Felony Assault (now Assault With a Weapon) Affirmed: In the process of arrest, defendant picked up a pistol and began swinging it toward the arresting officer. Defendant claimed his subsequent conviction for felony assault (now assault with a weapon) was unwarranted because he was only trying to surrender the pistol and did not knowingly intend to cause apprehension of serious bodily injury. However, it was not necessary for defendant to cause apprehension. He committed the offense if he was aware that his conduct would probably cause that result. St. v. Cope, 250 M 387, 819 P2d 1280, 48 St. Rep. 949 (1991).

Evidence Supports Essential Elements of Felony Assault (now Assault With a Weapon): Evidence showing that defendant came out of his house waving a knife and shouting at an officer, that the officer was pinned to the ground by defendant with a knife in his hand, and that the officer sustained an injury that required him to wear a brace for 6 months does not support defendant's claim of self-defense. The evidence is sufficient to support the conclusion that any rational trier of fact could have found beyond a reasonable doubt the essential elements of felony assault (now assault with a weapon). St. v. Matt, 249 M 136, 814 P2d 52, 48 St. Rep. 614 (1991).

Distinction of Elements of Domestic Abuse and Felony Assault (now Assault With a Weapon): In cases in which bodily injury is inflicted on a family member or household member, the distinction between felony assault (now assault with a weapon) and domestic abuse is that felony assault (now assault with a weapon) requires use of a weapon. In cases involving reasonable apprehension of bodily injury in a family member or household member, felony assault (now assault with a weapon) requires two additional elements in comparison to domestic abuse: (1) there is use of a weapon; and (2) the bodily injury apprehended is of a serious nature. St. v. Brown, 239 M 453, 781 P2d 281, 46 St. Rep. 1825 (1989).

Apprehension of Injury — No Observation of Weapon by Victim: Defendant and welfare eligibility technician had confrontations over defendant's welfare claims on several occasions. After one such meeting, defendant left the office and was seen getting a rifle from his truck and yelling and shaking the gun in the direction of the welfare office. The secretary who observed this act immediately related the presence of the weapon to the technician, who unequivocally testified to his apprehension of serious bodily injury. It was not necessary for the technician to personally observe the gun in order to experience reasonable apprehension of injury. Defendant's conviction of felony assault (now assault with a weapon) of the technician and of disorderly conduct against the secretary was affirmed. St. v. Misner, 234 M 215, 763 P2d 23, 45 St. Rep. 1853 (1988).

Required Mental State: A conviction for felony assault (now assault with a weapon) requires a finding of a mental state of "purposely" or "knowingly" rather than a finding of a specific intent or bad mens rea. St. v. Crabb, 232 M 170, 756 P2d 1120, 45 St. Rep. 966 (1988).

Verdict Supported by Sufficient Evidence of Felony Assault (now Assault With a Weapon) — "Use" of Weapon: Crabb was convicted of felony assault by use of a weapon (now assault with a weapon) after he pointed a .44 magnum revolver with an 8-inch barrel at Howard's face from a distance of 6 feet and threatened to kill him. Crabb's attorney claimed a misdemeanor assault charge would have been more appropriate because Crabb did not actually "use" the weapon, through firing or as a club. The Supreme Court labeled the argument as "ludicrous", noting the distinction between reasonable apprehension of bodily injury required in misdemeanor assault and reasonable apprehension of *serious* bodily injury required in felony assault (now assault with a weapon). Under the circumstances, a conviction of felony assault (now assault with a weapon) was appropriate and affirmed. St. v. Crabb, 232 M 170, 756 P2d 1120, 45 St. Rep. 966 (1988).

CHARGING DEFENDANT

Fourfold Increase in Sentence Following Mistrial — Appearance and Reasonable Likelihood of Prosecutorial Vindictiveness: The defendant argued that the assault with a weapon charge that carries a maximum 20-year sentence should have been dismissed for prosecutorial vindictiveness when, during a previous trial that resulted in a mistrial, the defendant was charged with assault on a minor in violation of 45-5-212, which carries a maximum 5-year sentence. Following U.S. v. Goodwin, 457 U.S. 368, 102 S. Ct. 2485 (1982), the Supreme Court reversed and remanded. By rejecting the state's deal to plead guilty to the assault on a minor charge, the defendant exercised his right to proceed to trial. The threat of a fourfold increase in punishment for the assault with a weapon charge had the appearance of prosecutorial vindictiveness when after the mistrial the facts and witnesses were known, the state had discovered and assessed all of the information, and no new evidence or information came to light between the trials. St. v. Knowles, 2010 MT 186, 357 Mont. 272, 239 P.3d 129.

Assault With Weapon Not Lesser Included Offense of Assault on Peace Officer — No Double Jeopardy in Convicting of Both Offenses: Matt was charged with assault with a weapon and with assault on a peace officer. Matt pleaded guilty to assault on a peace officer and moved to dismiss the assault with a weapon charge, contending that it was a lesser included offense of assault on a peace officer and that prosecution for assault with a weapon therefore violated Matt's double jeopardy rights. The Supreme Court noted that each offense requires proof of an element not included in the other offense, so assault with a weapon is not a lesser included offense of assault on a peace officer. Thus, prosecution of both offenses did not violate Matt's constitutional or statutory double jeopardy protections, and both convictions were affirmed. St. v. Matt, 2005 MT 9, 325 M 340, 106 P3d 530 (2005), following St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371 (1999).

Charge of Assault With Weapon Limited to Intended Victim: After threatening to shoot his estranged wife's boyfriend during a telephone call, Smith was charged with one count of assault with a weapon for causing reasonable apprehension in the wife that the boyfriend would be shot and a second count for causing reasonable apprehension in the boyfriend that he would be shot. As part of a plea agreement, the second count was dismissed. Smith then moved to dismiss the first count on grounds that use of the word "another" in the statute meant that reasonable apprehension of serious bodily injury was apprehension experienced by the intended victim, not by a third-party victim who suffers apprehension of reasonable harm to the intended victim. The Supreme Court agreed. Thus, to convict Smith of assault with a weapon required that Smith caused reasonable apprehension of serious bodily injury in the boyfriend. Although that crime was properly charged in the second count, that count was dismissed. The first count was not a proper charge and should have been dismissed, and the District Court erred in not doing so. St. v. Smith, 2004 MT 191, 322 M 206, 95 P3d 137 (2004).

Discretion of Prosecutor in Charging Defendant When Facts Support Possibility of More Than One Crime: After threatening to shoot his estranged wife's boyfriend during a telephone call, Smith was charged with assault with a weapon. Smith contended that he should instead have been charged with violation of privacy in communications through intimidation over the telephone and that the assault with a weapon charge should have been dismissed. The Supreme Court disagreed. The two charges were distinctly different, and the facts of the case supported a charge for either crime. Thus, the crime to be charged was a matter of prosecutorial discretion, and the County Attorney did not abuse those broad discretionary powers in charging Smith with assault with a weapon. St. v. Smith, 2004 MT 191, 322 M 206, 95 P3d 137 (2004).

Misdemeanor Statute Presumption — Knowingly Pointing Gun: Defendant argued that the language of the misdemeanor assault statute, "shall be presumed in any case in which a person knowingly points a firearm at or in the direction of another", is a conclusive presumption that "prevents the state from charging a defendant with felony assault (now assault with a weapon) once the state proves that the defendant pointed a gun towards another". However, the misdemeanor statute is not the exclusive vehicle for prosecution when such conduct occurs. The misdemeanor assault statute addresses the reasonable apprehension of bodily injury, and the felony assault (now assault with a weapon) statute addresses the reasonable apprehension of serious bodily injury. A county attorney has the discretion to charge a defendant under either 45-5-201 or 45-5-202 (now under this section), and a subsequent conviction will stand if the evidence supports it. St. v. Ottwell, 239 M 150, 779 P2d 500, 46 St. Rep. 1580 (1989).

EVIDENCE

Failure to Preserve Issue for Appeal by Failure to Object at Trial — Plain Error Review Inappropriate Absent Implication of Defendant's Fundamental Rights: At Price's trial for assault with a weapon, a stun gun, the trial court allowed evidence of Price's prior conviction for intimidation. Following conviction, Price appealed on grounds that the evidence was improperly introduced because the state failed to give notice of the intent to introduce other crimes evidence in violation of Price's due process rights. The state contended that Price waived the right to appeal the issue by failing to object to introduction of the evidence and by actively participating in its introduction. The Supreme Court declined to review the issue because Price failed to object to the evidence at trial and thus did not preserve the issue for appeal. Further, plain error review was inappropriate because Price's fundamental constitutional rights were not implicated by introduction of the evidence. St. v. Price, 2007 MT 269, 339 M 399, 171 P3d 293 (2007), followed in St. v. Thorp, 2010 MT 92, 356 Mont. 150, 231 P.3d 1096.

Admission of Evidence Regarding Language on Defendant's Vehicle and Clothing — Relationship to Crime of Assault With Weapon: Cesnik was charged with assaulting a fellow gun club member with a weapon. The trial court admitted evidence regarding phrases on Cesnik's vehicle and clothing. Cesnik contended that the evidence was unrelated to the assault charge and should not have been admitted. The Supreme Court held that the evidence provided further context regarding the animosity between the men and explained why the club member wanted Cesnik removed from the gun club—an issue that Cesnik's counsel broached on direct examination. The evidence was relevant and admissible. St. v. Cesnik, 2005 MT 257, 329 M 63, 122 P3d 456 (2005).

Failure to Object to Introduction of Evidence at Trial — Waiver of Right to Claim Error on Appeal: At Brasda's assault trial, the state offered Brasda's knife into evidence. Brasda objected on the basis of the knife's condition; the trial court heard evidence explaining the knife's condition; and the state again moved to admit the knife. Brasda did not object, argue that the knife had been tampered with, request a mistrial or new trial, move to reconsider admissibility, or propose a cautionary instruction for the jury. Nevertheless, Brasda claimed error on appeal. The Supreme Court found that the knife was properly admitted into evidence and that Brasda's failure to object constituted a waiver of the right to claim error on appeal. St. v. Brasda, 2003 MT 374, 319 M 146, 82 P3d 922 (2003).

Motion In Limine to Exclude Relevant Statements Made During and After Assault Properly Denied: During a bar fight, Brasda brandished a knife and stated that he would use it because he was not afraid to go back to prison. After the fight, Brasda stated to a deputy that he didn't try to stab anyone. At trial, Brasda made a motion in limine to suppress the statements on grounds that they were irrelevant to any fact at issue or, alternatively, that they were statements of other crimes or acts and inadmissible because no exception applied. The trial court denied the motion, and the Supreme Court affirmed. Both statements were clearly relevant and integral to the state's proof of the elements of the crime and to the jury's ability to evaluate witness testimony. Further, the statements were admissible under the mental, emotional, or physical condition exception to the hearsay rule and under the transaction rule in 26-1-103. The court also noted that under St. v. Bauer, 2002 MT 7, 308 M 99, 39 P3d 689 (2002), statements regarding a defendant's history or imprisonment and probationary status that are inextricably linked to circumstances surrounding the crime are admissible. Denial of the motion in limine was proper. St. v. Brasda, 2003 MT 374, 319 M 146, 82 P3d 922 (2003).

Demonstration of Fighting Prowess Disallowed as Cumulative: Defendant contended District Court error in disallowing a demonstration of how he "punches like a woman, blocks like a sissy and why a knife was an appropriate choice" to equalize his opponent's fighting prowess, asserting the evidence would show he could not defend himself without a weapon. The demonstrative evidence was cumulative and its exclusion did not constitute reversible error. St. v. Crazy Boy, 232 M 398, 757 P2d 341, 45 St. Rep. 1145 (1988).

Statutory Requirements Met: Two chickens belonging to defendant's neighbor flew onto his property. Defendant came out of the house waving a pistol, chased the birds back into his neighbor's yard, and then waved the pistol and shouted at two neighbor children, ages 10 and 11, to keep their chickens off his property or "something will have to be done". The key elements of aggravated assault were present, including reasonable apprehension of serious bodily harm and use of a weapon. St. v. Matson, 227 M 36, 736 P2d 971, 44 St. Rep. 874 (1987).

INSTRUCTIONS

Victims Not Individually Identified in Jury Form — Facts Sufficient to Uphold Conviction: The defendant was charged with assault after allegedly threatening a number of people with a gun and a pool cue. The defendant proposed a series of jury instructions that broke down the assault charge to identify each alleged victim separately. The state's verdict form, which went to the jury, identified the victims as a group and not individually. After his conviction, the defendant appealed and argued that the verdict form should have set out each victim individually and that not doing so could have left the verdicts factually unsupported. The Supreme Court rejected his argument and concluded that there was a sufficient factual basis for a jury to find all essential elements of the charge beyond a reasonable doubt. St. v. Redlich, 2014 MT 55, 374 Mont. 135, 321 P.3d 82.

Failure to Instruct Jury on Misdemeanor Assault as Lesser Included Offense of Assault With Weapon — Reversible Error: Feltz's attorney requested that the jury be instructed on misdemeanor assault as a lesser included offense of assault with a weapon, based on the fact that one of the victims may not have been in fear of serious bodily injury or that the fear was not reasonable in light of the circumstances. The instruction was denied and Feltz appealed. The Supreme Court held that evidence in the record supported the instruction in this case. Failure to give the instruction was reversible error, and the case was remanded for a new trial. St. v. Feltz, 2010 MT 48, 355 Mont. 308, 227 P.3d 1035, distinguishing St. v. Reiner, 179 Mont. 239, 587 P.2d 950 (1978).

No Abuse of Discretion in Giving Jury Instruction That Actual Viewing of Weapon Not Necessary: Defendant contended that adding the language "whether [the weapon was] actually seen or not" to a jury instruction impermissibly broadened the definition of assault with a weapon. However, in St. v. Smith, 2004 MT 191, 322 M 206, 95 P3d 137 (2004), it was held that it was unnecessary for the victim to actually see a weapon for there to be sufficient evidence of reasonable apprehension of serious bodily injury with a weapon. The jury instruction was taken directly from Smith and accurately reflected the law applicable to the case, and the Supreme Court found no abuse of discretion in giving the jury instruction. St. v. Swann, 2007 MT 126, 337 M 326, 160 P3d 511 (2007).

Failure to Instruct on Felony Assault (now Assault With a Weapon) Not Erroneous: Schmalz pleaded guilty to aggravated assault against his father and was convicted by jury of attempted deliberate homicide of his mother. At the close of evidence, the District Court refused Schmalz's request for a jury instruction on a lesser included offense of felony assault (now assault with a weapon) and instead instructed the jury on the lesser included offense of aggravated assault, reasoning that his mother suffered serious bodily injury. Schmalz pointed out that his mother testified that Schmalz had no intent to shoot her at all, raising the question of whether Schmalz possessed the necessary state of mind to be convicted of attempted deliberate homicide. However, an instruction on a lesser included offense of felony assault (now assault with a weapon) has no support in the evidence and is not necessary when the defense's evidence, if believed, would result in an acquittal. If the jury believed the testimony upon which Schmalz relied, an instruction on the lesser included offense would have had no support in the evidence because the necessary intent would be lacking; therefore, the District Court did not err in refusing the request for an instruction on felony assault (now assault with a weapon). St. v. Schmalz, 1998 MT 210, 290 M 420, 964 P2d 763, 55 St. Rep. 889 (1998), following St. v. Sellner, 286 M 397, 951 P2d 996, 54 St. Rep. 1464 (1997), and St. v. Howell, 1998 MT 20, 954 P2d 1102, 55 St. Rep. 72 (1998).

Instruction Regarding Apprehension of Bodily Injury Proper: The trial court's instruction that a "person commits the offense of felony assault (now assault with a weapon) if he purposely or knowingly causes reasonable apprehension of serious bodily injury in another by use of a weapon" and its instruction on the elements that the state must prove constituted a full, fair, and sufficient statement of the requisite proof for felony assault (now assault with a weapon). St. v. Dean, 262 M 189, 864 P2d 781, 50 St. Rep. 1508 (1993).

Jury Entitled to Complete Definition of "Knowledge": Defendant, who was convicted of felony assault (now assault with a weapon), argued that not all of the definitions contained in the definition of "knowingly" contained in 45-2-101 apply to every alleged criminal violation and that the trial court erred in giving the entire definition to the jury. The Supreme Court held that the requisite intent was "knowledge" or "purpose" and that the jury was entitled to a complete definition of "knowledge" as set forth in the statute. St. v. Ottwell, 239 M 150, 779 P2d 500, 46 St. Rep. 1580 (1989).

Credible Evidence of Assault — Jury Instructions Sufficient: Despite defendant's contentions that the victim's testimony could not form a basis for a finding of guilt because the testimony was inconsistent and because the victim's credibility was questionable, the jury was properly instructed regarding the weight to be given to the testimony and, given the facts and law presented, correctly concluded that defendant was guilty of misdemeanor and felony assault (now assault with a weapon). St. v. Hammer, 233 M 101, 759 P2d 979, 45 St. Rep. 1326 (1988).

SUFFICIENCY OF EVIDENCE

Assault With Weapon — Defendant Convicted Despite Lack of One Witness Testifying: The defendant was convicted of four counts of assault with a weapon. The crimes related to the defendant's affiliation with a gang and his attempts to recruit a former gang member to commit gang-related crimes. The defendant appealed the conviction, arguing that insufficient evidence supported one of the convictions because the witness did not testify on his own behalf. The Supreme Court affirmed, holding that ample evidence was presented at trial that would have allowed the jury to conclude that the witness felt apprehensive by the defendant's conduct. St. v. Michelotti, 2018 MT 158, 392 Mont. 33, 420 P.3d 1020.

Reasonable Apprehension of Bodily Harm Sufficient to Sustain Conviction for Assault With Weapon: Toth was charged with assault with a weapon after attempting to stab another man with a knife. The jury found Toth guilty and Toth appealed on grounds that the state failed to meet its burden of proof, but the Supreme Court affirmed. Although the knife was never found or described with specificity, a trier of fact need not have the actual weapon before it in order to convict a defendant of assault when circumstantial evidence supports a finding that the defendant used a weapon. Thus, even though the knife was not described with specificity or the nature of potential stab wounds it could inflict proved by medical evidence, the jury could have concluded beyond a reasonable doubt that Toth's act of wielding a knife and threatening to kill the victim caused the victim reasonable apprehension of being stabbed and seriously injured. St. v. Toth, 2008 MT 404, 347 M 184, 197 P3d 1013 (2008), following St. v. Longneck, 201 M 367, 654 P2d 977 (1982), distinguishing St. v. Andrews, 274 M 292, 907 P2d 967 (1995).

Jury Rejection of Impossibility Defense — Sufficient Evidence to Support Conviction of Assault and Criminal Endangerment: York was charged with assault and criminal endangerment for ramming a vehicle from behind at 50 miles an hour. The deputy who responded saw York going the opposite direction on the same highway. York's defense was that it would have been impossible for him to commit the assault as reported and then arrive at the location where he was observed by the deputy because of the time and distance involved. The jury was instructed that it could reject any portion of a witness's testimony that it considered to be false. York presented his impossibility defense, and the jury rejected it. Although it could not be determined precisely why the jury convicted York, there were plausible theories as to how the jury could have reconciled the witness's testimony with York's theory. The conviction was supported by sufficient evidence and thus affirmed. St. v. York, 2003 MT 349, 318 M 511, 81 P3d 1277 (2003).

Case Remanded Because Jury Improperly Summoned — Sufficient Evidence to Support Convictions for Assault With a Weapon and Aggravated Burglary: Lopez was convicted of felony assault (now assault with a weapon) and aggravated burglary. On appeal, it was held that the District Court should not have denied Lopez's motion to strike the jury because under St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000), summoning a jury by telephone violates 3-15-505 and frustrates the random nature of the jury process. Lopez contended that the state did not meet its burden of proving the elements of either crime and that he should not be retried on those charges. The Supreme Court disagreed, finding that the state offered sufficient evidence to prove both offenses, and remanded for retrial. St. v. Lopez, 2001 MT 97, 305 M 218, 26 P3d 745 (2001).

Sufficient Evidence of Mental State and Reasonable Apprehension to Prove Assault With a Weapon: When attempting to flee from pursuing officers, Martin ducked into the back door of a bakery and then ran out the front door in a further attempt to get away, seeking a hiding place in a small enclosure that was boarded up with plywood. There was a hole in the plywood, and as a pursuing officer stooped to look in the hole, Martin looked out directly at him. Recognizing Martin as the man he had chased out of the bakery, the officer identified himself and ordered Martin to drop his gun and show his hands. Instead, Martin looked out the hole two more times and then pointed the gun through the hole directly at the officer. Thinking he was about to be fired upon, the officer fired a shot. Martin disappeared from view and then threw the gun out of the hole. Martin was convicted of felony assault (now assault with a weapon), but contended on appeal that the state did not establish that he purposely or knowingly intended to create an apprehension of serious bodily injury in the officer. Martin argued that his mental state, not the officer's perception of it, controlled as to the "purposely or knowingly" element of felony assault. The Supreme Court agreed in part with Martin's reasoning, in that that element of the crime is controlled by the perpetrator's mental state, not that of the victim. However, the mental state element goes to the defendant's actions, not to whether those actions caused reasonable apprehension of injury in another. Thus, it was sufficient for the jury to find that Martin saw the officer and deliberately aimed a gun at him. Given the circumstances of the pursuit and the fact that the officer knew that Martin had just shot a fellow officer, coupled with the way Martin pointed the gun, the evidence was sufficient for the jury to find that the officer felt a reasonable apprehension of serious bodily injury, and Martin's conviction for felony assault was affirmed. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Felony Assault (now Assault With a Weapon) Affirmed Despite Defendant's Testimony That Cell Phone, Not Handgun, Used in Assault: Despite conflicting and contradictory witness testimony, the jury believed the five witnesses for the state who testified that Weitzel assaulted Brewer with a handgun, rather than believing Weitzel's version of events, which included Weitzel's testimony that he did not own a handgun and had only a cell phone in his possession on the night in question. Although the evidence could have supported a different verdict, it is not the role of the Supreme Court to substitute its judgment for that of the trier of fact if the evidence presented at trial presents a sufficient basis from which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The evidence was sufficient to support Weitzel's conviction for felony assault (now assault with a weapon), and the District Court did not abuse its discretion in denying Weitzel's motion to dismiss for insufficient evidence. St. v. Weitzel, 2000 MT 86, 299 M 192, 998 P2d 1154, 57 St. Rep. 368 (2000).

Motor Vehicle Stop of Intoxicated Defendant — Justifiable Apprehension of Harm: Officer Mantooth stopped a car fitting the radio description of a vehicle and, upon looking inside, saw an apparently drunken male passenger leaning over with his arms between his legs as if hiding something and saw an empty holster between the driver and passenger. After a scuffle, Hagberg was charged by information with felony assault (now assault with a weapon) and misdemeanor resisting arrest. The Supreme Court affirmed the holding of the District Court that Officer Mantooth's affidavit supporting the motion for leave to file the information was sufficient, noting that it was not necessary for Officer Mantooth to have personally observed a gun in order to be apprehensive about his safety. The Supreme Court also held that the District Court did not abuse its discretion by denying Hagberg's motion to dismiss because of an unlawful arrest. Because Officer Mantooth was in apprehension for his safety, a felony had been committed and Mantooth was justified in making the arrest. St. v. Hagberg, 277 M 33, 920 P2d 86, 53 St. Rep. 528 (1996).

Sufficient Circumstantial Evidence to Support Conviction: Defendant was properly convicted of felony assault (now assault with a weapon) when evidence, although circumstantial, showed: (1) defendant accidentally discharged his shotgun in his home the night of the incident for which he was charged; (2) police were called to investigate, and the serial number of defendant's gun was reported; (3) one-half hour later, victim was shot at by a male person from another car, causing considerable damage to victim's car; (4) victim described perpetrator's car as a dirty reddish color, possibly a Rabbit, and defendant's car fit that description; (5) shotgun shells collected at the scene were determined by experts to have been fired from defendant's gun; and (6) defendant's gun was discovered in a ditch near where the shooting took place. St. v. Buckingham, 240 M 252, 783 P2d 1331, 46 St. Rep. 2102 (1989).

Infer Mental State From Circumstantial Evidence: Although the defendant may have suffered from mental disease, evidence is overwhelming that he acted purposely or knowingly when he committed felony assault (now assault with a weapon). He purchased the gun shortly before he committed the assault, performed all acts necessary to bring him to the victims' trailer, parked his vehicle so he could get away quickly, cut the victims' telephone wire, fled the scene after firing directly at the victims, and then buried the weapon. Mental state may be inferred from circumstantial evidence, including the defendant's actions and evidence surrounding the alleged offense. St. v. Trask, 234 M 380, 764 P2d 1264, 45 St. Rep. 1988 (1988).

Newly Discovered Evidence Insufficient for New Trial: After defendant was convicted of felony assault (now assault with a weapon), he applied for a new trial on the basis of alleged newly discovered evidence. The evidence was that a bullet hole in the automobile from which he committed the offense indicated he was being fired upon at the time he was shooting. The Supreme Court found the application for a new trial was correctly denied, based on the criteria pronounced in St. v. Greeno, 135 M 580, 342 P2d 1052 (1959), in that defendant's attorney had observed the bullet hole during trial, that defendant should have discovered the evidence earlier, and that it was not so material as to probably produce a different result at trial. St. v. Cyr, 229 M 337, 746 P2d 120, 44 St. Rep. 2013 (1987).

Mental State Supported by Evidence:

Although defendant conceded only that he pointed a rifle at a third person, there was sufficient evidence for the jury to find that he had, with the requisite mental state, caused reasonable apprehension of serious bodily harm to two other persons by use of the weapon. St. v. Greenwell, 206 M 233, 670 P2d 79, 40 St. Rep. 1616 (1983).

There was sufficient evidence to establish that defendant knowingly attempted to inflict serious bodily injury or reasonable apprehension of serious bodily injury by shooting into a bar. Even conceding that defendant might not have been able to actually see anyone inside the bar does not negate the possibility that he acted knowingly. There was still the jury question of whether he was necessarily aware of a high probability that someone was in the bar at 4:30 in the afternoon. St. v. Gone, 179 M 271, 587 P2d 1291 (1978).

Aggravated Assault Conviction Sustained: Evidence was clearly sufficient to sustain an aggravated assault conviction, aggravated assault being defined as purposefully or knowingly causing bodily injury to another with a weapon, where defendant attempted to kiss the victim a few minutes after he met her, she first stated she was not interested and then asked him to leave, defendant threw her onto a couch and hit her on the head about five times with an ashtray weighing about 1½ pounds, made of glass, square of shape, and with sharp edges, and the victim had bruises and a cut about 1½ inches long requiring two stitches. St. v. Klemann, 194 M 117, 634 P2d 632, 38 St. Rep. 1627 (1981).

Slingshot Not Proven Capable of Serious Injury: When injury by use of a slingshot was alleged, the cumulative effect of the testimony offered at trial, taken in the light most favorable to the State, did not prove that the assault was committed with a weapon "capable of being used to produce death or serious bodily injury". St. v. Deshner, 175 M 175, 573 P2d 172 (1977).

SENTENCE

Fourfold Increase in Sentence Following Mistrial — Appearance and Reasonable Likelihood of Prosecutorial Vindictiveness: The defendant argued that the assault with a weapon charge that carries a maximum 20-year sentence should have been dismissed for prosecutorial vindictiveness when, during a previous trial that resulted in a mistrial, the defendant was charged with assault on a minor in violation of 45-5-212, which carries a maximum 5-year sentence. Following U.S. v. Goodwin, 457 U.S. 368, 102 S. Ct. 2485 (1982), the Supreme Court reversed and remanded. By rejecting the state's deal to plead guilty to the assault on a minor charge, the defendant exercised his right to proceed to trial. The threat of a fourfold increase in punishment for the assault with a weapon charge had the appearance of prosecutorial vindictiveness when after the mistrial the facts and witnesses were known, the state had discovered and assessed all of the information, and no new evidence or information came to light between the trials. St. v. Knowles, 2010 MT 186, 357 Mont. 272, 239 P.3d 129.

Punishment for Defendant's Refusal to Accept Responsibility or Show Remorse Not Considered Legal Sentence: Although steadfastly maintaining innocence, Cesnik was convicted of assaulting a fellow gun club member with a weapon. The sentencing court was dismayed at Cesnik's refusal to acknowledge the verdict and placed considerable weight on the fact that Cesnik refused to accept responsibility for the crime despite having been convicted. The court spent the bulk of the sentencing hearing commenting on the need to impose a sentence that would instill a sense of responsibility in Cesnik and then sentenced Cesnik to 10 years with 6 years suspended. On appeal, the Supreme Court reversed, holding that a sentencing court may not punish a defendant for failing to accept responsibility for a crime when the defendant has expressly maintained innocence and has a right to appeal the conviction. St. v. Cesnik, 2005 MT 257, 329 M 63, 122 P3d 456 (2005).

No Sentence Enhancement for Felony Assault With Weapon or Aggravated Burglary: Sentences on convictions for felony assault with a weapon and aggravated burglary are the only offenses that may not be enhanced under 46-18-221. St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002).

Failure to Adequately Inform Defendant of Maximum Possible Penalty — Reversible Error in Failing to Allow Withdrawal of Guilty Plea: After offering an Alford plea but prior to a change of plea hearing, Melone signed an acknowledgment of waiver of rights, stating that he understood the maximum possible penalty for felony assault (now assault with a weapon) and that his sentence could be enhanced for using a deadly weapon and because of his prior criminal record. At the change of plea hearing, the court informed Melone that the weapon enhancement penalty would not apply and that the maximum penalty for felony assault was "ten years in the Montana State Prison or a $50,000 fine". The court then allowed Melone to withdraw his guilty plea and enter the Alford plea. The court later sentenced Melone to 10 years in prison, plus 10 years to be served consecutively as a persistent offender. Melone moved for a hearing on the persistent offender enhancement and requested that he be allowed to withdraw his plea. The court rejected the motion to withdraw the plea, but vacated the sentence and granted a new sentencing hearing to allow Melone to present evidence regarding applicability of the persistent offender enhancement. Following the hearing, the court affirmed its original sentence. Melone appealed, contending that he was never informed that he could receive up to 100 years because of his potential status as a persistent offender and that, as a consequence, his plea was not knowing and voluntary. The Supreme Court agreed. Under 46-12-210 and 46-16-105, a defendant must be informed of the maximum penalty, including the effect of any penalty enhancement provision. The fact that the *prosecutor* informed Melone of a possible persistent offender penalty immediately prior to questioning did not satisfy the statutory requirement that the *court* inform the defendant of the maximum penalty. Melone's statements in the written acknowledgment were insufficient to satisfy the doubts of the Supreme Court that Melone was aware that his sentence could be enhanced by up to 100 years as a result of his plea. Rather, it appeared that Melone was under the mistaken belief that he risked sentence enhancement only if he proceeded to trial. Resolving their doubt that the plea was voluntary in favor of Melone, the Supreme Court reversed and remanded the case to District Court to allow Melone to withdraw the plea. St. v. Melone, 2000 MT 118, 299 M 442, 2 P3d 233, 57 St. Rep. 493 (2000).

Application of Weapon Enhancement Statute to Felony Conviction When Underlying Offense Requires Proof of Weapon Use Unconstitutional Under Montana Double Jeopardy Provision: When presented with the question of whether the weapon enhancement statute, 46-18-221, violates the double jeopardy provisions of Art. II, sec. 25, Mont. Const., the Supreme Court held that the Montana Constitution affords greater protection against multiple punishment than the federal constitution and that application of the weapon enhancement statute to felony convictions when the underlying offense requires proof of the use of a weapon violates Montana's constitutional double jeopardy provision. In the instant case, the only factor raising Guillaume's charge from misdemeanor assault to felony assault (now assault with a weapon) was the use of a weapon. The distinction between the two offenses and the different penalties imposed by each offense is the Legislature's way of punishing a criminal defendant for the use of a weapon in committing an assault. Thus, when the weapon enhancement statute was applied to the felony assault (now assault with a weapon) conviction, Guillaume was subjected to double punishment—once when the charge was elevated from misdemeanor assault to felony assault (now assault with a weapon) and again when the weapon enhancement statute was applied. This is exactly what double jeopardy was intended to prevent. The state's argument, that double jeopardy did not protect against multiple punishments for the same offense because that protection is not explicit in the constitutional language, failed because the fifth amendment to the U.S. Constitution has been held in N.C. v. Pearce, 393 US 711, 23 L Ed 2d 656, 89 S Ct 2072 (1969), to protect against multiple punishments for the same offense, and the Montana Constitution provides at least the same protection or greater. Further, the fact that legislative modification of the felony assault (now assault with a weapon) statute could achieve the same result as the present sentencing scheme did not mean that double jeopardy did not apply in this case. St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312, 56 St. Rep. 117 (1999), distinguishing St. v. Davison, 188 M 432, 614 P2d 489 (1980), and St. v. Zabawa, 279 M 307, 928 P2d 151, 53 St. Rep. 1162 (1996), distinguished in St. v. Park, 2001 MT 157, 306 M 98, 30 P3d 1062 (2001), and followed in St. v.

Brown, 1999 MT 31, 293 M 268, 975 P2d 321, 56 St. Rep. 139 (1999), St. v. Roullier, 1999 MT 37, 293 M 304, 977 P2d 970, 56 St. Rep. 157 (1999), St. v. Aguilar, 1999 MT 159, 295 M 133, 983 P2d 345, 56 St. Rep. 629 (1999), St. v. Smith, 2000 MT 57, 299 M 6, 997 P2d 768, 57 St. Rep. 272 (2000), St. v. Weitzel, 2000 MT 86, 299 M 192, 998 P2d 1154, 57 St. Rep. 368 (2000), and St. v. Gustafson, 2000 MT 364, 303 M 386, 15 P3d 944, 57 St. Rep. 1554 (2000). Aguilar was followed in St. v. Gustafson, 2000 MT 364, 303 M 386, 15 P3d 944, 57 St. Rep. 1554 (2000). Guillaume will not be retroactively applied to cases not pending on direct appeal or to cases that were final when that opinion was issued. St. v. Nichols, 1999 MT 212, 295 M 489, 986 P2d 1093, 56 St. Rep. 827 (1999). Nichols was overruled in St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002), to the extent that the Supreme Court refused to retroactively apply Guillaume.

Considerations for Application of Mandatory Minimum Sentence: Section 46-18-222(5), prior to amendment by sec. 1, Ch. 396, L. 1979, provided that although a loaded weapon was involved in the alleged assault, where no serious bodily injury was inflicted on the victim, the mandatory minimum sentence prescribed by law did not apply. It was therefore error to impose the minimum mandatory sentence. St. v. Nelson, 184 M 491, 603 P2d 1050 (1979).

45-5-214. Assault with bodily fluid.

Compiler's Comments

2021 Amendment: Chapter 339 in (1)(a)(iii) substituted "correctional facility as defined in 41-5-103" for "state youth correctional facility". Amendment effective October 1, 2021.

2019 Amendment: Chapter 220 in (4)(b) near middle substituted "emergency care provider" for "emergency medical technician". Amendment effective July 1, 2019.

2017 Amendment: Chapter 321 in (3) after "any violation of this section by a minor" deleted "unless the charge is filed in district court, in which case the district court has jurisdiction"; and made minor changes in style. Amendment effective July 1, 2017.

Applicability: Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

2005 Amendment: Chapter 292 in (1) after "purposely" deleted "or knowingly"; in (1)(a) at end inserted "or a health care provider, as defined in 50-4-504, including a health care provider performing emergency services, while the health care provider is acting in the course and scope of the health care provider's profession and occupation"; in (1)(a)(ii) at end inserted "or a health care facility"; in (1)(a)(iii) near end inserted "health care facility"; inserted (1)(b) concerning emergency responder; in (4)(b) inserted definition of emergency responder; and made minor changes in style. Amendment effective October 1, 2005.

Effective Date: This section is effective October 1, 1999.

Case Notes

Youth Court Jurisdiction Under 45-5-214 Not Exclusive Jurisdiction — District Court Jurisdiction Over Youth Offender May Be Established in Conjunction With Commission of Enumerated Felony. St. v. Pehringer, 2023 MT 146, 413 Mont. 122, 533 P.3d 657.

Sentence Under Plea Bargain Within Statutory Maximum Not Cruel and Unusual Punishment — Cruel and Unusual Punishment Claim Not Raised on Direct Appeal Barred in Postconviction Proceedings: In exchange for dismissal of a charge of assault with a bodily fluid, Basto entered a plea agreement to plead guilty of possession of a deadly weapon by a prisoner. Basto was sentenced to 5 years in prison and subsequently filed a timely petition for postconviction relief on grounds that the sentence was disproportionately severe when compared to the sentences of other defendants in the case, constituting cruel and unusual punishment. The state responded that there is no guarantee of proportionality under the constitutional prohibition against cruel and unusual punishment and that even if there were, Basto's sentence was still within statutory parameters. The Supreme Court agreed with the state. A sentence that is within maximum statutory guidelines does not violate the constitutional prohibition against cruel and unusual punishment. Basto received the sentence that he bargained for, and there was nothing in the plea agreement that indicated that Basto would receive the same sentence as the other defendants. Further, Basto failed to raise any cruel and unusual punishment argument on direct appeal, so the argument was barred in postconviction proceedings under 46-21-105. Basto v. St., 2004 MT 257, 323 M 80, 97 P3d 1113 (2004). See also St. v. DeSalvo, 273 M 343, 903 P2d 202 (1995), and St. v. Mingus, 2004 MT 24, 319 M 349, 84 P3d 658 (2004).

45-5-215. Strangulation of partner or family member.

Compiler's Comments

Effective Date: Section 16, Ch. 394, L. 2017, provided: "[This act] is effective on passage and approval." Approved May 19, 2017.

Case Notes

Hearsay Evidence Improperly Admitted — Hearsay Statements Repeated Prior Admissible In-Court Testimony — Right to Fair Trial by Impartial Jury Not Violated by Court's Refusal to Interview Juror Who Talked to Witness — Repeated Playing of Recorded Jail Phone Calls to Jury Encouraged by Defendant — Record Insufficient for Ineffective Assistance of Counsel — Cumulative Error Doctrine. St. v. Oliver, 2022 MT 104, 408 Mont. 519, 510 P.3d 1218.

Defense Counsel Mistake Questioning Victim on Prior Abuse — Other Evidence Sufficient for Conviction: The defendant was convicted of felony strangulation and on appeal claimed he was entitled to a new trial because his counsel opened the door to inadmissible evidence of prior violence in the relationship. The Supreme Court acknowledged that the defendant's counsel made a mistake by asking the victim directly whether physical violence in her relationship with the defendant was "the exception." However, to prevail on an ineffective assistance of counsel claim, a defendant must demonstrate, first, that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the sixth amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. As applied, the defendant failed to prove a reasonable probability that, without counsel's error, the result of the proceeding would have been different. Considering the undisputedly admissible evidence and the circumstances as a whole, the Supreme Court concluded that the defendant did not meet the Strickland prejudice standard. St. v. Dineen, 2020 MT 193, 400 Mont. 461, 469 P.3d 122, following Strickland v. Wash., 466 US 668 (1984).

Felony Strangulation — Sufficient Corroborating Evidence — Defendant's Own Actions Followed by Admission — Sufficient Evidence for Jury's Verdict: The trial evidence supported the defendant's conviction of felony strangulation by a jury's verdict. Every witness gave considerable additional evidence corroborating the victim's assault when she initially described it. Moreover, the defendant's own actions and statements afterward offered additional corroboration, including about 100 phone calls, numerous text messages, and an admission to the police officer that he was tired of listening to the victim yell and he covered her mouth for 10 to 15 seconds. St. v. Dineen, 2020 MT 193, 400 Mont. 461, 469 P.3d 122.

45-5-220. Stalking — exemption — penalty.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 444, L. 2023. Amendment effective October 1, 2023.

2019 Amendment: Chapter 255 deleted former (1) that read: "(1) A person commits the offense of stalking if the person purposely or knowingly causes another person substantial emotional distress or reasonable apprehension of bodily injury or death by repeatedly:

(a) following the stalked person; or

(b) harassing, threatening, or intimidating the stalked person, in person or by mail, electronic communication, as defined in 45-8-213, or any other action, device, or method"; inserted (1) revising the elements of stalking; in (2) inserted definitions of course of conduct, reasonable person, and substantial emotional distress; deleted former (3) that read: "(3) For the first offense, a person convicted of stalking shall be imprisoned in the county jail for a term not to exceed 1 year or fined an amount not to exceed $1,000, or both. For a second or subsequent offense or for a first offense against a victim who was under the protection of a restraining order directed at the offender, the offender shall be imprisoned in the state prison for a term not to exceed 5 years or fined an amount not to exceed $10,000, or both"; inserted (4) related to the penalty for the first offense and the exception; and made minor changes in style. Amendment effective May 2, 2019.

2003 Amendment: Chapter 344 in (1)(b) after "in person or by" deleted "phone, by" and after "mail" inserted "electronic communication, as defined in 45-8-213"; and made minor changes in style. Amendment effective October 1, 2003.

1995 Amendment: Chapter 350 in (4) substituted reference to Title 40, chapter 15, for reference to 40-4-121.

1993 Statement of Intent: The statement of intent attached to Ch. 292, L. 1993, provided: "The legislature finds that there are not adequate provisions in existing state law to protect stalking victims. Civil restraining orders are often difficult to obtain and alone are often inadequate to deter a stalker from committing an act of violence. It is the intent of the legislature to criminalize and punish the activities of people who repeatedly watch, follow, harass, or threaten someone when such activity causes the victim substantial emotional distress or reasonable apprehension of bodily injury or death. It is the intent of the legislature to give law enforcement personnel recourse before an attack takes place. Further, it is the intent of the legislature that the offense not apply to an otherwise lawful activity. In particular, the legislature does not want to place a chill on constitutionally protected rights, such as the right to demonstrate, to assemble, to picket, to peacefully protest, to distribute literature, and to lawfully communicate with persons in public places, or on the full exercise of freedom of speech and freedom of the press."

Effective Date: Section 6, Ch. 292, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 9, 1993.

Case Notes

Discovery Not Condoned Under Temporary Order of Protection Proceedings: After the petitioner obtained a temporary order of protection (TOP) against the respondent for stalking, the respondent proceeded to conduct extensive discovery. After the respondent was charged criminally for stalking, the petitioner moved to dismiss the TOP without prejudice, which the District Court granted. On appeal, the respondent argued that the petition should have been dismissed with prejudice as a discovery sanction against the petitioner for failing to appear at depositions. The Supreme Court disagreed, noting that the breadth of discovery allowed in the case was antithetical to the purpose of a TOP, and concluded that unless extraordinary circumstances exist, courts should not compel a petitioner in a stalking matter to be subjected to discovery by a respondent. Because the need for a TOP may arise in the future, the District Court did not abuse its discretion in dismissing the TOP without prejudice. Lear v. Jamrogowicz, 2013 MT 147, 370 Mont. 320, 303 P.3d 790, followed in Boushie v. Windsor, 2014 MT 153, 375 Mont. 301, 328 P.3d 631.

Jurisdiction Conferred on District Court When Acts of Stalking Committed Partly Within State: The District Court had jurisdiction over a petition for a temporary order of protection because the petition alleged that acts of stalking were committed partly within Montana. There is no statutory requirement under 40-15-102 or 45-5-220 that repeated acts of stalking must occur in Montana in order to confer jurisdiction on the District Court. Jordan v. Kalin, 2011 MT 142, 361 Mont. 50, 256 P.3d 909.

Presence of Physical Symptoms or Substantial Change in Victim's Life Not Necessary to Establish Substantial Emotional Distress Required to Uphold Conviction for Stalking: Whether a stalked person has suffered substantial emotional distress is determined by the reasonable person standard. St. v. Yuhas, 2010 MT 223, 358 Mont. 27, 243 P.3d 409.

Expenses Recoverable in Civil Action Properly Imposed as Restitution — Sufficient Evidence of Restitution Amount: Essig was convicted of stalking and sentenced to pay restitution of $5,582.03, including counseling expenses for the victim's children, blood testing for one of the children, and the cost of six memory cards for a digital camera. Essig contested the restitution and the amount, but the Supreme Court affirmed. Under 46-18-243, pecuniary loss includes general damages that a person could recover in a civil action against the defendant. In this case, the evidence showed that the expenses could have been recovered in a civil action by the victim and thus were legally imposed as restitution. The value of the various items was supported by the evidence and their inclusion as restitution was not erroneous. St. v. Essig, 2009 MT 340, 353 M 99, 218 P3d 838 (2009). However, see St. v. Johnson, 2011 MT 286, 362 Mont. 473, 235 P.3d 638 (declining to address a challenge to a restitution award when the defendant failed to object to the imposition of restitution at his sentencing hearing).

Prohibition Against Firearms as Condition of Deferred Sentence for Stalking Affirmed: As a condition of Essig's deferred sentence for stalking, the District Court prohibited Essig from owning, possessing, or being in control of firearms. Essig appealed the prohibition, but the Supreme Court affirmed. Several years earlier Essig was convicted of a concealed weapon violation, and considering the threatening nature of the stalking violation, the District Court did not abuse its discretion by restricting Essig's firearms use to obtain the objectives of rehabilitation and the protection of the victim and society. St. v. Essig, 2009 MT 340, 353 M 99, 218 P3d 838 (2009).

Failure to Enter Findings and Conclusions Regarding Continuation of Protective Order — Protective Order to Remain in Effect Pending Remand: Following the breakup of the parties, plaintiff obtained a temporary protective order in Justice's Court prohibiting contact by defendant. The court subsequently held a hearing on whether to make the protective order permanent and determined that good cause existed to continue the protective order. Defendant appealed to the

District Court, which determined that defendant caused plaintiff substantial emotional distress, if not reasonable apprehension of bodily injury, by repeatedly harassing, threatening, and intimidating plaintiff. However, the court did not enter findings of fact and conclusions of law as required by former Rule 52(a), M.R.Civ.P. (now superseded), precluding appellate review absent a complete order. The Supreme Court remanded for the required findings and conclusions, but left the protective order in place during remand. Edelen v. Bonamarte, 2007 MT 138, 337 M 407, 162 P3d 847 (2007).

Stalking Activities Not Related to Constitutionally Protected Rights: As part of a parenting plan, Adgerson was allowed to contact his former wife regarding decisions regarding their children. However, Adgerson also contacted her repeatedly regarding issues not related to the children in ways that frightened her and made her fear for her safety. On appeal, Adgerson contended that the stalking statute was unconstitutional because it interfered with his right to happiness, individual dignity, and family privacy and the right to parent his children. The Supreme Court noted that it was not constitutionally protected activity for which Adgerson was prosecuted, but rather the activity outside the scope of the parenting plan that was intended to intimidate his former wife. Adgerson's motion to dismiss on constitutional grounds was properly denied. St. v. Adgerson, 2003 MT 284, 318 M 22, 78 P3d 850 (2003).

Jury Instructions on Offense of Stalking Affirmed: Tichenor contended that two jury instructions confused the jury by including references to the fact that Tichenor had been ordered on two occasions to have no contact with the victim. The Supreme Court disagreed. The instructions did not diminish the state's burden of proving every element of the stalking offenses and, as a whole, fully and fairly instructed the jury on the applicable law without prejudicially affecting Tichenor's substantive rights. Tichenor's stalking convictions were affirmed. St. v. Tichenor, 2002 MT 311, 313 M 95, 60 P3d 454 (2002).

Pretrial Motion to Dismiss Burglary and Stalking Charges Properly Denied as Premature: Tichenor was charged with three counts of felony burglary and two counts of stalking for entering his girlfriend's apartment. Following arraignment, Tichenor moved to dismiss the charges for lack of sufficient evidence, claiming that he lacked the necessary intent required for the stalking charges and that he had license to enter the apartment, so the burglary charges were unfounded. The motion was denied, and Tichenor appealed. The Supreme Court noted that the questions of Tichenor's requisite intent and whether he was unlawfully in the apartment were questions for the jury. It would have been improper for the court to step into the jury's place and resolve the issues before trial, so the motion to dismiss was premature and properly dismissed. St. v. Tichenor, 2002 MT 311, 313 M 95, 60 P3d 454 (2002), distinguishing St. v. David, 266 M 365, 880 P2d 1308 (1994).

Second Count of Stalking Properly Charged as Felony: Tichenor was charged with two counts of stalking, one a misdemeanor and a second a felony. Tichenor contended that the felony count should have been dismissed and that there should have been only one count of misdemeanor stalking. The Supreme Court disagreed. The prosecutor properly exercised discretion in charging two counts because the evidence supported two distinct charges. Tichenor violated two separate orders to avoid contact with the victim, the second count also included a second victim, and there was a break in Tichenor's course of conduct. By identifying the second count as a felony, the state gave Tichenor notice that if convicted on both counts, the second count would be treated as a felony for sentencing purposes. Further, this section does not require that there be a prior conviction before an offender receives a felony sentence, but only that there be a second or subsequent offense. Tichenor's motion to dismiss the felony stalking count was not erroneously dismissed. St. v. Tichenor, 2002 MT 311, 313 M 95, 60 P3d 454 (2002).

Addition of New Stalking Incidents to Original Complaint — Acceptance of Substantive Amended Complaint on Day of Trial — New Trial Warranted: Kennedy was charged with a stalking incident on October 5, 1999, and was convicted in City Court. Kennedy appealed to District Court for a trial de novo. No new information or complaint was filed in District Court to reiterate the charge, but on the morning of trial, the City Attorney filed an amended complaint alleging six specific incidents of stalking, including the October 5 incident, that had occurred between December 1997 and October 1999. Kennedy moved to dismiss the stalking charge on grounds that the city failed to state the offense of repeated stalking behavior in its complaint, while the city contended that evidence of the other alleged criminal stalking offenses constituted a continuing course of conduct within the meaning of 45-1-205. The District Court denied Kennedy's motion to dismiss and allowed the amended complaint over Kennedy's objection. The trial proceeded as scheduled, and Kennedy was convicted. On appeal, the Supreme Court noted that an information must reasonably apprise the accused of the charges in order to provide an opportunity to prepare and present a defense and that alteration of a complaint is allowed at any time prior to verdict, but that acceptance of a substantive amendment is prohibited within 5 days of trial under 46-11-205. An amendment of form is one that charges the same crime, and the elements of the crime and the proof required remain the same. A substantive amendment alters the nature of the offense, the essential elements of the crime, the proofs, and the defenses. Here, the amended complaint alleging several new episodes of stalking, together with the allegation that all the incidents formed a continuous course of conduct dating back over 2 years, constituted a substantive change that added new proofs to the prosecution's burden and required Kennedy to prepare new defenses. The proposed substantive amendment was not timely filed at least 5 days before trial as required, nor did the District Court follow the procedures for motioning and rearraignment. Thus the District Court abused its discretion by accepting the amended complaint on the morning of trial, and the case was reversed for a new trial. Red Lodge v. Kennedy, 2002 MT 89, 309 M 330, 46 P3d 602 (2002).

Attempt to Contact Former Spouse Through Unauthorized Third Party — Order of Protection Violation: In 1993, a Missoula County District Court issued a permanent injunction, based on a stalking violation of this section, prohibiting Gillispie from contacting his former wife "by a third person, except by telephone or correspondence through her attorney of record". In 1997, Gillispie admitted contacting his former wife's mother in Missoula and was charged with and convicted of an order of protection violation pursuant to 45-5-626. Gillispie contended that the 1993 injunction was no longer in effect in 1997 because the 1997 version of 45-5-626 does not make criminal a violation of the permanent injunction imposed upon him in 1993. The Supreme Court disagreed. By broadening protections available to victims of partner and family assault in 1995 and clarifying the law in 1997, the Legislature did not intend to do away with any existing orders of protection already in place. The 1993 permanent order of protection remained in place in 1997, and Gillispie was properly charged and convicted when he admittedly violated the terms of the 1993 order. Missoula v. Gillispie, 1999 MT 268, 296 M 444, 989 P2d 401, 56 St. Rep. 1085 (1999).

Jurisdiction Over Municipal Court Protection Order: A Missoula County District Court issued a permanent injunction, based on a stalking violation of this section, prohibiting Gillispie from contacting his former wife "by a third person, except by telephone or correspondence through her attorney of record". Gillispie admitted contacting his former wife's mother in Missoula and was charged with and convicted in Municipal Court of an order of protection violation pursuant to 45-5-626. On appeal, Gillispie contended that the Municipal Court did not have jurisdiction over the offense. A Municipal Court has geographic jurisdiction over misdemeanors coextensive with the jurisdiction of Justices' Courts located in the same county. Although neither Gillispie nor the former wife was present in Missoula County at the time of the prohibited phone call, the former wife's mother received the call in Missoula County. Thus, the Municipal Court was vested with jurisdiction over the misdemeanor order of protection violation when the necessary result of Gillispie's third-party contact by telephone was committed within Missoula County. Missoula v. Gillispie, 1999 MT 268, 296 M 444, 989 P2d 401, 56 St. Rep. 1085 (1999).

"Repeatedly" Means "More Than Once" in Stalking Statute: McCarthy was convicted of stalking and, while incarcerated, twice tried to contact the victim by letter, but the victim did not read the letters. He was charged with stalking, second offense. At trial, he moved to dismiss on grounds that two instances of attempted contact by letter were insufficient to support a stalking conviction. Legislative intent and the common definition of "repeatedly" persuaded the Supreme Court that the state need demonstrate only more than one instance of harassment, intimidation, or threat. The motion to dismiss was properly denied. St. v. McCarthy, 1999 MT 99, 294 M 270, 980 P2d 629, 56 St. Rep. 418 (1999).

Stalking by Intimidation Through Third Party: Communication through a third party whom the stalker knows is likely to relay the fact of contact and hence produce the desired effect of harassing or intimidating the victim constitutes an action, device, or method of stalking in the context of this section. Despite the fact that the letter went unseen by the victim, McCarthy's purpose in sending the victim a letter through a third party was harassment, constituting sufficient evidence to sustain a conviction. St. v. McCarthy, 1999 MT 99, 294 M 270, 980 P2d 629, 56 St. Rep. 418 (1999).

Release of Stalker Unsafe — Continuing Custody Warranted: Following conviction on felony stalking charges, Cooney was diagnosed with an erotomanic type of delusional disorder that manifested itself in an obsession with delusional beliefs that another person was in love with him. The District Court found that Cooney continued to suffer from a mental disease or defect and that if released, Cooney was capable of again acting on his delusional beliefs, creating a substantial risk of serious bodily injury to his victim. Cooney's stalking activities over 8 years caused the victim a great deal of emotional anguish related to fears for her own and her family's safety and may have resulted in a diagnosable psychiatric condition for her. Coupled with the opinion of two experts that Cooney would likely resume stalking activities if released, the District Court did not err in committing Cooney to the continuing custody of the Department of Public Health and Human Services. St. v. Cooney, 1998 MT 208, 290 M 414, 963 P2d 1272, 55 St. Rep. 886 (1998).

No Appeal, Based on Constitutionality of Offense Charged, From Judgment of Not Guilty by Reason of Mental Disease or Defect: Kaplan was charged with seven counts of stalking under this section, arising from her repeated contact with her former martial arts instructor. Kaplan moved to dismiss the charges on grounds that this section is unconstitutional. Following a briefing, the motion was denied. By stipulation, Kaplan was subsequently found not guilty by reason of mental disease or defect. Because Kaplan was not convicted, there was no judgment of conviction from which to appeal. Therefore, the denial of her motion to dismiss, absent a judgment of conviction, was not itself an appealable order. The proper method of challenging a finding of mental disease or defect is found in 46-14-301 through 46-14-303. Appealing the constitutionality of the statute under which the person was charged is not an option. St. v. Kaplan, 275 M 108, 910 P2d 240, 53 St. Rep. 60 (1996), followed in St. v. Violette, 2009 MT 19, 349 M 81, 201 P3d 804 (2009).

Burden of Proof on Defendant to Prove Vagueness of Statute: Martel argued that the stalking statute is vague as applied to him and therefore unenforceable. The Supreme Court held that Martel never explained to the trial court why he felt his actions were constitutionally protected and that the burden of showing that his actions were protected or that the statute is unconstitutional was the defendant's. St. v. Martel, 273 M 143, 902 P2d 14, 52 St. Rep. 873 (1995), followed in St. v. Adgerson, 2003 MT 284, 318 M 22, 78 P3d 850 (2003).

Defendant to Show That Application of Alleged Overbroad Statute Could Adversely Affect Others: Martel alleged that the stalking statute is overbroad because it punishes activities protected by the first amendment as well as the activities that it was designed to punish. The Supreme Court held that Martel failed to provide any proof that the alleged overbreadth is both real and substantial, not just to himself, but to others as well. St. v. Martel, 273 M 143, 902 P2d 14, 52 St. Rep. 873 (1995), followed in St. v. Adgerson, 2003 MT 284, 318 M 22, 78 P3d 850 (2003).

Legislature's Failure to Define Terms — Statute Not Rendered Void: Martel argued that the stalking statute is vague on its face and therefore void because it does not define such terms as "repeatedly", "intimidating", and "reasonable apprehension". The Supreme Court held that the terms are of common usage and are presumed to be understandable by a reasonable person of average intelligence. Therefore, the statute presented the defendant with adequate notice of what conduct is proscribed. St. v. Martel, 273 M 143, 902 P2d 14, 52 St. Rep. 873 (1995), followed in St. v. Adgerson, 2003 MT 284, 318 M 22, 78 P3d 850 (2003).

State Not Required to Prove That Defendant's Activities Not Protected by Constitution: Martel argued that the stalking statute contains a clause stating that the statute does not apply to constitutionally protected activities and that the state had failed to prove that his activities were not constitutionally protected. The Supreme Court held that the Legislature had included the clause to reflect its intention that constitutionally protected activity be protected; however, it is not an element of the crime of stalking. St. v. Martel, 273 M 143, 902 P2d 14, 52 St. Rep. 873 (1995).

Proper Venue — Letters and Phone Call to Victim's Parents' Home: Cooney contended that alleged acts of stalking committed against Busby occurred in Missoula and in Colorado where Busby was living when the charges were brought. However, the state introduced numerous letters sent to Busby's parents' home in Powell County, as well as an offensive telephone message left there, to prove that the acts necessary to establish stalking occurred in Powell County. It was not error for the District Court to determine that proper venue was in Powell County. St. v. Cooney, 271 M 42, 894 P2d 303, 52 St. Rep. 320 (1995).

Stalking Statute Not Violative of Free Speech: Cooney asserted that this section, prohibiting stalking, deprived him of his freedom of speech because he did not threaten the victim but rather only expressed his love for her. The Supreme Court disagreed, finding that Cooney's conduct inflicted injury on the victim by causing substantial emotional distress and that the conduct lacked any social value. The trial court did not unconstitutionally apply this section in holding that Cooney's conduct was not a violation of the constitutional right to free speech. St. v. Cooney, 271 M 42, 894 P2d 303, 52 St. Rep. 320 (1995).

Sufficient Evidence of Victim's Distress and Stalker's Persistence to Warrant Stalking Conviction: Cooney contended that although his repeated expressions of affection toward Busby may have been in poor taste, there was no evidence that he caused anyone substantial emotional distress or reasonable apprehension of bodily harm sufficient to constitute stalking. However, testimony by the victim that she felt terrible and nervous, was afraid that Cooney would find her alone, and feared what he would do if he found her, coupled with Cooney's persistence despite being rejected, was a sufficient showing of emotional distress to support the guilty verdict. St. v. Cooney, 271 M 42, 894 P2d 303, 52 St. Rep. 320 (1995).

No Right to Instruction That Stalking Is Lesser Included Offense of Intimidation That Occurred Before Enactment of Stalking Statute: Ross argued that he was entitled to an instruction to the jury indicating that stalking is a lesser included offense of intimidation. The Supreme Court held that since 59 of his 62 letters to the victim were written prior to the enactment of the stalking statute, the essential part of his offense had occurred prior to the enactment of the statute and he was not entitled to the requested jury instruction. The Supreme Court also stated that the issue of whether stalking is a lesser included offense would have to be decided in a future case. St. v. Ross, 269 M 347, 889 P2d 161, 52 St. Rep. 22 (1995).

Denial of Motion for Leave to File Information Charging Felony Stalking — Court Discretion Properly Exercised: A motion for leave to file an information charging defendant with felony stalking was properly denied, in the court's discretion, because the affidavit failed to show that defendant followed, threatened, or intimidated the alleged victim or that defendant's purported stalking activities were the cause of the alleged victim's emotional distress or apprehension. St. v. David, 266 M 365, 880 P2d 1308, 51 St. Rep. 844 (1994).

45-5-221. Malicious intimidation or harassment relating to civil or human rights — penalty.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Case Notes

Hate Crime Statute Not Violative of Right to Free Speech: Nye and four other individuals affixed bumper stickers that read "NO I do not belong to CUT" on state and county road signs near Gardiner, Montana; placed stickers on several mailboxes in the area; and affixed stickers to property belonging to the Church Universal and Triumphant (CUT). Pursuant to a plea agreement, Nye pleaded guilty to a charge of malicious intimidation or harassment relating to civil or human rights under this section, reserving the right to appeal his prior motion to dismiss. On appeal, Nye claimed that this section violated his constitutional right to freedom of speech because his acts of distributing the bumper stickers were meant to convey his beliefs and ideas and were thus constitutionally protected. Nye pointed out that numerous other residents in the Gardiner area also have the stickers attached to their vehicles or in their windows as a protest against perceived objectionable CUT practices. Noting the distinction between content-neutral regulation and impermissible content-based regulation set out in St. v. Lilburn, 265 M 258, 875 P2d 1036 (1994), the Supreme Court held that the governmental purpose in this section is not to suppress the content of the communication but rather to prohibit conduct that violates other criminal laws. If Nye had limited his attack on CUT to the display of a bumper sticker on his car or the window of his home, that expression of speech would have been constitutionally protected. However, Nye lost his constitutional free speech protection when he coupled the message on the sticker with defacement of the property of others. Free speech does not include the right to cause substantial emotional distress by harassment or intimidation. St. v. Nye, 283 M 505, 943 P2d 96, 54 St. Rep. 766 (1997).

Section Not Unconstitutionally Overbroad: As set out in St. v. Ross, 269 M 347, 889 P2d 161 (1995), the claimed overbreadth of a statute must not only be real but must be substantial as well when judged in relation to the statute's plainly legitimate sweep, particularly when conduct and not merely speech is involved. In the present case, defendant failed to demonstrate how this section might infringe on another's constitutionally protected rights in a real or substantial way, especially when compared to the statute's wide variety of constitutional applications. The District Court did not err in holding that this section is not unconstitutionally overbroad on its face or as applied to defendant's conduct. St. v. Nye, 283 M 505, 943 P2d 96, 54 St. Rep. 766 (1997).

Section Not Unconstitutionally Vague: This section does not punish a defendant for offending or annoying another individual because of that individual's race, religion, or national origin. Rather, the statute punishes a defendant for assaults or damage to property when the conduct is done with the intent to annoy or offend another individual because of that individual's race, religion, or national origin. This section is not unconstitutionally vague on its face. St. v. Nye, 283 M 505, 943 P2d 96, 54 St. Rep. 766 (1997).

45-5-222. Sentence enhancement — offenses committed because of victim's race, creed, religion, color, national origin, or involvement in civil rights or human rights activities.

Compiler's Comments

2001 Amendment: Chapter 524 in (1) after "may" inserted "if the provisions of 46-1-401 have been complied with"; and made minor changes in style. Amendment effective May 1, 2001.

1999 Amendment: Chapter 395 in (1) near beginning after "who has" inserted "pleaded guilty or nolo contendere to or who has". Amendment effective October 1, 1999.

Preamble: The preamble to Ch. 570, L. 1989, provided: "WHEREAS, the Legislature finds and declares that it is the right of every person, regardless of race, creed, religion, color, national origin, or political or religious ideas, to be secure and protected from fear, intimidation, harassment, and physical harm caused by the activities of groups and individuals; and

WHEREAS, the Legislature recognizes the constitutional right of every citizen to harbor and express beliefs on any subject and to associate with others who share similar beliefs; and

WHEREAS, it is not the intent, by enactment of [this act] [45-5-221 and 45-5-222], to interfere with the exercise of rights protected by the Constitution of the State of Montana or the United States; and

WHEREAS, the Legislature further recognizes and finds that the advocacy of unlawful acts by groups or individuals against other persons or groups for the purpose of inciting and provoking damage to property and bodily injury or death to persons is not constitutionally protected, poses a threat to public order and safety, and should be subject to criminal sanctions."

Severability: Section 4, Ch. 570, L. 1989, was a severability clause.

45-5-223. Surreptitious visual observation or recordation — place of residence — public place — exceptions.

Compiler's Comments

2015 Amendment: Chapter 75 in (1) near middle after "loiters" inserted "in person or by means of a remote electronic device within or"; in (1)(a) at end inserted "without the occupant's knowledge"; in (1)(b) near beginning substituted "electronic device" for "electronic or mechanical recording device", inserted "observing or", and at end inserted "without the occupant's knowledge"; in (2) substituted current language concerning the offense of surreptitious visual observation or recordation in public for "An owner, manager, or employee of a business or a landlord who knowingly surreptitiously records a visual image of a person in a restroom, washroom, shower, bedroom, fitting room, or other room used by a customer, guest, tenant, or member of the public to, with a reasonable expectation of privacy, change or try on clothes, bathe, perform intimate bodily functions, or appear nude or partially nude or in underclothes commits the offense of surreptitious visual recordation in a public establishment"; in (4) near beginning after "convicted of" substituted "an offense under subsection (1) or (2)" for "the offense of surreptitious visual observation or recordation in a place of residence"; deleted former (4)(b) that read: "(b) A person convicted of the offense of surreptitious visual recordation in a public establishment shall be fined an amount not to exceed $1,000 or incarcerated for a term not to exceed 6 months, or both, if the victim was an adult and shall be fined an amount not to exceed $5,000 or incarcerated for a term not to exceed 2 years, or both, if the victim was a minor"; and made minor changes in style. Amendment effective February 27, 2015.

Coordination Instruction: Section 3, Ch. 303, L. 1997, was a coordination instruction that provided that if both Ch. 62, Ch. 303 and L. 1997, became law and if Ch. 62 contained a section criminalizing the surreptitious taking of a person's picture in certain rooms in a business establishment, which it did, then that section of Ch. 62 and section 1 of Ch. 303 were to be combined and codified together as this section. Section 1 of Ch. 303 criminalized the surreptitious visual observation or recordation of a person in a place of residence.

Effective Date: Section 4, Ch. 303, L. 1997, provided that this section is effective April 17, 1997.

45-5-231. Definitions.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 23, Ch. 713, L. 2023. Amendment effective October 1, 2023.

Effective Date: This section is effective October 1, 2001.

45-5-232. Offender intervention counseling referral.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

45-5-233. Report to court or probation officer.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

45-5-234. Offender intervention counseling confidentiality.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

Part 3
Kidnapping

45-5-301. Unlawful restraint.

Criminal Law Commission Comments

Source: New and M.P.C., 1962, § 212.3.

This section is intended to deal with the problem of false imprisonment; however, unlawful restraint is a more accurate name for the offense which embodies restraining another without authority of law. The principal distinctions between this section and the old code provisions of R.C.M. 1947, section 94-3576 are the inclusion of the requirements of knowledge and purpose, and the substantial reduction in penalty.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: Under this part of Chapter 5, the kidnapping related offenses are arranged in a hierarchy with overlapping provisions to allow a comprehensive treatment of these crimes. Unlawful restraint is the lowest form of interference with the liberty of another. Under this section, which replaces the former crime of False Imprisonment, any intentional interference with another's freedom of movement without lawful authority, even a temporary detention, by which the victim is deprived of his liberty is prohibited. Because false imprisonment is more commonly thought of as a tort, the offense has been renamed. Additional changes from the former law include the use of the mental states "knowingly" and "purposely" (MCA, 45-2-101) for a previously undefined mental state and a reduction in penalty. The phrase "without lawful authority" is included to prevent peace officers from being punished for performing their official duties. The language for this section has been adopted in part from the Model Penal Code.

Case Notes

Prior Inconsistent Statements and Other Evidence Sufficient for Proof of Burglary: A victim's statements just after the incident and independent, reliable evidence corroborating those statements were sufficient to establish burglary and the underlying offense, unlawful restraint, even though the victim later retracted those statements. St. v. Torres, 2013 MT 101, 369 Mont. 516, 299 P.3d 804.

Failure to Give Jury Instruction on Lesser Included Offense of Unlawful Restraint in Aggravated Kidnapping Trial — Reversible Error: In Meyer's aggravated kidnapping trial, Meyer requested a jury instruction allowing the jury to consider unlawful restraint as a lesser included offense, but the instruction was denied. The Supreme Court noted that what constitutes isolation in terms of kidnapping and unlawful restraint is an issue for the trier of fact to decide, as long as there is some basis in the evidence for its conclusion. The jury as trier of fact in this case did not receive full and fair instructions on the applicable law and thus was not allowed to consider whether Meyer was guilty of the lesser included offense of unlawful restraint in light of the evidence. The judgment was reversed, and the case was remanded for a new trial. St. v. Meyer, 2005 MT 215, 328 M 247, 119 P3d 1214 (2005).

Voluntary Act Precluding False Imprisonment Claim — Lack of Underlying Tort Precluding Civil Conspiracy Claim: A woman with breast cancer was advised by Hughes, a radiation oncologist, to undergo therapeutic radiology for the disease. Prior to radiation, an oncologist makes specific marks on the affected area to identify where to direct radiation beams. However, in addition to the marks directing radiation beams, Hughes drew a "smiley face" on the woman's breast by drawing two dime-sized "eyes" above the nipple of the breast and outlining the scar from the breast biopsy for the "mouth". The woman complained to hospital administration, and an ad hoc investigative committee recommended that Hughes receive a letter of reprimand, have a term of probation, have a chaperone while working, and be evaluated by the Montana Professional Assistance Program (MPAP). Hughes agreed to a medical, psychiatric, or chemical dependency evaluation and voluntarily enrolled in two such programs in Texas and Kansas. After release, Hughes signed an aftercare agreement. Hughes then brought suit against the individual members of the ad hoc committee and MPAP, alleging false imprisonment, civil conspiracy, breach of contract, and civil right violations related to the disciplinary actions. Summary judgment was granted to defendants in federal District Court on the civil rights claims, and the remaining charges were remanded to state District Court, where they were also summarily dismissed. Hughes appealed. The Supreme Court affirmed dismissal of the false imprisonment claim because Hughes voluntarily signed the treatment agreements and submitted to evaluation. Two elements of false imprisonment are the restraint of an individual against the individual's will and the unlawfulness of that restraint, but because no material fact existed as to the voluntariness of Hughes's action, the false imprisonment claim failed as a matter of law. Further, to sustain a civil conspiracy claim, plaintiff must allege a tort committed by one of the conspirators, but because the false imprisonment claim failed, there was no underlying tort action to form a basis for civil conspiracy, so that claim failed as well. Hughes v. Pullman, 2001 MT 216, 306 M 420, 36 P3d 339 (2001).

Evidence of Aggravated Kidnapping Precluding Instruction of Unlawful Restraint and Kidnapping: Defendant charged with aggravated kidnapping contended the jury should have been instructed on the lesser included offenses of unlawful restraint and kidnapping. Defendant was entitled to an instruction on unlawful restraint only if there was evidence that the victim was not restrained by secreting him or by using force; however, there was no evidence that the restraint was not accompanied by use of force. Defendant was entitled to an instruction on kidnapping only if there was evidence that no purpose to inflict bodily injury or terrorize the victim existed; however, there was no evidence of a kidnapping without the purpose to injure or terrorize. Defendant was not entitled to instructions on the lesser included offenses absent reasonable support in the evidence. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

No Prejudicial Error in Failure to Give Instruction on Lesser Included Offenses: The Supreme Court ruled that the defendant, accused of aggravated kidnapping, was not entitled to an instruction on the lesser included offenses of unlawful restraint and kidnapping because no evidence existed that would reasonably support the lesser included offenses. St. v. Kills On Top, 241 M 378, 787 P2d 336, 47 St. Rep. 366 (1990).

Not Specific Intent Crime: The Lemmons were divorced after 20 years of marriage. Leroy was seeing Donna Myers, and Koralyn was seeing John Sweeting. Myers and Sweeting had just ended a personal and business relationship. Sweeting asked Koralyn to get a briefcase out of Leroy's truck. The briefcase actually belonged to Myers. Leroy and Myers returned to the truck and found the briefcase missing. They concluded Koralyn had taken it since the truck was not broken into. Leroy and Myers went to Koralyn's home. She heard them drive up and put a gun in the waistband of her pants. Leroy and Koralyn fought, and Leroy struck her in the head with the gun. Leroy and Myers put Koralyn on the floor of the truck and went to the Sheriff's department. The Sheriff was not immediately available, so Leroy and Myers left, with Koralyn still on the floor of the truck, to find Sweeting. A high speed chase ensued in which the cars rammed together and gunshots were exchanged. The chase ended when Leroy's transmission caught fire. The charges arising from the pursuit were dropped. Leroy was charged with aggravated assault and kidnapping. He was convicted of assault and unlawful restraint. Leroy contended the evidence of intent was insufficient. The court held that the prosecution did not have to prove specific intent. The necessary elements for "mens rea" are embodied in "purposely" and "knowingly". Aggravated assault is not a specific intent crime. The prosecution was required to show only that he acted purposely or knowingly. St. v. Lemmon, 214 M 121, 692 P2d 455, 41 St. Rep. 2359 (1984).

Official Restraint:

In an action for false imprisonment brought by plaintiff against a Sheriff and the surety on his official bond based on unnecessary delay in taking plaintiff before a magistrate, it was necessary that the plaintiff prove that a magistrate was available on the particular day when the false imprisonment allegedly occurred. Rounds v. Bucher, 137 M 39, 349 P2d 1026 (1960).

Where, after an officer obtained the custody of another by a privileged arrest, he failed to use due diligence in taking him promptly before a proper court or magistrate, his misconduct made him liable to the person arrested only for such harm as was caused thereby but not for the arrest or for keeping him in custody prior to such misconduct; false imprisonment as defined by 94-3576, R.C.M. 1947 (the forerunner of this section) did not exist until the moment the imprisonment became unlawful. Cline v. Tait, 113 M 475, 129 P2d 89 (1942).

Warden could not be held liable for failure to allow good behavior time to convict and thus detaining him unlawfully when the prison board had not awarded the good behavior time. Stephens v. Conley, 48 M 352, 138 P 189 (1914).

Release of Civil Claim: Where plaintiff compromised an action against the Sheriff and his surety for false imprisonment and executed a release of defendants captioned "release in full of all claims" and reciting that plaintiff accepted said sum as "complete compensation for all injuries sustained in connection with" the matters set forth in the complaint, a subsequent false imprisonment action against the County Attorney was properly dismissed on motion for judgment on the pleadings, nothing appearing in the release reserving plaintiff's right to proceed against the County Attorney. Beedle v. Carolan, 115 M 587, 148 P2d 559 (1944).

Civil Liability:

Section 94-3576, R.C.M. 1947 (the forerunner of this section), which defined the crime of false imprisonment, defined also the civil wrong resulting from it; therefore, in order to make out a case for damages, the plaintiff had to allege a violation of his personal liberty and that such violation was without legal justification. Slifer v. Yorath, 52 M 129, 155 P 1113 (1916).

False imprisonment was treated as a tort and also as a crime under 94-3576, R.C.M. 1947 (the forerunner of this section), the definition being the same in either case. The liability of a wrongdoer did not depend primarily upon his mental attitude. Kroeger v. Passmore, 36 M 504, 93 P 805 (1908).

45-5-302. Kidnapping.

Criminal Law Commission Comments

Source: New.

Both the Illinois Criminal Code and the Model Penal Code kidnaping provisions are marked by great detail in defining the offense. Under the Illinois Code, kidnaping may be either simple (misdemeanor or felony) or aggravated (felony), and there is a third offense entitled unlawful restraint (misdemeanor). The Model Penal Code contemplates offenses called kidnaping, felonious restraint, false imprisonment, and interference with custody. A detailed statement of the circumstances required for each offense is given in each provision.

It is possible that such a detailed treatment of the kidnaping provisions will lead to difficulties in interpreting ambiguous conduct and relating it to the stated offenses. Too often conduct which seems criminal escapes the precise language of the statutes. The commission concluded that a carte blanche approach whereby the offenses of kidnaping and unlawful restraint are given broad definition was warranted. Any leniency justified by the character of such ambiguous conduct could best be considered and given effect in the sentence imposed. If this approach is utilized the range of punishment that may be imposed should be substantial.

It should be noted that subsection (1) conforms with current Montana law, that a showing of actual physical violence or threat of personal injury are not required to prove the force necessary to establish the crime. (St. v. Walker, 139 M 276, 362 P2d 548 (1961)).

Compiler's Comments

1995 Amendment: Chapter 482 in version effective July 1, 1997, in (2), near end, inserted reference to 46-18-219; and made minor changes in style.

Coordination Instruction — Effective Dates: Section 21, Ch. 482, L. 1995, provided: "(1) If House Bill No. 357 and [this act] [Senate Bill No. 66] are both passed and approved:

(a) [sections 1 through 18] of [this act] are effective July 1, 1997; and

(b) the sentencing commission shall include recommendations for implementing the public policy contained in [sections 1 through 18] of [this act].

(2) [Sections 19, 20, and this section] [enacted as codification and coordination instructions] are effective July 1, 1995.

(3) If House Bill No. 357 is not passed and approved, then this section is void." House Bill No. 357 was approved March 31, 1995, as Ch. 306, L. 1995. Therefore, the amendments to 45-5-302, enacted as sec. 5 of Senate Bill No. 66, are effective July 1, 1997.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: In drafting this section on kidnapping, the Criminal Law Commission examined the approaches which have been taken by other jurisdictions. Most codes, such as the Illinois Criminal Code and the Model Penal Code, contain several categories of kidnapping-related offenses each pertaining to carefully detailed statements of the circumstances required for each offense. Such a detailed approach, however, leads to difficulty in treating cases in which classic kidnapping has not occurred, but in which the abduction has certainly been criminal in nature. Consequently the offenses of Kidnapping and Unlawful Restraint have been given broad definitions designed to encompass any conceivable type of abduction or unlawful detention. Where the character of the conduct is thought too ambiguous or less culpable, leniency may be expressed in the imposition of sentence, which is given a broad range under the new Code. One problem that this section and the following provision on Aggravated Kidnapping seek to solve is the treatment of prisoners who hold hostages during escape or for coercive purposes. Because former law required the victim to be "secretly confined" before a kidnapping charge was possible, the courts were forced to use tortuous logic to apply the kidnapping statute to such conduct. The Legislature reacted by passing R.C.M. 1947, § 94-2604 providing a separate crime for such conduct. The final clause of subsection (1), therefore, covers such "hostage" situations where the victim is openly held by providing criminal liability whenever force or threat of force has occurred. It should be noted that there is an overlap between this subsection and subsection (a) of the provision on aggravated kidnapping to allow the punishment of offenders who use hostages under different types of factual situations and degrees of culpability. The clause "holding him in a place of isolation" in this section on kidnapping conforms with prior law by providing that a showing of actual violence or threat of injury is not required when the victim has been isolated. See St. v. Walker, 139 M 276, 362 P2d 548 (1961). Attention is directed to the difference between kidnapping which requires either isolation or use of forceful restraint and Unlawful Restraint (MCA, 45-5-301) which is a lesser offense requiring only unlawful detention.

The 1977 amendment has imposed a mandatory minimum sentence of not less than 2 years.

Case Notes

No Right to Be Informed of Possibility of Lesser Included Offense When No Such Possibility Exists: Defendant was charged with felony attempted sexual assault, but ultimately pleaded nolo contendere to a charge of felony attempted kidnapping. After being sentenced to 10 years in prison, defendant appealed the conviction on grounds that the trial court erred by failing to inform defendant that he could have been convicted on a lesser charge of unlawful restraint and by failing to allow withdrawal of the guilty plea. However, only those lesser included offenses applicable to the charge of felony attempted sexual assault were relevant to defendant's decision to plead nolo contendere. The court and the state could not be faulted for failing to inform defendant of any lesser included offense that was not relevant to defendant's decision, and defendant had no right to be informed of the possibility of submitting a lesser included offense instruction to the jury when no such possibility existed. Absent anything in the record that an omission, misinformation, or mental incapacity hindered defendant's ability to enter knowingly and intelligently into a plea agreement, the trial court did not err in holding that defendant failed to establish good cause to withdraw the plea, and the Supreme Court affirmed. St. v. Iafornaro, 2007 MT 77, 336 M 489, 155 P3d 1238 (2007).

Sufficient Evidence of Criminal Accountability — Motion for Directed Verdict on Grounds of Insufficient Evidence to Go to Jury Properly Denied: High Elk contended that there was insufficient evidence of accountability for assault with a weapon to send the case to the jury and moved for a directed verdict. The District Court denied the motion, and on appeal, the Supreme Court considered the record and affirmed. Evidence showed that High Elk was angry with the victim and argued with and punched the victim, preventing the victim's exit from a vehicle, at which time a friend of High Elk undisputedly stabbed the victim several times from the back seat of the vehicle, after which High Elk asked, "Did you get him?" A rational trier of fact could have found High Elk guilty of the elements of accountability, and the District Court did not err in allowing the case to go to the jury. St. v. High Elk, 2006 MT 6, 330 M 259, 127 P3d 432 (2006).

Circumstantial Evidence Establishing Defendant's Presence at Crime Scene When Victim Only Other Witness Sufficient for Conviction: Southern was charged with two counts of kidnapping, one count of burglary, one count of theft, and five counts of sexual intercourse without consent. Southern contended that the only evidence connecting him to the crimes, which included DNA and other physical evidence, was circumstantial and that even though the evidence placed him at the crime scene, it did not establish that he committed the crimes. The Supreme Court noted that under State ex rel. Murphy v. McKinnon, 171 M 120, 556 P2d 906 (1976), presence at a crime scene is insufficient, in itself, to prove criminal liability. However, this evidence not only placed Southern at the crime scene, but placed him there when the only people present were the victim and her attacker. Although the evidence was circumstantial, it was of sufficient quality and quantity that a reasonable jury could find Southern guilty. Judgment was affirmed. St. v.

Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999). The Southern standard that circumstantial evidence by itself was sufficient to sustain a conviction when the evidence was of sufficient quality and quantity that a reasonable jury could find defendant guilty was applied to a drug possession case in St. v. Hill, 2008 MT 260, 345 M 95, 189 P3d 1201 (2008).

Delay of One Hundred Seven Days Before Filing Information — No Due Process Violation: On June 6, 1990, Beatty reported to the Sheriff and County Attorney that he had been kidnapped, beaten, and intimidated 2 days before. Following an investigation by the Sheriff, defendant Flesch was arrested on October 5, 1990. At a hearing on April 8, 1991, defendant's wife and a casino employee testified that although they could not be certain, both thought defendant was in the Gold Nugget Casino the night of the kidnapping. At the hearing and later at trial, Flesch argued that he was deprived of due process because the delayed arrest meant that his witnesses could not positively testify about his whereabouts the night of the kidnapping. The Supreme Court stated, citing St. v. Krinitt, 251 M 28, 823 P2d 848, 48 St. Rep. 1088 (1991), that Flesch was not deprived of due process because he was not prejudiced by the 107-day delay; his alibi defense, including his wife's later definite statement that defendant was at home the night of the kidnapping, was submitted to the jury, and it failed. Even if defendant was prejudiced, any prejudice must be balanced with the necessity for a reasonable time to investigate the crime. Because the information was filed within the applicable statute of limitations and with less delay than found in Krinitt, the Supreme Court found no due process violation. St. v. Flesch, 254 M 529, 839 P2d 1270, 49 St. Rep. 813 (1992).

Evidence of Aggravated Kidnapping Precluding Instruction of Unlawful Restraint and Kidnapping: Defendant charged with aggravated kidnapping contended the jury should have been instructed on the lesser included offenses of unlawful restraint and kidnapping. Defendant was entitled to an instruction on unlawful restraint only if there was evidence that the victim was not restrained by secreting him or by using force; however, there was no evidence that the restraint was not accompanied by use of force. Defendant was entitled to an instruction on kidnapping only if there was evidence that no purpose to inflict bodily injury or terrorize the victim existed; however, there was no evidence of a kidnapping without the purpose to injure or terrorize. Defendant was not entitled to instructions on the lesser included offenses absent reasonable support in the evidence. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

No Prejudicial Error in Failure to Give Instruction on Lesser Included Offenses: The Supreme Court ruled that the defendant, accused of aggravated kidnapping, was not entitled to an instruction on the lesser included offenses of unlawful restraint and kidnapping because no evidence existed that would reasonably support the lesser included offenses. St. v. Kills On Top, 241 M 378, 787 P2d 336, 47 St. Rep. 366 (1990).

Codefendants — Disparate Sentences — Suspension Versus Twenty Years: Defendant, a 28-year-old male with a history of involvement with weapons, and his codefendant, a 58-year-old alcoholic with a wooden leg and no record of violence, were each convicted of two counts of kidnapping and two counts of assault in regard to two girls 12 and 14 years old. Defendant was sentenced to two consecutive 10-year prison sentences on the kidnapping convictions and to 6 months on each assault charge, to run concurrently with each other and with the kidnapping sentences. Codefendant, defendant's natural father, received a 10-year sentence, all of which was suspended on the condition that he commit himself to alcohol treatment at a state institution and remain a law-abiding citizen. The Supreme Court ruled that there was no denial of equal protection as claimed by defendant. St. v. Herrera, 197 M 463, 643 P2d 588, 39 St. Rep. 731 (1982).

Elements of Offense — Apprehension of Injury Not an Element: A showing of reasonable apprehension of serious bodily injury is not required to sustain a kidnapping conviction. St. v. Herrera, 197 M 463, 643 P2d 588, 39 St. Rep. 731 (1982).

Use of Force — Dragging, Prodding, and Confining Victims: Defendant grabbed 12- and 14-year-old girls as they attempted to run after a voice in nearby bushes said, "Come here, sweethearts". Defendant dragged the girls to codefendant's house while codefendant prodded the girls with his cane. The girls were then forced to sit in chairs in isolation in codefendant's house. The use or threatened use of force required by this section as an essential element of kidnapping was well established by the evidence. St. v. Herrera, 197 M 463, 643 P2d 588, 39 St. Rep. 731 (1982).

Pleadings:

Information charging kidnapping "with intent" to confine clearly charged violation of 94-2602, R.C.M. 1947 (since repealed), rather than 94-2601, R.C.M. 1947 (since repealed), which required that defendant "attempt or cause" confinement. St. v. Corliss, 150 M 40, 430 P2d 632 (1967), certiorari denied St. v. Corliss, 390 US 961, 88 S Ct 1063 (1968).

An information under 94-2602, R.C.M. 1947 (since repealed), was sufficient if it contained a statement of facts constituting the offense charged in ordinary and concise language so as to enable a person of common understanding to know what was intended. St. v. Randall, 137 M 534, 353 P2d 1054, 100 ALR 2d 171 (1960).

Force or Threat:

On the trial of defendant charged with kidnapping a prison guard, a showing of actual physical violence or threat of personal injury was not required to prove the force necessary to establish the crime. St. v. Walker, 139 M 276, 362 P2d 548 (1961).

Defendant was guilty of confining prison guard secretly against his will where the evidence showed that defendant, an inmate of the state prison, walked behind prison guard with a knife, after another inmate had disarmed the guard, until the inmates had placed the guard in isolation. St. v. Frodsham, 139 M 222, 362 P2d 413 (1961).

45-5-303. Aggravated kidnapping.

Criminal Law Commission Comments

Source: M.P.C., 1962, § 212.1.

This section is derived almost exclusively from the Model Penal Code, section 212.1, and is generally intended to answer the question of when the crime of kidnaping should be punished by death. The section proposes to maximize the kidnaper's incentive to return the victim alive, by making the capital penalty apply only when the victim is not released, alive, in a safe place and not suffering from serious bodily injury.

Compiler's Comments

1995 Amendment: Chapter 482 in version effective July 1, 1997, in (2), near beginning, inserted reference to 46-18-219; and made minor changes in style.

Coordination Instruction — Effective Dates: Section 21, Ch. 482, L. 1995, provided: "(1) If House Bill No. 357 and [this act] [Senate Bill No. 66] are both passed and approved:

(a) [sections 1 through 18] of [this act] are effective July 1, 1997; and

(b) the sentencing commission shall include recommendations for implementing the public policy contained in [sections 1 through 18] of [this act].

(2) [Sections 19, 20, and this section] [enacted as codification and coordination instructions] are effective July 1, 1995.

(3) If House Bill No. 357 is not passed and approved, then this section is void." House Bill No. 357 was approved March 31, 1995, as Ch. 306, L. 1995. Therefore, the amendments to 45-5-303, enacted as sec. 6 of Senate Bill No. 66, are effective July 1, 1997.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section on Aggravated Kidnapping enumerates those situations when the crime of kidnapping may be punished by lengthy prison sentences or by death. The crimes of Kidnapping and Unlawful Restraint, supra, are the lesser included offenses within the Kidnapping hierarchy and provide flexibility in punishing behavior which is often factually diverse and difficult to categorize. This section covers both the classic form of kidnapping wherein the victim is abducted and held for ransom as well as the increasingly common situation where a person is held against his will to coerce the accomplishment of some illegal act.

Subsection (2) seeks to maximize the kidnapper's incentive to return the victim alive by providing a much more lenient sentence if the victim is released alive, in a safe place, and not suffering from serious bodily injury. If these conditions are not met the maximum penalty may be imposed—death if the victim has been killed or up to 100 years imprisonment if death has not occurred.

This section was amended twice in 1977. The first amendment substituted "death or life imprisonment as provided in 95-2206.6 through 95-2206.15" in subsection (2) for "death as provided in section 94-5-304". The second 1977 amendment inserted "except as provided in 95-2206.18" at the beginning of subsection (2); substituted "a term of not less than two years or more than" in the middle and at the end of subsection (2) for "any term not to exceed", thereby enacting a mandatory minimum sentence of 2 years imprisonment.

Case Notes

Not Facially Unconstitutional for Judge Rather Than Jury to Determine Factors That Mitigate Sentence. St. v. Pine, 2023 MT 172, 413 Mont. 254, __ P.3d __, following St. v. Stewart, 175 Mont. 286, 573 P.2d 1138 (1977).

Sufficient Circumstantial Evidence of Use of Physical Force to Warrant Sending Aggravated Kidnapping Charge to Jury: At the close of the state's case, Rosling moved for dismissal of an aggravated kidnapping charge on grounds that the evidence was insufficient to send the case to the jury. The motion was denied, and on appeal, the Supreme Court affirmed. Rosling first contended that the state failed to prove that Rosling restrained the victim by secreting or holding the victim in a place of isolation. However, the crime may also be proved by evidence that the defendant used or threatened to use physical force. In this case, the evidence, although circumstantial, indicated that the victim was accosted and terrorized in the bedroom, strangled, and then dragged or forced into the bathroom where she was stabbed 67 times and cut 28 times, causing her death. This evidence was sufficient to show that Rosling used or threatened to use physical force. Rosling also asserted that the act of homicide does not itself constitute restraint for purposes of kidnapping. However, the factual bases for the deliberate homicide and aggravated kidnapping charges were not identical or inseparable, but were entirely distinct, so there were grounds for charging both deliberate homicide and aggravated kidnapping in the context of the same crime. Thus, the trial court did not err in denying Rosling's motion to dismiss on grounds of insufficient evidence. St. v. Rosling, 2008 MT 62, 342 M 1, 180 P3d 1102 (2008).

Failure to Give Jury Instruction on Lesser Included Offense of Unlawful Restraint in Aggravated Kidnapping Trial — Reversible Error: In Meyer's aggravated kidnapping trial, Meyer requested a jury instruction allowing the jury to consider unlawful restraint as a lesser included offense, but the instruction was denied. The Supreme Court noted that what constitutes isolation in terms of kidnapping and unlawful restraint is an issue for the trier of fact to decide, as long as there is some basis in the evidence for its conclusion. The jury as trier of fact in this case did not receive full and fair instructions on the applicable law and thus was not allowed to consider whether Meyer was guilty of the lesser included offense of unlawful restraint in light of the evidence. The judgment was reversed, and the case was remanded for a new trial. St. v. Meyer, 2005 MT 215, 328 M 247, 119 P3d 1214 (2005).

Conflicting Testimony Regarding Defendant's Involvement in Assault With Weapon and Aggravated Kidnapping — Trial Court to Determine Witness Credibility and Weight of Testimony: In Toulouse's trial for assault with a weapon and aggravated kidnapping, the District Court heard conflicting testimony from 14 witnesses concerning Toulouse's involvement. Following conviction, Toulouse contended that the state failed to present sufficient evidence of guilt beyond a reasonable doubt. The Supreme Court was satisfied that the District Court heard all the conflicting stories, waded through the evidence, and determined that Toulouse was guilty. It was within the District Court's province as fact finder to assess the credibility of all the witnesses and the weight to be afforded their testimony, and the Supreme Court declined to disturb the District Court's findings, conclusions, and verdict. St. v. Toulouse, 2005 MT 166, 327 M 467, 115 P3d 197 (2005).

Maximum Sentence Inappropriate if Kidnap Victim Safely Released Unharmed — Remand for Resentencing: Nelson was convicted of aggravated kidnapping and sentenced to a 20-year sentence with 10 years suspended. However, the victim testified that she was released voluntarily in her own home, physically unharmed. This section provides that if a defendant voluntarily releases the victim alive in a safe place with no serious bodily injury, the term of imprisonment must be not less than 2 years or more than 10 years. Nelson's sentence was thus inappropriate, and the case was remanded for resentencing to no more than the 10-year maximum. St. v. Nelson, 2002 MT 122, 310 M 71, 48 P3d 739 (2002).

Delay of One Hundred Seven Days Before Filing Information — No Due Process Violation: On June 6, 1990, Beatty reported to the Sheriff and County Attorney that he had been kidnapped, beaten, and intimidated 2 days before. Following an investigation by the Sheriff, defendant Flesch was arrested on October 5, 1990. At a hearing on April 8, 1991, defendant's wife and a casino employee testified that although they could not be certain, both thought defendant was in the Gold Nugget Casino the night of the kidnapping. At the hearing and later at trial, Flesch argued that he was deprived of due process because the delayed arrest meant that his witnesses could not positively testify about his whereabouts the night of the kidnapping. The Supreme Court stated, citing St. v. Krinitt, 251 M 28, 823 P2d 848, 48 St. Rep. 1088 (1991), that Flesch was not deprived of due process because he was not prejudiced by the 107-day delay; his alibi defense, including his wife's later definite statement that defendant was at home the night of the kidnapping, was submitted to the jury, and it failed. Even if defendant was prejudiced, any prejudice must be balanced with the necessity for a reasonable time to investigate the crime. Because the information was filed within the applicable statute of limitations and with less delay than found in Krinitt, the Supreme Court found no due process violation. St. v. Flesch, 254 M 529, 839 P2d 1270, 49 St. Rep. 813 (1992).

Domestic Abuse Not Lesser Included Offense: Aggravated kidnapping and domestic abuse each contain elements not common to the other; therefore, a defendant could be charged with both crimes. There was no error in the state's choice to prosecute the defendant for aggravated kidnapping and not to prosecute him for domestic abuse. St. v. Brady, 249 M 290, 816 P2d 413, 48 St. Rep. 667 (1991), followed in St. v. Fertterer, 255 M 73, 841 P2d 467, 49 St. Rep. 846 (1992).

Evidence of Aggravated Kidnapping Precluding Instruction of Unlawful Restraint and Kidnapping: Defendant charged with aggravated kidnapping contended the jury should have been instructed on the lesser included offenses of unlawful restraint and kidnapping. Defendant was entitled to an instruction on unlawful restraint only if there was evidence that the victim was not restrained by secreting him or by using force; however, there was no evidence that the restraint was not accompanied by use of force. Defendant was entitled to an instruction on kidnapping only if there was evidence that no purpose to inflict bodily injury or terrorize the victim existed; however, there was no evidence of a kidnapping without the purpose to injure or terrorize. Defendant was not entitled to instructions on the lesser included offenses absent reasonable support in the evidence. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

No Prejudicial Error in Failure to Give Instruction on Lesser Included Offenses: The Supreme Court ruled that the defendant, accused of aggravated kidnapping, was not entitled to an instruction on the lesser included offenses of unlawful restraint and kidnapping because no evidence existed that would reasonably support the lesser included offenses. St. v. Kills On Top, 241 M 378, 787 P2d 336, 47 St. Rep. 366 (1990).

Offense Committed Partly Within State: The defendant and his companions picked the victim up in Montana and subsequently beat and robbed him before transporting him to Wyoming, where they killed him. The Supreme Court held that the District Court did have jurisdiction because part of the events constituting aggravated kidnapping occurred in Montana. St. v. Kills On Top, 241 M 378, 787 P2d 336, 47 St. Rep. 366 (1990).

Sexual Intercourse Without Consent Not Lesser Included Offense of Aggravated Kidnapping: Under the rationale of 46-11-502 (renumbered 46-11-410) and the standard set out in St. v. Thornton, 218 M 317, 708 P2d 273 (1985), sexual intercourse without consent is not a lesser included offense of aggravated kidnapping. St. v. Clawson, 239 M 413, 781 P2d 267, 46 St. Rep. 1792 (1989).

Unconstitutional Retroactive Application of New Death Penalty Statute: Defendant was sentenced to death under a statute (later found unconstitutional) that mandated the death penalty. A new death penalty statute was passed providing for consideration of aggravating and mitigating circumstances during sentencing. Defendant was then resentenced to death under the new statute. In effect, the new statute added a sentencing "trial" at which the judge could consider evidence at the trial on guilt. This violated due process because counsel for defendant at the trial on guilt would have handled the trial differently had he known the evidence would also be used at the sentencing stage. The District Court was instructed to grant habeas corpus unless the state vacated the death sentence. Coleman v. McCormick, 874 F2d 1280 (9th Cir. 1989).

Aggravated Kidnapping — Omission of Instructions on Force, Specific Intent, and Unlawful Restraint — No Error: Defendant, convicted of aggravated kidnapping, contended that instructions should have been given defining force, on specific intent, and on the lesser included offense of unlawful restraint. The Supreme Court found: (1) no error in omitting an instruction concerning force because no Montana statute defines force as used in this instance; (2) that no requirement by law had been established regarding a specific intent instruction; and (3) that defendant never offered an instruction on unlawful restraint as a lesser included offense. St. v. Smith, 228 M 258, 742 P2d 451, 44 St. Rep. 1503 (1987), distinguishing St. v. Furlong, 213 M 251, 690 P2d 986, 41 St. Rep. 2096 (1984), St. v. Sotelo, 209 M 86, 679 P2d 779, 41 St. Rep. 568 (1984), and St. v. Thomas, 147 M 325, 413 P2d 315 (1966).

Duration of Restraint Not Statutory Concern: This section requires no specific proof regarding duration of restraint. Concern is for violence, terror, and danger while the victim is restrained, and a specific period of restraint is not an element of aggravated kidnapping. St. v. Smith, 228 M 258, 742 P2d 451, 44 St. Rep. 1503 (1987).

Evidence Precluding Reduced Penalty: The District Court did not abuse its discretion by refusing to apply a reduced penalty when evidence showed that the victim was not voluntarily released or released in a safe place. St. v. Smith, 228 M 258, 742 P2d 451, 44 St. Rep. 1503 (1987).

Proof of Purpose, Not Specific Intent, Required: Defendant convicted of aggravated kidnapping contended the state must prove he had the specific intent to inflict bodily injury on or to terrorize the victim. The Supreme Court, citing St. v. Howard, 195 M 400, 637 P2d 15 (1981), noted that distinctions between general and specific intent were abandoned when the Montana Criminal Code was adopted. The initial mental state that must be proved is that the defendant knowingly and purposely restrained another person, with the "purpose" to inflict bodily injury or to terrorize the victim. Proof of this additional mental state does not require proof of a specific intent as found under common law, but rather requires proof of "purpose" as defined in 45-2-101. Howard should not be read to reassert the common-law distinction between specific and general intent accompanied by the differing schemes of proof. St. v. Smith, 228 M 258, 742 P2d 451, 44 St. Rep. 1503 (1987).

Serious Bodily Injury — Major Surgery and Disfigurement: Defendant was charged with and pleaded guilty to aggravated kidnapping and sexual intercourse without consent. After sentencing, the defendant contended that there was insufficient evidence to support the District Court's finding that the victim suffered serious bodily injury, an element increasing the possible sentence. Serious bodily injury is defined as injury creating a substantial risk of death or which causes serious permanent disfigurement. The Supreme Court found that the victim had suffered a serious internal laceration requiring major surgery. Two physicians testified that the victim had faced a substantial risk of death from possible infection. The record also showed that permanent serious disfigurement had been inflicted on the victim. There was sufficient evidence to support the finding of serious bodily injury. St. v. Goodwin, 208 M 522, 679 P2d 231, 41 St. Rep. 508 (1984).

Death Penalty Not Disproportionate to Offense: When a life has been taken by a kidnapper, it cannot be said that the punishment of death is invariably disproportionate to the offense of aggravated kidnapping. McKenzie v. Osborne, 195 M 26, 640 P2d 368, 38 St. Rep. 1745 (1981), followed in St. v. Keith, 231 M 214, 754 P2d 474, 45 St. Rep. 556 (1988). For full appellate history of McKenzie, see case note at 45-5-102, INFORMATION and INDICTMENT, *Felony Murder Alleged.*

Aggravated Kidnapping and Aggravated Assault — Conviction From Same Act: Both aggravated kidnapping and aggravated assault may be charged for the same act. Section 46-11-502 (renumbered 46-11-410) does not prohibit such convictions because the elements of the crimes differ and neither aggravated kidnapping nor aggravated assault is a general offense a specific instance of which is prohibited by the other. St. v. Buckman, 193 M 145, 630 P2d 743, 38 St. Rep. 1007 (1981).

Felony-Murder Rule — Double Jeopardy — No Merger With Underlying Felony: In a case where the defendant was convicted of felony murder, aggravated kidnapping, and robbery, the Supreme Court found that it was not the intent of the Legislature to merge the three offenses for the purposes of punishment and that the defendant had therefore not been convicted in violation of the Double Jeopardy Clause. The Supreme Court based its holding first upon the fact that different facts of the case supported each different conviction for each offense, second upon a finding that the history and purpose of the felony-homicide law showed that it could not have been intended to have been merged, and third upon the findings of the Criminal Law Commission upon which the Legislature relied in enacting the felony-murder rule. St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981).

Sentencing Under Statutes Amended After Date of Crime: The sentencing of the defendant to death for a conviction of aggravated kidnapping under statutes amended after section 94-5-304, R.C.M. 1947 (now repealed), was declared unconstitutional did not violate the constitutional prohibition against ex post facto laws. The amendments were ameliorative in nature and did not deprive defendant of a substantial right or immunity that he possessed at the time the crime was committed. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343 (1980).

Double Jeopardy: The offenses of deliberate homicide and aggravated kidnapping are separate and distinct offenses in our Codes, and each requires proof of elements the other does not. Therefore, a defendant may be convicted and sentenced for both deliberate homicide and aggravated kidnapping without violating the double jeopardy prohibition even though the counts arose from the same conduct or episode. Because each offense requires proof of elements which the other does not, aggravated kidnapping is not a lesser included offense and defendant's double jeopardy claim must fail on this point as well. St. v. Coleman, 185 M 299, 605 P2d 1000 (1979), affirmed in St. v. Coleman, 249 M 128, 814 P2d 48, 48 St. Rep. 610 (1991). For full appellate history of Coleman, see case note at 45-2-101, SERIOUS BODILY INJURY, *Evidence*.

Ex Post Facto: The substantive portion of the aggravated kidnapping statute, enumerating the elements of the crime and declaring the quantum of punishment, has not been altered since its enactment in 1973. The changes made by the 1977 Legislature ameliorated a mandatory death penalty to one imposed only after certain procedural steps were taken. Those procedural steps were followed in the resentencing of Dewey Coleman. At the time the crime was committed the statutes were clear that the penalty of death was a very probable consequence for the commission of the crime. Therefore, the District Court properly applied the 1977 statutes relating to the imposition of the death penalty, and it was not an ex post factor violation. St. v. Coleman, 185 M 299, 605 P2d 1000 (1979). For full appellate history of Coleman, see case note at 45-2-101, SERIOUS BODILY INJURY, *Evidence*.

Sufficiency of Information: The information filed in this case was sufficient since each count followed the language of the statutes for deliberate homicide, aggravated kidnapping, and sexual intercourse without consent. The State's attempt to amend the information did not aid the defendant in claiming the information was not sufficient. St. v. Coleman, 177 M 1, 579 P2d 732 (1978). For full appellate history of Coleman, see case note at 45-2-101, SERIOUS BODILY INJURY, *Evidence*.

Court Determination of Release — Constitutionality: The release or nonrelease of a kidnapper's victim is a fact unnecessary to establishment of the crime of aggravated kidnapping, thus it is within the power of the state to allow the trial court, rather than the jury, to make this factual determination without violating constitutional guarantees. St. v. Stewart, 175 M 286, 573 P2d 1138 (1977), followed in St. v. Pine, 2023 MT 172, 413 Mont. 254, __ P.3d __.

Release of Victim in Safe Place: Defendant was properly sentenced to 100 years, rather than a maximum of 10 years under 94-5-303(2), R.C.M. 1947 (now MCA, 45-5-303(2)), because he did not release the victim unharmed and in a safe place when the defendant abandoned the kidnapping scheme but left the victim with his cohorts who subsequently killed the victim. St. v. Stewart, 175 M 286, 573 P2d 1138 (1977).

Multiple Counts: It was not necessary to charge defendant with 10 separate counts of kidnapping, specifying weapons used or the related felony, where a single count based on subsection (1)(b) specifying the felonies of aggravated assault and sexual intercourse without consent, and a single count based on the statutory language of subsection (1)(c) would fulfill the notice requirement of the statute. State ex rel. McKenzie v. District Court, 165 M 54, 525 P2d 1211 (1974). For full appellate history of McKenzie, see case note at 45-5-102, INFORMATION and INDICTMENT, *Felony Murder Alleged*.

Law Review Articles

The Death Penalty in Montana: A Violation of the Constitutional Right to Individual Dignity, Eklund, 65 Mont. L. Rev. 135 (2004).

45-5-304. Custodial interference.

Criminal Law Commission Comments

Source: New.

Violation of lawful custody, especially of children, requires special legislation notwithstanding its similarity in some respects to kidnapping. The interest protected is not freedom from physical danger or terrorization by abduction, since that is adequately covered by sections 94-5-302 and 94-5-303 [now §§ 45-5-302, 45-5-303], but rather the maintenance of parental custody against all unlawful interruption, even when the child is a willing, undeceived participant in the attack on the parental interest. The problem is further distinguishable from kidnapping by the fact that the offender will often be a parent or other person favorably disposed toward the child. One should be especially cautious in providing penal sanctions applicable to estranged parents struggling over the custody of their children, since such situations are better regulated by custody orders enforced through contempt proceedings. Despite these distinctive aspects of child-stealing and the existence of special provisions on the subject in most jurisdictions, the problem is frequently covered by kidnapping and the penalties and exceptions do not adequately reflect the special circumstances.

Compiler's Comments

1997 Amendment: Chapter 343 deleted (1)(b) and (1)(c) that read: "(b) prior to the entry of a court order determining custodial rights, takes, entices, or withholds any child from the other parent when the action manifests a purpose to substantially deprive that parent of parental rights; or

(c) is one of two persons who has joint custody of a child under a court order and takes, entices, or withholds the child from the other when the action manifests a purpose to substantially deprive the other parent of parental rights"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

1995 Amendment: Chapter 467 in (3), at beginning of first and second sentences, inserted "With respect to the first alleged commission of the offense only"; and made minor changes in style. Amendment effective April 15, 1995.

Severability: Section 5, Ch. 467, L. 1995, was a severability clause.

1987 Amendment: Inserted (1)(b) defining offense prior to a custody order; and inserted (1)(c) relating to joint custody situations.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section on Custodial Interference provides criminal liability for the abduction of a child or incompetent person in the custody of an institution or person where the offender has knowledge that he has no legal right to have custody of the person. Both the situation in which two parents are fighting for custody of a child and the situation where an individual committed to an institution is taken are covered by this provision. The clause "knowing that he has no legal right to do so" is equivalent to a general mental state of "knowingly" as provided in MCA, 45-2-101. Former subsection (2) allowed the conduct to be excused if the person taken was returned before trial for the offense commenced. The 1979 amendment removed that provision from subsection (2) and added subsection (3) which provides that a person does not commit the offense of custodial interference if he returns the individual taken to lawful custody prior to arraignment or, in the case of a person who has left the state, prior to arrest.

Case Notes

Constitutionality of Custodial Interference Statute: Price argued that this section, prohibiting custodial interference, was constitutionally invalid on equal protection and vagueness grounds. The Supreme Court disagreed. A party challenging the constitutionality of a statute bears the burden of proving unconstitutionality beyond a reasonable doubt, and by failing to present any analysis regarding levels of scrutiny or potential governmental interests, Price did not meet that burden. The court applied the rational basis test in concluding that the statute's objective is a legitimate attempt to facilitate the return of children who are taken during parental custody disagreements, rather than to prosecute the person who took the child, and thus the statute does not violate equal protection. Further, the plain language of this section, taken as a whole, is not misleading as to the conduct prohibited or confusing as to the mitigation available to a defendant who violates the statute for the first time, nor is the statutory language confusing to a person of average intelligence. The District Court properly denied Price's motion to dismiss on equal protection and vagueness grounds. St. v. Price, 2002 MT 229, 311 M 439, 57 P3d 42 (2002).

Proper Venue of Custodial Interference Proceeding: Price was charged with custodial interference after failing to return his daughter to her mother. Price moved to dismiss the charge for improper venue, arguing that Lake County, where he had withheld the child, rather than Missoula County, where both parties resided and where dissolution proceedings were taking place, was the proper venue. Venue is a jurisdictional fact that must be proved at trial as any other material element. Deprivation of custodial rights is a requisite element of the offense of custodial interference, so the state must establish that the defendant: (1) knowing that there was no legal right to do so, took, enticed, or withheld a child; and (2) deprived the legal custodian of custody. When establishing the commission of an offense requires proving two or more acts, the charges may be filed in any county in which any of the acts occurred. In this case, at least one of the elements of custodial interference occurred in Missoula, so Missoula County was a proper venue for prosecution of the offense, and the District Court properly denied the motion to dismiss for improper venue. St. v. Price, 2002 MT 229, 311 M 439, 57 P3d 42 (2002), followed in St. v. Young, 2007 MT 323, 340 M 153, 174 P3d 460 (2007).

Person or Entity to Whom Children May Be Returned: Husband and wife entered into a separation agreement awarding wife custody of their three minor children. Husband left the state with the children in violation of the agreement, and a warrant for his arrest was issued. Subsequently, the separation agreement was integrated into the divorce decree. Upon his return, the husband turned the children over to the Department of Family Services (now Department of Public Health and Human Services). Husband was arrested but was released, and the felony charge was dismissed upon the children's return to their mother. Husband brought suit for false arrest and false imprisonment contrary to the law. His action was dismissed with prejudice under former Rule 12(b)(6), M.R.Civ.P. (now superseded). On appeal, the Supreme Court affirmed the dismissal, holding that the arrest was proper because the statute requires that the child be returned to lawful custody and the lawful custodian is that person designated in the divorce decree and not a legal entity chosen by the person returning the child. Contway v. Camp, 236 M 169, 768 P2d 1377, 46 St. Rep. 270 (1989).

Return of Child Prior to Arrest by Person Who Had Left State: The return of a child by a person who had left the state, if done prior to arrest, is a defense against arrest rather than a defense against conviction in that the statute provides that a person who has left the state does not commit the offense of custodial interference if he returns the individual taken to lawful custody prior to arrest. Contway v. Camp, 236 M 169, 768 P2d 1377, 46 St. Rep. 270 (1989).

Alternative Remedy of Contempt Proceeding to Enforce Custody Order Preferred in Certain Cases: Courts should be especially cautious in applying penal sanctions to estranged parents who are struggling over the custody of their children, since such situations are better regulated by custody orders enforced through contempt proceedings. Husband took child from wife in violation of a custody order, and the police arrested husband at a shopping center at which he told wife he would be. Husband had not left the state and had not attempted to hide the child. Police arrested the husband, apparently did not give him an opportunity to return the child voluntarily to the child's mother, and returned the child themselves. Defendant pleaded guilty to custodial interference, and the record did not indicate that husband was aware of the defense that a person who has not left the state does not commit the offense if he voluntarily returns the child. Twenty-six months after his pleading guilty and being sentenced, defendant's motion to withdraw his plea was denied on the ground of undue delay. It was reversible error to accept the plea without fully informing husband of the available defense, though defendant had stated he voluntarily entered the plea and an attorney appointed for defendant, who was present even though defendant refused to accept him as counsel, stated he believed husband voluntarily entered the plea with full understanding of what was involved. The plea was not an intelligent choice when there was a defense available. Denial of the motion to withdraw the guilty plea was reversed and the cause remanded with directions to allow withdrawal of the plea. St. v. Lance, 201 M 30, 651 P2d 1003, 39 St. Rep. 1932 (1982).

Part 4
Robbery

45-5-401. Robbery.

Criminal Law Commission Comments

Source: M.P.C., 1962, § 222.1.

With some verbal changes the Montana draft on robbery parallels that of the Model Penal Code, section 222.1.

Common-law robbery was theft of property from the person or in the presence of the victim by force or by putting him in fear either of immediate bodily injury or of certain other grievous harms. The above draft does not explicitly include the traditional basis for classifying robbery as taking property from the person or in the presence of a person, but approaches the crime as one of immediate danger to the person and relies on the condition of violence or threatened violence to distinguish the crime from ordinary theft. The gist of the offense is taking by force or threat of force.

The above provision would apply where property was not taken from the person or from his presence. For example, an offender might threaten to shoot the victim in order to compel him to telephone directions for the disposition of property located elsewhere. Further, it is immaterial whether property is or is not obtained. This seems compatible with the theory of treating robbery as an offense against the person rather than against property. Hence, a completed robbery may occur even though the crime is interrupted before the accused obtained the goods, or if the victim had no property to hand over. The section includes armed robbery. Further, subdivision (1)(b) encompasses the use of a toy or unloaded gun, since such a device can be employed to threaten serious injury and may be effective to create fear of such injury.

Compiler's Comments

1995 Amendment: Chapter 482 in version effective July 1, 1997, in (2), near end, inserted reference to 46-18-219; and made minor changes in style.

Coordination Instruction — Effective Dates: Section 21, Ch. 482, L. 1995, provided: "(1) If House Bill No. 357 and [this act] [Senate Bill No. 66] are both passed and approved:

(a) [sections 1 through 18] of [this act] are effective July 1, 1997; and

(b) the sentencing commission shall include recommendations for implementing the public policy contained in [sections 1 through 18] of [this act].

(2) [Sections 19, 20, and this section] [enacted as codification and coordination instructions] are effective July 1, 1995.

(3) If House Bill No. 357 is not passed and approved, then this section is void." House Bill No. 357 was approved March 31, 1995, as Ch. 306, L. 1995. Therefore, the amendments to 45-5-401, enacted as sec. 7 of Senate Bill No. 66, are effective July 1, 1997.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: The crime of robbery has always been treated as a "hybrid" offense against both person and property. Under the common law as previously codified in Montana, the crime required establishment of a number of rather technical elements constituting an offense against property in addition to the man-endangering element of force or putting in fear. These elements were a "felonious taking", a taking with intent to steal of personal property in the possession of another, and the taking from the person or his immediate presence. The new section replaces these elements with the inclusive term "in the course of committing a theft" which is broadly defined by subsection (3) to include "acts which occur in an attempt to commit or the commission of theft, or in flight after the attempt or commission". This provision effectively eliminates the prior law's requirements that the offender succeed in taking the property, that the property be in the possession of the person robbed and that it be taken from his person or immediate presence. All that is required as an offense against property under the new code is that there be a theft or attempt to commit theft. The effect of these changes is to make the gravamen of robbery more clearly the threat to the person.

Prior law made the threat to the person element of robbery hinge on either the actual application of force or a putting in fear. The new code has retained both of these elements, although in a somewhat changed form. The new law requires that there be the infliction of bodily injury, or a threat to inflict bodily injury, or a knowing placing in fear of bodily injury, or the commission or threat of commission of any felony other than theft. These elements are in large measure objective since, with the exception of knowingly placing in fear, none depend on the victim's state of mind, rather all depend solely on the acts of the offender. The commission or threat to commit any other felony is an expansion of prior law and reflects the continued concern with the aggravating factors which justify the classification of robbery as a separate offense. This section includes armed robbery and encompasses the use of a toy or unloaded gun to threaten serious injury.

The 1977 amendment substituted "a term of not less than two years or more than forty years except as provided in 95-2206.18" in subsection (2) for "any term not to exceed forty (40) years", thus enacting a mandatory two-year minimum sentence.

With some verbal changes the Montana draft on robbery parallels that of the Model Penal Code, section 222.1.

Case Notes

Federal Bank Robbery Not Reasonably Equivalent to Robbery — No Persistent Felony Offender Enhancement: In 2018, a jury convicted the defendant of two counts of distributing dangerous drugs in 2017. The state sought to designate the defendant as a persistent felony offender (PFO) based on two prior felony convictions, including a 2014 conviction in Montana for burglary under 45-5-401 and a 1994 federal conviction for bank robbery in violation of 18 U.S.C. 2113(a). The District Court sentenced the defendant to the minimum PFO sentence enhancement of 5 years at the Montana State Prison, and the Supreme Court reversed, holding that the defendant's 1994 bank robbery conviction was not reasonably equivalent to robbery under Montana law and may not be used as a predicate violent offense under 46-1-202 to impose a PFO sentence enhancement. St. v. Scott, 2020 MT 178, 400 Mont. 394, 467 P.3d 595.

Gun Hidden in Car Not Found During Initial Police Search — Chain of Custody Properly Maintained After Gun Found — Motion to Suppress Evidence of Gun Properly Denied: The defendant was charged with robbery, and his vehicle was seized, searched, and then impounded and transported out of state for sale. Later, when the car was being detailed for sale, a gun, ammunition, and the defendant's license were found hidden behind a door panel. The defendant filed an unsuccessful motion to suppress the introduction of the hidden evidence at trial, arguing that the officer who initially seized his car had lacked probable cause. Following his conviction, the defendant appealed, arguing that the state had not maintained the gun's chain of evidence and that it therefore should not have been introduced. The Supreme Court affirmed, holding that the officer who had seized the car had had probable cause, and ruling that the chain of custody did not apply until the gun was located and that the police had maintained the chain of custody from that point forward. St. v. Burchill, 2019 MT 285, 398 Mont. 52, 454 P.3d 633.

Bodily Injury After Stolen Property Abandoned — Felony Theft Conviction Proper: After the defendant stole a tool set from a store, he was pursued by the store's employees and others. After they caught him, he hit and spat at them until the police arrived. The defendant was convicted by a jury of felony theft. On appeal, the defendant claimed that because he had abandoned the stolen property before he injured anyone, he had not inflicted bodily injury as part of the theft. The Supreme Court rejected his argument and affirmed, concluding that the defendant was "in flight" after the commission of the crime at the time he injured those restraining him and that the jury had sufficient evidence on which to convict him of felony theft. St. v. R.S.A., 2015 MT 202, 380 Mont. 118, 357 P.3d 899.

Getaway Driver Accountable for Robbery — Specificity of Charging Documents — Jury Instructions: The defendant was convicted of accountability for robbery after serving as the getaway driver. On appeal, the defendant argued that he was never specifically charged with and convicted of a subelement of accountability for robbery, that the jury instruction was improper because it did not require the jury to reach unanimity with regard to a specific element of robbery, and that the jury instruction regarding a getaway driver was inaccurate. The Supreme Court disagreed, holding that the charging documents and jury instruction provided accountability for any of the subelements of the crime and there was ample evidence that each subelement was satisfied, that the defendant failed to object to the robbery instruction's lack of a unanimity requirement and a plain error review was not warranted, and that the getaway driver jury instruction gave a full and fair explanation of the law. St. v. Hanna, 2014 MT 346, 377 Mont. 418, 341 P.3d 629.

Sufficient Evidence of Attempted Robbery — Directed Verdict Properly Denied: At the conclusion of testimony in his attempted robbery trial, after his witnesses presented testimony corroborating Ferguson's claim, Ferguson moved for a directed verdict on grounds of insufficient evidence that Ferguson planned the robbery and was aware that it would occur. The trial court denied the motion, and the Supreme Court affirmed. Ferguson's witnesses' testimony was conflicting and did in fact indicate Ferguson's involvement at some level in the crime. Viewed in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. A directed verdict is appropriate only when there is no evidence upon which a jury could base a guilty verdict, so denial of Ferguson's motion was not an abuse of the trial court's discretion. St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005).

Use of Weapon by Person in Group Robbery but No Evidence That Defendant Used Weapon — Sentence as Violent Offender Reversed: Ferguson was one of a group of persons that attempted a robbery. It was uncontested that someone in the group brandished a knife, but testimony was conflicting whether it was Ferguson. Nevertheless, the trial court enhanced Ferguson's sentence because he was part of a crime of violence when a knife was used. However, the mere finding that someone in the group used a knife did not rise to the level of a finding that Ferguson used a knife. Thus, the Supreme Court reversed that part of Ferguson's sentence and remanded for sentencing Ferguson as a nonviolent offender. St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005).

Trier of Fact to Determine Reasonableness of Conflicting Circumstantial Evidence — Sufficient Evidence to Conclude Defendant Possessed Necessary Mental State for Robbery: At Hill's trial for robbery, only circumstantial evidence identified Hill as the perpetrator. At the close of the state's case, Hill's counsel moved for a directed verdict regarding Hill's identity as the perpetrator, but the motion was denied. Hill appealed on grounds that the trial court erroneously denied the motion, but the Supreme Court affirmed. Pursuant to St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004), when circumstantial evidence is susceptible to two interpretations, one supporting guilt and one supporting innocence, the trier of fact determines which interpretation is most reasonable, and a directed verdict is appropriate only when there is no evidence whatsoever to support a guilty verdict. In this case, it could not be concluded that there was no evidence whatsoever from which the jury could conclude that Hill was the assailant and, given that reasonable inference, that Hill possessed the necessary mental state to commit the robbery. St. v. Hill, 2005 MT 216, 328 M 253, 119 P3d 1210 (2005).

Conviction of Robbery but Acquittal of Assault With Weapon Not Considered Inconsistent Verdict — Sufficient Evidence of Robbery to Affirm Verdict: Bailey was acquitted of felony assault with a weapon, but was convicted of felony robbery and misdemeanor theft, and appealed on grounds that it was inconsistent to convict someone of robbery and acquit the same person of assault with the same evidence. The Supreme Court noted that the elements of the two crimes are not identical and that the verdict was not really inconsistent because robbery does not require a weapon. Further, the court declined to speculate about the jury's intention, citing U.S. v. Powell, 469 US 57 (1984), in holding that a criminal defendant is already afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by trial and appellate courts. Thus, the question is not whether a criminal verdict is inconsistent, but whether the verdict is supported by sufficient evidence. In this case, there was sufficient evidence for a rational trier of fact to find the essential elements of robbery, and the court affirmed. St. v. Bailey, 2003 MT 150, 316 M 211, 70 P3d 1231 (2003). See also St. v. Merrick, 2000 MT 124, 299 M 472, 2 P3d 242 (2000).

Jury's Finding That Defendant Purposely or Knowingly Put Another in Fear of Bodily Injury Sufficient Support for Robbery Conviction: As he left a store with stolen merchandise, Merrick was stopped by store security, who told him that the alarm had been triggered and asked Merrick to return to the store. Merrick refused, telling the security person that it was his gun that set off the alarm. When Merrick unzipped his coat and inserted his hand inside, the security person testified that she thought Merrick was going to pull out a gun and use it to shoot her or scare her away. Merrick was convicted of robbery and sentenced to prison for 40 years. On appeal, Merrick maintained that there was insufficient evidence that he acted purposely or knowingly to put the security person in fear of immediate bodily injury. The Supreme Court disagreed and affirmed the conviction, noting that the sufficiency of the evidence turned on credibility. The jury chose to believe that Merrick was not simply making a joke when he referred to the gun nor was he adjusting the stolen merchandise when he reached toward his coat, but rather that he mentioned a gun and moved toward his coat with the awareness that it was highly probable that the security person would fear immediate bodily injury on account of his conduct. St. v. Merrick, 2000 MT 124, 299 M 472, 2 P3d 242, 57 St. Rep. 509 (2000). See also St. v. Santos, 273 M 125, 902 P2d 510 (1995).

Unloaded BB Gun Not Considered Weapon for Purposes of Sentence Enhancement for Use of Dangerous Weapon: Clemo pleaded guilty to robbing a casino by threatening an employee with an unloaded BB pistol and was sentenced to 7 years with 5 years suspended for felony robbery pursuant to this section, plus an additional 2 years for committing the offense with a dangerous weapon pursuant to 46-18-221. Following St. v. Wilson, 282 M 134, 936 P2d 316, 54 St. Rep. 278 (1997), the Supreme Court concluded that Clemo's unloaded BB gun was no more capable of causing harm at the time in question than the inoperable BB gun used in Wilson and thus could not be characterized as a weapon because it was not easily able to produce serious harm when it was used to rob the casino. The case was remanded to vacate the enhanced portion of Clemo's sentence. St. v. Clemo, 1999 MT 323, 297 M 316, 992 P2d 1263, 56 St. Rep. 1292 (1999), distinguishing St. v. Matson, 227 M 36, 736 P2d 971, 44 St. Rep. 874 (1987), and In re R.L.S., 1999 MT 34, 293 M 288, 977 P2d 967, 56 St. Rep. 149 (1999).

Theft Not Lesser Included Offense of Robbery: The offense of robbery does not require the completed act of theft as an element of robbery. The offense of theft requires proof of an additional fact—that the offense was completed. Therefore, theft is not a lesser included offense of robbery. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990), followed in St. v. Greywater, 282 M 28, 939 P2d 975, 54 St. Rep. 16 (1997).

Defendant's Mental State Inferred From Circumstantial Evidence: The defendant argued that his attorney should have presented a defense based on the inability of the defendant to have the requisite mental state to be convicted of robbery because the defendant had been injured in a motorcycle accident and claimed he had suffered brain damage. The Supreme Court stated that the attorney could rely on his own experience in determining whether or not to present a specific defense. The court further held that there was sufficient circumstantial evidence to support the jury's conclusion that the defendant was able to form the requisite intent to commit robbery. St. v. Albrecht, 242 M 403, 791 P2d 760, 47 St. Rep. 800 (1990).

Theft Not Required to Prove Robbery: The defendant argued that the lower court erred in not instructing the jury that theft is a lesser included offense of robbery. He contended that because there was conflicting evidence of whether or not he had induced fear in the bank teller, the instruction was required. The Supreme Court held that theft is not a lesser included offense because the elements of robbery can be proved even if there is no taking of property. St. v. Albrecht, 242 M 403, 791 P2d 760, 47 St. Rep. 800 (1990), followed in St. v. Greywater, 282 M 28, 939 P2d 975, 54 St. Rep. 16 (1997).

Fear of Injury — Hand in Coat and Demand for Money: There was sufficient evidence that defendant put his robbery victim in fear of immediate bodily harm when store clerk testified that defendant swiftly put his hand under his coat and demanded the money in the till, that the clerk believed defendant had a gun, and that the clerk feared his life was in danger. The jury may use common experience to conclude that a particular situation would cause a person to experience fear. An actual weapon need not be used. St. v. Lewis, 220 M 418, 715 P2d 1064, 43 St. Rep. 492 (1986).

Robbery With Gun Apparently Under Coat — Sentence of Thirty Years Permissible: Defendant claimed that his 30-year sentence for robbery of a convenience store was disproportionate to the facts (which included a finding that he had his hand under his coat and the store clerk believed he had a gun). The sentence was within the permissible statutory range, there was no clear abuse of discretion, and the sentence was properly reviewable in the Sentence Review Division, not the Supreme Court. St. v. Lewis, 220 M 418, 715 P2d 1064, 43 St. Rep. 492 (1986); following St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985).

Defendant Not Primary Actor but Participant — Robbery Conviction Upheld: When evidence may not have definitely indicated that defendant was a primary actor in a robbery but did show that he was a participant in the events leading up to and surrounding the robbery, the jury's guilty verdict was proper. St. v. Ortega, 209 M 285, 679 P2d 793, 41 St. Rep. 711 (1984).

Felony Theft — Not Lesser Included Offense of Robbery: LaMere was convicted of felony theft and robbery of the Dumas Hotel in Butte. On appeal, he contended that the District Court erred in not treating theft as a lesser included offense of the charge of robbery. Applying the "Blockburger test" as explained in Iannelli v. U.S., 420 US 770, 95 S Ct 1284, 43 L Ed 2d 616 (1975), the Supreme Court looked to determine if each offense required proof of a fact the other did not. The proof of robbery was complete if, as an element of the offense, the State proved the threat of injury in the commission of misdemeanor or felony theft. In order to prove felony theft, the State must prove that the value of the property taken exceeds $150. There is an additional element required to prove felony theft not required for conviction of the charge of robbery. The theft in this case was not a lesser included offense within the charge of robbery. St. v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983), affirmed in LaMere v. Risley, 827 F2d 622 (9th Cir. 1987). Madera was followed in St. v. Greywater, 282 M 28, 939 P2d 975, 54 St. Rep. 16 (1997).

Presentence Report Recommendation Not Followed by Judge: The defendant, while pretending to have a gun, stole $28 from a convenience store. It was not improper for a sentencing judge to impose a 30-year sentence for the robbery even though the presentence report recommended a 15-year sentence. St. v. Stephens, 198 M 140, 645 P2d 387, 39 St. Rep. 822 (1982).

Aggravated Assault Not a Lesser Included Offense of Robbery: When, in the course of a robbery, the defendant fired a shotgun in the direction of a bartender, the District Court did not err in imposing sentences for both robbery and aggravated assault following the defendant's conviction. Under the text established in Blockburger v. U.S., 284 US 299, 52 S Ct 180, 76 L Ed 306 (1932), as applied by St. v. Close, 191 M 229, 623 P2d 940 (1981), and other Montana cases, the "facts" to which 46-11-501(2) (now repealed) must be understood to refer are the statutory elements of the crime rather than the individual facts of each case. Here, because the aggravated assault statute requires proof of at least one element that is not needed to establish the offense of robbery, aggravated assault is not a lesser included offense in the crime of robbery. St. v. Ritchson, 193 M 112, 630 P2d 234, 38 St. Rep. 1015 (1981).

Failure of State to Elect Alternative Proofs of Robbery Not Violation of Due Process — Intent Required for Each Alternative: When the defendant was charged with robbery in the alternative under 45-5-401(1)(b) within separate counts in the same information, the District Court did not err in refusing to require the State to elect to prove one of the alternative methods of committing robbery under subsection (1)(b). The defendant was not deprived of notice and due process of law because the information was sufficient to notify the defendant of the charges against him and because the Supreme Court previously approved the charging practice followed in this case in McKenzie v. District Court, 165 M 54, 525 P2d 1211 (1974). (For full appellate history of McKenzie, see case note at 45-5-102, INFORMATION and INDICTMENT, *Felony Murder Alleged.*) Any failure of 45-5-401 to require that the crime of robbery be committed purposely or knowingly under each alternative in subsection (1)(b) was cured by the giving of a jury instruction making it clear that intent was required to be proved. St. v. Ritchson, 193 M 112, 630 P2d 234, 38 St. Rep. 1015 (1981).

Felony-Murder Rule — Double Jeopardy — No Merger With Underlying Felony: In a case where the defendant was convicted of felony murder, aggravated kidnapping, and robbery, the Supreme Court found that it was not the intent of the Legislature to merge the three offenses for the purposes of punishment and that the defendant had therefore not been convicted in violation of the Double Jeopardy Clause. The Supreme Court based its holding first upon the fact that different facts of the case supported each different conviction for each offense, second upon a finding that the history and purpose of the felony-homicide law showed that it could not have been intended to have been merged, and third upon the findings of the Criminal Law Commission upon which the Legislature relied in enacting the felony-murder rule. St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981).

Accomplice to Robbery — What Constitutes: Defense counsel elicited undisputed testimony from one of the codefendants that defendant did not engage in any of the acts proscribed by 45-2-302 either before the robbery of the bar or during the time the robbery was being committed. Defendant argues that his complicity arose, if at all, only after the robbery had concluded, thus removing him from any accountability for the robbery. Defendant drove the car during the getaway. Defendant's argument is dependent on the validity of his conclusion that the robbery ended the moment the codefendants stepped outside the bar. In Montana, the ensuing flight is considered part and parcel of a robbery until such time as the criminal purpose, including carrying away the spoils of the crime, is completed. Here, defendant's involvement commenced before the robbers had reached a place of seeming security and before the proceeds had been divided. By serving as a getaway driver, defendant aided in the commission of the robbery and became liable for the robbery under 45-2-302. St. v. Case, 190 M 450, 621 P2d 1066, 37 St. Rep. 2057 (1980), followed in St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Force or Fear:

Defendant and three others came to Montana from California with plans for robberies of roadhouse saloons. Defendant and the others robbed Mac's Bar in Wolf Creek. They held the owners at gunpoint, placed them face down on the floor, and bound them with tape while they committed the robbery. Defendant contended that the State failed to produce evidence that the victims were placed in fear and therefore his conviction could not stand. The brandishing of the gun could hardly constitute anything less than sufficient circumstances to place the victims in fear. It is well within the province of the jury to determine that fear exists in such a situation. It would be contrary to the common experience of all mankind to conclude that a person would experience no fear when confronted with a robber wielding a gun. St. v. Case, 190 M 450, 621 P2d 1066, 37 St. Rep. 2057 (1980).

It is reasonable to presume fear where victim is forced to look down the barrel of a 45-caliber automatic pistol held by a stranger whose purpose is to rob him. St. v. Erickson, 141 M 118, 375 P2d 314 (1962).

Though the crime of robbery under 94-4301, R.C.M. 1947 (a forerunner of this section), could be accomplished only by means of force or fear, proof of an assault without showing that it was resorted to as a means to prevent resistance fell far short of establishing the crime of an attempt to commit robbery. St. v. Hanson, 49 M 361, 141 P 669 (1914).

Since 94-4301, R.C.M. 1947 (a forerunner of this section), did not define the degree of force necessary to constitute the taking of personal property from the person or immediate presence of another to constitute the crime of robbery, an information charging such offense was not required to allege the degree of force used. St. v. Paisley, 36 M 237, 92 P 566 (1907).

The taking of personal property from the person or immediate presence of another, without resistance on his part, did not bring the offense within the definition of robbery under 94-4301, R.C.M. 1947 (a forerunner of this section); it was necessary that the element of force or fear be present to constitute the crime. St. v. Paisley, 36 M 237, 92 P 566 (1907).

Pleadings:

Petitioner objected to being charged with multiple counts of robbery arising out of the same incident. The State is permitted to do so by the express provisions of statute. Although the propriety of filing such multiple charges has been criticized in some cases, it is within the discretion of the prosecution to do so under Montana law and accordingly there was no error. Parker v. Crist, 190 M 376, 621 P2d 484, 37 St. Rep. 2048 (1980).

An information on a prosecution for robbery under 94-4301, R.C.M. 1947 (a forerunner of this section), which charged that the property was taken by means of force and putting in fear and that it was taken from the person in possession and from the immediate presence of a specified person, did not charge more than one offense. St. v. Howard, 30 M 518, 77 P 50 (1904).

An indictment which charged that the defendant committed the robbery by force and intimidation and by putting the person robbed in fear was sufficient under 94-4301, R.C.M. 1947 (a forerunner of this section). St. v. Clancy, 20 M 498, 52 P 267 (1898).

Sandstrom Instruction — Permissive Inference or Conclusive Presumption: A "Sandstrom-type" instruction was given at petitioner's trial, which resulted in his conviction on seven counts of armed robbery and one count of assault. No objection to the instruction was made at the trial, but the Supreme Court reviewed the instruction under the "plain error" rule. Petitioner contended that the instruction either shifts the burden of proof on the issue of intent from the State to the defendant or constitutes a presumption against the defendant, either of which is constitutionally impermissible under Sandstrom v. Montana, 442 US 510, 99 S Ct 2450, 61 L Ed 2d 39 (1979). The instruction given was a permissive inference and not a conclusive presumption. The questioned instruction was not a "naked" presumption as in Sandstrom; the instructions as a whole made it abundantly clear that the State bears the burden of proving beyond a reasonable doubt every essential element of the crimes of which defendant was charged. The court found that the error, if any, was harmless. Parker v. Crist, 190 M 376, 621 P2d 484, 37 St. Rep. 2048 (1980).

"Mere Presence at Scene" Instruction Not Required: In appealing his conviction for robbery, the defendant claimed that he had been entitled to a jury instruction that "mere presence at or about the scene where a crime is committed does not make one a party to a crime" because his defense involved an admission of being at the scene of the crime but of not being involved except after the fact. The reviewing court concluded that the defendant had not been prejudiced by the trial court's refusal to give this instruction, noting that no authority was cited for this instruction, that the jury instruction fairly covered the issues raised, and that the charge of robbery as well as the jury instructions required the jury to find more than mere presence at the scene of the robbery. Thus, the jury was fully aware, even without the instruction, that mere presence at the scene of the crime was not sufficient to prove criminal involvement. The jury believed that the defendant committed the crime by holding the knife to the store clerk's throat, and the evidence clearly was sufficient to sustain this belief. St. v. Dahl, 190 M 207, 620 P2d 361, 37 St. Rep. 1852 (1980).

Photographic Lineup — When Not Overly Suggestive — No Right to Have Counsel Present: A defendant appealed from a robbery conviction. He alleged that a motion to suppress evidence relating to pretrial photographic lineup procedures should have been sustained. The motion was based on contentions that the victim's ability to identify him was tainted by the fact the victim had seen him in police custody shortly after the robbery and that the victim may have seen another photograph of him which had been in the custody of a police officer. The defendant also challenged the suggestiveness of the lineup because his attorney was not present. If the photographic identification process was so suggestive as to present a "substantial likelihood of misidentification", an in-court identification of the defendant would not be permitted. Under the circumstances of this particular case, there was not a substantial chance of misidentification. Further, the reviewing court followed a U.S. Supreme Court decision and stated that the confrontation clause is not violated by a photoarray identification process, and therefore the right to counsel does not attach. Accordingly, the motion to suppress was properly denied. St. v. Dahl, 190 M 207, 620 P2d 361, 37 St. Rep. 1852 (1980).

Proof of Crimes Charged — Proof of Ownership of Stolen Money — Disbelief of Portion of Witness' Testimony as Not Requiring Total Disbelief: Defendant charged with robbery and theft was convicted of theft but found not guilty of robbery. One ground of his appeal was the assertion that the prosecution's evidence was insufficient to prove theft. Defense counsel argued that the jury must have distrusted the testimony of the truckstop cashier who was held up because they found the defendant not guilty of robbery. Further, since the cashier's testimony was critical to prove a theft was committed, the evidence was insufficient to prove theft if the jury disbelieved the cashier. The Supreme Court dismissed this argument because sufficient disbelief of the cashier's testimony to find the defendant not guilty of robbery would not require the jury to disbelieve all of the cashier's testimony. The jury had instructions about its right to believe or disbelieve any portion of a witness' testimony. As long as there was substantial evidence to support the verdict, it will not be disturbed on appeal. The Supreme Court found sufficient evidence to convict here and sufficient evidence to refute the defendant's argument that the truckstop did not own the stolen money. Here, proof of possession sufficed to prove ownership because the defendant's jury instruction to that effect was accepted by the court. St. v. Dolan, 190 M 195, 620 P2d 355, 37 St. Rep. 1860 (1980).

Sufficiency of Corroborating Evidence: While a conviction cannot be had on the testimony of one equally accountable for the same offense, where the corroborating evidence tends to connect the defendant with the commission of the offenses of robbery and homicide as a participant in the actual robbery and as an accomplice in the commission of and flight after the deliberate homicide, the evidence as a whole is sufficient to sustain defendant's conviction. St. v. Owens, 182 M 338, 597 P2d 72 (1979).

Nature of Punishment — Not Excessive: Given the function of the Sentence Review Board, its decision to leave as originally imposed a 40-year sentence for robbery amounts to an implicit finding that the sentence was not so greatly disproportionate to the crime so as to constitute cruel and unusual punishment. In re Jones, 176 M 412, 578 P2d 1150 (1978), clarified in Driver v. Sentence Review Div., 2010 MT 43, 355 Mont. 273, 227 P.3d 1018, to the extent that the proper standard of sentence review by the Sentence Review Division is first whether the sentence imposed by the District Court is presumed correct, and after a hearing, whether this presumption has been overcome and whether a new sentence should be imposed, after determining if the original sentence was clearly inadequate or excessive.

Substantial Evidence of Attempted Robbery: The fact that the assailant asked for the combination of the safe supports the inference that he intended to commit theft. The fact that he wielded a knife establishes that he knowingly or purposely placed his victim in fear of immediate bodily injury. In short, there was substantial evidence of attempted robbery. St. v. Pendergrass, 179 M 106, 586 P2d 691 (1978).

Evidence as to Propensity to Violence: Testimony as to changes in mood and temper and a high regard for firearms in light of giving a pistol as security for a loan of money to play poker by the defendant was relevant and not improper evidence tending to show only bad character. St. v. Armstrong, 170 M 256, 552 P2d 616 (1976).

Knowingly or Purposely: The mental state required to commit the offense defined in subsection (1)(b) of this section is "knowingly or purposely", and the jury need not consider "intent" as well, since the first two terms are substitutes for the older terms "intentionally" and "feloniously". St. v. Klein, 169 M 350, 547 P2d 75 (1976).

Felonious Taking:

Evidence that victim had a certain amount of money in a wallet in his vest pocket 9 days before an assault and that after the assault his vest was torn and the wallet and money were gone supported inference that the money was taken after the assault, thus that there was a robbery within the meaning of 94-4301, R.C.M. 1947 (a forerunner of this section). St. v. Olson, 87 M 389, 287 P 938 (1930).

An instruction defining robbery under 94-4301, R.C.M. 1947 (a forerunner of this section), which omitted to state "the taking" must be felonious, was prejudicially erroneous. St. v. Oliver, 20 M 318, 50 P 1018 (1897). See also St. v. Rodgers, 21 M 143, 53 P 97 (1898).

Conspiracy Evidence: Where defendant, while attempting to open the safe on a train, robbed a mail clerk, evidence as to details of the attempted train robbery and a conspiracy therefor was admissible to show the entire transaction in prosecution for robbery of clerk under 94-4301, R.C.M. 1947 (a forerunner of this section). St. v. Howard, 30 M 518, 77 P 50 (1904).

Part 5

Sexual Crimes

Part Case Notes

Inadequacy of Amended Information Charging Commission of Undefined Sexual Crime: Hardaway was initially charged with burglary, and the information was amended to charge that Hardaway knowingly entered or remained unlawfully in an unoccupied structure with intent to commit theft or a sexual crime. Hardaway contended that the amended information should have been dismissed because the term "sexual crime" was not sufficiently definite in its legal meaning to reasonably apprise him of the charge against him so that he could prepare a defense. The Supreme Court agreed. An information is sufficient if it properly charges an offense in the language of the statute defining the offense charged and if a person of common understanding would know what was charged. Here, the amended information failed to adequately put Hardaway on notice of the nature or character of the offense that he was accused of intending to commit. Numerous offenses of a sexual nature are defined in Montana law, but the purported offense of sexual crime is not, nor did the information provide any factual allegations to indicate which of the potential offenses of a sexual nature Hardaway was accused of intending to commit, so he had no way of determining which of the potential offenses, if any, was being charged. St. v.

Hardaway, 2001 MT 252, 307 M 139, 36 P3d 900 (2001). See also St. v. Steffes, 269 M 214, 887 P2d 1196 (1994).

Sex Crime Complaint — Reason for Amendment to Lesser Offense — Admissibility on Issue of Victim's Credibility: Defendant sought to introduce evidence that the state twice amended its original information to reduce charges of sexual intercourse or attempted sexual intercourse to sexual assault. Defendant contended the amendments reflected the alleged victims' changing stories and wished to attack their credibility through the amendments. The evidence was properly denied. The prosecutor had stated the amendments were for tactical reasons, not because of any decision by the alleged victims. Defendant's argument, that because the court judicially noticed the amendments evidence behind their having been made should have been admitted, was without merit because the court noticed them only for the purpose of ruling on the state's motion to exclude evidence of them and not for future evidentiary considerations. St. v. Anderson, 211 M 272, 686 P2d 193, 41 St. Rep. 1357 (1984).

45-5-501. Definitions.

Criminal Law Commission Comments

Source: New and N.Y. Pen. L. 1965, § 130.05.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 24, Ch. 713, L. 2023. Amendment effective October 1, 2023.

2019 Amendments — Composite Section — Code Commissioner Correction — Coordination: Chapter 133 inserted (1)(b)(xi) providing that a witness or a person who is under investigation is incapable of consent; inserted (1)(b)(xii) providing that a parent or guardian involved in a child abuse or neglect proceeding is incapable of consent when the perpetrator is an employee of the department of public health and human services or directly involved in the parent or guardian's case; and made minor changes in style. Amendment effective October 1, 2019.

Chapter 181 inserted (1)(b)(viii) and (1)(b)(ix) to include in the list of victims who are incapable of giving consent program participants in a private alternative adolescent residential or outdoor program and clients receiving psychotherapy services, if the perpetrator has supervisory or disciplinary authority over the victim; inserted (1)(e) and (1)(f) regarding exceptions to (1)(b)(viii) and (1)(b)(ix) for individuals who are married to each other; inserted definition of psychotherapy services; and made minor changes in style. Amendment effective April 18, 2019.

Chapter 344 in (1)(b)(v) and (1)(c) inserted "conditional release"; in (3) inserted definition of conditional release; in definition of parole deleted former (ii) that read: "(ii) in the case of a juvenile offender, means supervision of a youth released from a state youth correctional facility, as defined in 41-5-103, to the supervision of the department of corrections"; in definition of probation in two places substituted "youth" for "juvenile"; and made minor changes in style. Amendment effective July 1, 2019.

Chapter 346 inserted (1)(b)(x) concerning students and school employees; inserted (1)(g) providing an exception for married individuals who are students or school employees; and made minor changes in style. Amendment effective October 1, 2019.

The amendment to this section made by sec. 1, Ch. 305, L. 2019, was rendered void by sec. 6, Ch. 305, L. 2019, a coordination section.

Pursuant to sec. 43, Ch. 3, L. 2019, the code commissioner in (1)(b)(viii) in two places substituted "52-2-802" for "37-48-102" and substituted "Title 52, chapter 2, part 8" for "Title 37, chapter 48" and in (1)(b)(viii) and (1)(e) substituted "person associated with the program" for "worker affiliated with the program" to reflect the amendments made by Ch. 293, L. 2019, which repealed Title 37, chapter 48, and transferred responsibility for the licensure and regulation of private alternative adolescent residential or outdoor programs to the department of public health and human services.

Applicability: Section 4, Ch. 181, L. 2019, provided: "[This act] applies to incidents occurring on or after [the effective date of this act]." Effective April 18, 2019.

Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

2017 Amendment: Chapter 279 in (1)(a) substituted "As used in 45-5-502, 45-5-503, and 45-5-508, the term "consent" means words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact and is further defined but not limited by the following" for "As used in 45-5-503, the term "without consent" means"; in (1)(a)(i) substituted "an expression of lack of consent through words or conduct means there is no consent or that consent has been withdrawn" for "the victim is compelled to submit by force against the victim or another"; inserted (1)(a)(ii) and (1)(a)(ii) concerning social or sexual relationship or manner of dress and consideration of surrounding circumstances; in (2) substituted "45-5-508" for "subsection (1)"; and made minor changes in style. Amendment effective October 1, 2017.

Applicability: Section 8, Ch. 279, L. 2017, provided: "[This act] applies to crimes committed on or after [the effective date of this act]." Effective October 1, 2017.

2015 Amendment: Chapter 161 in (1)(a)(ii)(A) substituted "mentally disordered" for "mentally defective". Amendment effective April 1, 2015.

2007 Amendments — Composite Section: Chapter 321 in definition of without consent in (a)(ii) inserted reference to subsection (1)(c) and inserted (a)(ii)(F) concerning services at a youth care facility and (a)(ii)(G) concerning admission to mental health facility; inserted (1)(c) concerning married individuals; and made minor changes in style. Amendment effective October 1, 2007.

Chapter 335 in definition of without consent in (a)(ii) inserted reference to subsection (b), in (a)(ii)(E) inserted "or is on probation or parole", and inserted (b) providing exception if individuals are married and the victim is on probation or parole and the other individual is a probation or parole officer of a supervising authority; inserted definitions of parole, probation, and supervising authority; and made minor changes in style. Amendment effective October 1, 2007.

2001 Amendment: Chapter 562 in definition of without consent inserted (b)(iii) to include deception, coercion, and surprise; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 84 inserted (1)(b)(iv) concerning lack of consent by incarcerated victim; and made minor changes in style. Amendment effective October 1, 1999.

1991 Amendments: Chapter 175 in introductory clause, after "45-5-503", deleted "and 45-5-505".

Chapter 218 in (1)(a), after "force", substituted "against himself or another" for "or by threat of imminent death, bodily injury, or kidnapping to be inflicted on anyone"; inserted (2) defining force; and made minor changes in style.

Chapter 687 in (1), near beginning after "45-5-503", deleted reference to 45-5-505; inserted (2) defining force; and made minor changes in style. Amendment effective April 27, 1991.

Coordination: Section 8, Ch. 687, L. 1991, provided: "The amendment in section 1, Chapter 218, Laws of 1991, inserting subsection (2)(b) of 45-5-501 is void."

Annotator's Note: The 1975 amendment designated the former section as subsection (1) and added as subsection (2) the current section. The 1977 amendment deleted former subsection (1) which read "in this part unless a different meaning plainly is required the definitions given in Chapter 2 of 94-2-101 apply" and renumbered the section accordingly.

It is an element of every sexual offense except for deviate sexual conduct that the sexual act be committed without consent. This definition details when consent will be lacking. It should be noted, however, that this definition does not apply to § 45-5-502 on sexual assault, where the same term, "without consent", is used, but with its ordinary meaning, i.e. that the conduct was, in fact, not agreed to by the victim. Since young children do not always find it easy to withhold consent from an adult, there can be cases under § 45-5-502 where the requisite lack of consent cannot be proved although the sexual contact is obvious. That problem was alleviated to a great extent by the enactment of § 45-5-502(5) in 1979, which makes actual consent ineffective where the victim is less than 14 years old and the offender is three or more years older. Any offenses involving juveniles not covered by § 45-5-502(5) can be prosecuted under § 45-5-201(1)(c) (assault by contact of an insulting or provoking nature) in which the mental state or consent of the victim is not an issue. Subsection (1) covers forcible compulsion. Subsection (2) covers those instances when, regardless of acquiescence, the victim is deemed incapable of consent. The terms "mentally defective", "mentally incapacitated", and "physically helpless" refer to varying degrees of incapacity as defined in section 45-2-101. A person who has not reached the age of sixteen is legally incapable of consenting to a sexual act. The wording for this definition while based on New York source has been changed considerably. Consent as a defense is covered in MCA, 45-2-211.

Case Notes

Denial of Motion to Remove Prospective Juror — Structural Error Standard Not Met — Conduct-Based Jury Instruction Defining Mental State for Sexual Intercourse Without Consent — Incorrect Jury Instruction on Definition of Consent Not Plain Error. St. v. Deveraux, 2022 MT 130, 409 Mont. 177, 512 P.3d 1198.

Refusal to Issue Jury Instruction Concerning Age of Consent — Victim Older Than Age of Consent — Perpetrator Younger Than Age of Consent — No Abuse of Discretion: In a case concerning a 14-year-old defendant accused of committing sexual intercourse without consent against a 16-year-old, the Youth Court did not abuse its discretion in refusing the defendant's proposed jury instruction on the legal age of consent because only victims — not perpetrators — can be incapable of consenting, and the instruction did not accurately reflect this distinction, nor was the defendant's age an element of the crime charged. In re J.W., 2021 MT 291, 406 Mont. 224, 498 P.3d 211.

Failure to Object to Erroneous Jury Instruction on Age of Consent — Ineffective Assistance of Counsel — Conviction Reversed and Remanded for New Trial: The defendant was charged with sexual intercourse without consent and felony sexual assault against a 14-year-old victim. At trial, the jury was incorrectly instructed that the victim could not have consented to either charge due to her age, even though she was old enough to consent to the sexual assault charge. The jury found the defendant guilty of felony sexual assault and not guilty of sexual intercourse without consent. On appeal, the defendant claimed that his attorney had provided him ineffective assistance of counsel because he had not objected to the clearly erroneous jury instruction. The Supreme Court agreed that there was no plausible reason for the attorney's failure to object to the instruction and reversed the conviction and remanded for a new trial. St. v. Resh, 2019 MT 220, 397 Mont. 254, 448 P.3d 1100.

Massage Therapist Guilty of Sexual Intercourse Without Consent — Totality of Circumstances — Definition of Sexual Intercourse — Penetration Analyzed — Threat of Physical Force Supported: A jury found the defendant, a licensed massage therapist, guilty of sexual intercourse without consent while giving his victim a massage. The defendant argued on appeal that the prosecution did not present sufficient evidence to the jury to support the elements of penetration and force. The defendant further argued that testimony of clitoral rubbing did not prove that the vulva was penetrated. The Supreme Court determined that the defendant's arguments that clitoral rubbing did not constitute penetration under the law were without legal merit pursuant to the definition of sexual intercourse in 45-2-101. The Supreme Court held that viewed in a light most favorable to the prosecution, a rational trier of fact could conclude that the totality of the circumstances communicated a threat to the defendant's victim: the two were isolated in an empty office building after hours, the defendant was much larger than his victim, and the defendant persisted in his assault despite the victim's repeated objections. The victim testified that she told the defendant she was uncomfortable before he digitally penetrated her. After the penetration, she told the defendant pointedly to stop. Instead, the defendant returned to her groin area and started rubbing her clitoris. Montana law did not require the victim to push the defendant away, strike out at him, or attempt to flee. A rational jury could find that the defendant's actions communicated a threat of physical force to the victim. Viewing the evidence in the light most favorable to the prosecution, the Supreme Court affirmed the District Court's decision that a rational trier of fact could find all elements of sexual intercourse without consent beyond a reasonable doubt. St. v. Lerman, 2018 MT 5, 390 Mont. 117, 408 P.3d 1008, distinguishing St. v. Haser, 2001 MT 6, 304 Mont. 63, 20 P.3d 1, and St. v. Stevens, 2002 MT 181, 311 Mont. 52, 53 P.3d 356.

"Without Consent" Legal Theory Adequately Identified in Information: The defendant was convicted of sexual intercourse without consent and appealed, arguing that at trial the state had unlawfully changed its legal theory of how he had committed sexual intercourse "without consent" and that the state improperly relied on several definitions of "without consent" under 45-5-501(1), without identifying which definition applied in the charging document (information). The Supreme Court disagreed with the defendant, noting that the affidavit in support of the information contained several references to the victim's intoxication and unconsciousness. These references adequately notified the defendant of the state's theory of how the victim could not have given consent and thus how the defendant had committed sexual intercourse "without consent". St. v. Lacey, 2012 MT 52, 364 Mont. 291, 272 P.3d 1288.

Jury Instruction Adequate Description of Definitions and Law of Case: Thorp contended that the trial court erred in instructing the jury on the definition of "without consent" in the context of a sexual intercourse without consent charge. The trial court accepted the state's instruction that defined the term as the victim being incapable of consent based on being under the age of 16, but Thorp pointed out that the information filed by the state alleged force. However, 45-5-501 defines "without consent" as the victim either being compelled to submit by force or being incapable of consent for a variety of reasons, including age. Thorp did not dispute the victim's age as under 16 years, so the "without consent" element was settled, leaving the jury to resolve any dispute about whether sexual contact had occurred. Thorp also did not challenge jury instructions regarding the knowing, intentional, or sexual intercourse elements of the offense. Therefore, the jury was fully and fairly instructed on the law applicable to the case, and the trial court was affirmed. St.

v. Thorp, 2010 MT 92, 356 Mont. 150, 231 P.3d 1096, distinguishing St. v. Hardaway, 2001 MT 252, 307 Mont. 139, 36 P.3d 900.

Sexual Assault Lesser Included Offense of Sexual Intercourse Without Consent — Conviction of Both Crimes Arising From Same Act Precluded: The definition of "without consent" in the crime of sexual assault falls squarely within the scope of sexual intercourse without consent, so sexual assault qualifies as a lesser included offense of sexual intercourse without consent. Therefore, pursuant to 46-11-401, the state may not convict a defendant of both sexual intercourse without consent and sexual assault when the charges arise from the same attack as alleged in the information. St. v. Williams, 2010 MT 58, 355 Mont. 354, 228 P.3d 1127. See also St. v. Beavers, 1999 MT 260, 296 Mont. 340, 987 P.2d 371, St. v. Becker, 2005 MT 75, 326 Mont. 364, 110 P.3d 1, St. v. Russell, 2008 MT 417, 347 Mont. 301, 198 P.3d 271, and St. v. Weatherell, 2010 MT 37, 355 Mont. 230, 225 P.3d 1256.

Jury Question as to Whether Rape Victim Asleep and Physically Helpless — Conflicting and Uncorroborated Victim Testimony: Shields contended that the state failed to show that Shields had sexual intercourse with a woman by force. The victim testified that she was asleep and did not realize what was happening until she awoke and did not realize who was in the room with her until she turned on the light, while Shields testified that the victim was not asleep, but was in fact an active participant in the act. However, the mere existence of conflicting evidence did not render the state's evidence insufficient to support a guilty verdict, nor was Shields' conviction rendered infirm by the fact that the state presented no evidence corroborating the victim's testimony that she was asleep. It was within the province of the jury to decide which of the conflicting evidence would prevail, and only in cases in which a witness's testimony is so inherently improbable, or is so nullified by material self-contradiction that no fair-minded person could believe it, will the Supreme Court say that no firm foundation exists for a verdict based on that testimony. In this case, any rational trier of fact could have found that the victim was asleep during the sexual intercourse, despite the fact that the victim may have had some sensory perception during the incident, and was therefore physically helpless and incapable of consent. Shields' conviction was affirmed. St. v. Shields, 2005 MT 249, 328 M 509, 122 P3d 421 (2005).

Massage Patients Not Incapable of Consent Because of Force or Physical Helplessness — Conviction for Sexual Intercourse Without Consent Improper: Stevens was convicted of two counts of sexual intercourse without consent after having sexual contact with two female patients at his massage clinic. Stevens appealed on grounds that the state failed to prove the "without consent" element beyond a reasonable doubt. Stevens asserted that the victims were not physically helpless even though they were in a dream state of total relaxation and that there was no evidence that Stevens used any force or threat of force even though the victims were surprised or fearful. The Supreme Court agreed, concluding that no rational trier of fact could have found that the victims were unconscious or otherwise physically unable to communicate unwillingness to act or that the victims' fear was a result of Stevens' infliction, attempted infliction, or threatened infliction of bodily injury. The court reduced the offenses to sexual assault and remanded for further proceedings. St. v. Stevens, 2002 MT 181, 311 M 52, 53 P3d 356 (2002). See also St. v. Haser, 2001 MT 6, 304 M 63, 20 P3d 100 (2001).

Sleeping Victim of Sexual Intercourse Without Consent Considered Physically Helpless: A sleeping victim of sexual intercourse without consent is physically helpless within the definitions in 45-2-101 and this section. The statutory definition of physically helpless is broadly worded to encompass a person who is sleeping because a sleeping person is temporarily unconscious or otherwise physically unable to communicate unwillingness to act. Therefore, a sleeping person cannot consent to sexual intercourse. Whether a person was indeed sleeping, and thus physically helpless, is a question of fact for the jury to decide. St. v. Stevens, 2002 MT 181, 311 M 52, 53 P3d 356 (2002).

"Surprise" Penetration Insufficient to Establish Sexual Intercourse Without Consent: Defendant, a photographer, appealed his conviction for sexual intercourse without consent, alleging that his ploy of deceiving the female victims into submitting to his unlawful sexual touching under the guise of showing them how to pose for modeling photos did not constitute the element of "without consent" because the victims were not compelled to submit by force nor were they "incapable of consent" as required by law. In reversing the District Court's decision, the Supreme Court held that although the victims experienced shock, embarrassment, surprise, anger, and perhaps even a trace of fear during the photo sessions, evidence of defendant's "surprise" penetration, alone, was insufficient to satisfy the "compelled to submit by force" element of "without consent". (However, see 2001 amendment enacted in response to this case.) The evidence did not establish

that the victims were "incapable of consent" because of mental incapacity or physical helplessness (see 2001 amendment). St. v. Haser, 2001 MT 6, 304 M 63, 20 P3d 100 (2001).

Mental Incapacitation of Voluntarily Intoxicated Sexual Assault Victim: The definition of "mentally incapacitated" is clear on its face. By its terms, it does not differentiate between voluntary and involuntary intoxication and is not limited to the latter. The definition includes the voluntary intoxication of the victim of sexual intercourse without consent, whose voluntary intoxication did not preclude the state from proving that mental incapacitation due to voluntary intoxication kept her from consenting. St. v. Gould, 273 M 207, 902 P2d 532, 52 St. Rep. 930 (1995).

Sufficient Evidence of Mental Incapacitation, Due to Intoxication, of Victim of Sexual Intercourse Without Consent: Mental incapacitation, due to voluntary intoxication, of the victim of sexual assault and therefore her lack of consent were uncontroverted. There was evidence that she had a blood alcohol content of at least 0.45, ran into things and fell, and needed help in getting up. A toxicologist also opined that the victim was in the comatose-to-death phase of intoxication. St. v. Gould, 273 M 207, 902 P2d 532, 52 St. Rep. 930 (1995), distinguished in St. v. Haser, 2001 MT 6, 304 M 63, 20 P3d 100 (2001) (see 2001 amendment).

Intoxication to Point of Unconsciousness — Victim Incapable of Consent — Victim's Uncorroborated Testimony Sufficient to Support Jury Verdict: When the drunk victim fell asleep on the bed fully clothed and awoke to find the defendant having sex with her, there was sufficient evidence to support the jury verdict of sexual intercourse without consent. Convictions for sexual intercourse without consent and sexual assault are sustainable based entirely on the uncorroborated testimony of the victim. St. v. Graves, 272 M 451, 901 P2d 549, 52 St. Rep. 755 (1995), distinguished in St. v. Haser, 2001 MT 6, 304 M 63, 20 P3d 100 (2001) (see 2001 amendment).

Sufficient Evidence to Support Finding That Victim Did Not Consent: The defendant argued that the fact that he had intercourse with the victim on previous occasions demonstrated that she had consented to have sex with him. The Supreme Court held that the fact that the victim had not reported two prior attacks did not indicate she consented to sex and that the medical evidence supported a finding that force had been used. St. v. Hamm, 250 M 123, 818 P2d 830, 48 St. Rep. 830 (1991), overruled on other grounds in St. v. Wolf, 2020 MT 24, 398 Mont. 403, 457 P.3d 218.

Instructions on Required Proof of Lack of Consent — Statement of Law: In instructing the jury on the definition of "lack of consent", the District Court included language from this section, which defines "without consent", and general language from 45-5-511, which includes language applicable to sexual crimes. Defendant contended that the use of the general language improperly diluted the state's burden of proof. However, consistent with St. v. Thompson, 243 M 28, 792 P2d 1103 (1990), the element of force required to find a conviction was properly stated. Because the instruction was a direct statement of law and was consistent with prior case law, defendant was not prejudiced. St. v. Goodwin, 249 M 1, 813 P2d 953, 48 St. Rep. 539 (1991).

Victim Threatened With Nongraduation From High School: The principal of a high school threatened a student with nongraduation if she did not submit to his sexual advances. The Supreme Court held that the state had to show that the victim submitted due to physical force or threats of physical force. The court held that under the present definition of "without consent", the state could not prove all the elements of the crime. (See 1991 amendment.) St. v. Thompson, 243 M 28, 792 P2d 1103, 47 St. Rep. 1065 (1990).

Victim's Conduct Irrelevant: This section provides that a victim is incapable of consent if she is less than 16 years old. The victim's alleged consent or conduct is irrelevant to this case because she was less than 16 years old, and thus evidence on that subject was properly excluded. St. v. Pease, 227 M 424, 740 P2d 659, 44 St. Rep. 1203 (1987).

Without Consent:

In a sexual intercourse without consent case, the jury was instructed that the victim need only resist to the extent that is reasonable and that continued resistance is not necessary to show that the act was done without consent. That was a correct statement of the law, and the District Court properly refused defendant's proposed instruction. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980).

An instruction defining lack of consent to include "consent having been overcome by threats, or putting in fear of his [victim's] safety" was not prejudicial to defendant in a prosecution for deviate sexual conduct without consent, where the threats made all related to the victim's physical well-being; it would have been better to charge in the words of the statute. St. v. Ballew, 166 M 270, 532 P2d 407 (1975).

Burden of Proving Defense: The court did not err in instructing the jury that defendant had the burden of proving the defense of reasonable belief of age by a preponderance of the evidence. St. v. Smith, 176 M 159, 576 P2d 1110 (1978).

Constitutionality: This section's definition of "without consent" and the definitions of "deviate sexual relations", "sexual contact", and "sexual intercourse" contained in 45-2-101, when read into 45-5-505 (renumbered 45-8-218), prohibiting deviate sexual conduct, are sufficient to protect 45-5-505 (renumbered 45-8-218) from the contention that it is unconstitutional for vagueness. St. v. Ballew, 166 M 270, 532 P2d 407 (1975). (See 2013 amendments to 45-2-101 and 45-8-218.)

45-5-502. Sexual assault.

Criminal Law Commission Comments

Source: M.P.C., 1962, § 213.4.

This section is a substantial change from the old law. It carries out the rationale behind section 213.4 of the Model Penal Code. This section deals with acts of sexual aggression which do not involve the element of "penetration", found in R.C.M. 1947, former section 94-4103. The range of activity covered extends from unauthorized fondling of a woman's breasts to homosexual manipulation of a boy's genitals. The old law did not differentiate sexual from other assault, except assault in connection with rape or lewd and lascivious acts upon children. The following considerations favor special treatment of indecent assault within the sexual offense category: (1) The individualized treatment of sexual misconduct with children is consistent with current legislation; (2) Societal concern with indecent assault focuses on the outrage, disgust or shame engendered in the victim rather than fear of physical injury; and (3) the gist of the offense being a sexual imposition, although of a lesser degree. The important features of this section require an actual touching and leave for separate consideration cases of indecent exposure, etc. Although contact must be with the victim it need not be contact between the offender and the victim. Thus, subjecting another to sexual contact with a third person is covered. It covers situations of nonconsent only.

There is a maximum penalty of twenty years if the victim is under sixteen years and the defendant is three years or more older, covering the situation where sexual contact takes a deviate form in regard to children. The rationale behind heavy punishment of "lewd acts upon children" or statutory rape is victimization of immaturity. To give effect to the victimization rationale, an age differential in favor of the male is provided. Thus, a youth who had sexual contact with a fifteen year-old girl would have to be eighteen years or older before such act is a criminal event.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 205, L. 2023. Amendment effective October 1, 2023.

Applicability: Section 5, Ch. 205, L. 2023, provided: "[This act] applies to violations of 45-5-502(4) that occur on or after [the effective date of this act]." Effective October 1, 2023.

2019 Amendments — Composite Section — Coordination: Chapter 181 in (5) in introductory clause inserted references to (5)(d) and (5)(e); inserted (5)(a)(v) and (5)(a)(vi) to include in the list of victims incapable of giving consent program participants in a private alternative adolescent residential or outdoor program and clients receiving psychotherapy services, if the perpetrator meets certain criteria; inserted (5)(d) and (5)(e) regarding exceptions to (5)(a)(v) and (5)(a)(vi) for individuals who are married to each other; and made minor changes in style. Amendment effective April 18, 2019.

Chapter 344 in (5)(a)(i) and (5)(b) inserted "conditional release"; and made minor changes in style. Amendment effective July 1, 2019.

Chapter 346 in (5)(a) inserted reference to (5)(f); inserted (5)(a)(vii) concerning students and school employees; inserted (5)(f) providing an exception for married individuals who are students or school employees; and made minor changes in style. Amendment effective October 1, 2019.

The amendment to this section made by sec. 2, Ch. 305, L. 2019, was rendered void by sec. 7, Ch. 305, L. 2019, a coordination section.

Code Commissioner Correction: Pursuant to sec. 43, Ch. 3, L. 2019, the code commissioner in (5)(a)(v) in two places substituted "52-2-802" for "37-48-102" and substituted "Title 52, chapter 2, part 8" for "Title 37, chapter 48"; and in (5)(a)(v) and (5)(d) substituted "person associated with the program" for "worker affiliated with the program" to reflect the amendments made by Ch. 293, L. 2019, which repealed Title 37, chapter 48, and transferred responsibility for the licensure and regulation of private alternative adolescent residential or outdoor programs to the department of public health and human services.

Applicability: Section 4, Ch. 181, L. 2019, provided: "[This act] applies to incidents occurring on or after [the effective date of this act]." Effective April 18, 2019.

Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

2011 Amendment: Chapter 46 in (2)(a) at beginning substituted "On a first conviction for sexual assault, the offender shall" for "A person convicted of sexual assault shall"; inserted (2)(b) regarding second conviction for sexual assault; and inserted (2)(c) regarding third and subsequent conviction for sexual assault. Amendment effective October 1, 2011.

2007 Amendments — Composite Section: Chapter 321 in (5)(a) at beginning inserted reference to subsection (5)(c); inserted (5)(a)(iii) concerning services at a youth care facility; inserted (5)(a)(iv) concerning admission to mental health facility; inserted (5)(c) concerning married individuals; and made minor changes in style. Amendment effective October 1, 2007.

Chapter 335 in (5)(a) inserted reference to subsection (5)(b); in (5)(a)(i) near middle after "facility" inserted "or is on probation or parole"; inserted (5)(b) providing a limited marriage exception to sexual assault; and made minor changes in style. Amendment effective October 1, 2007.

2003 Amendment: Chapter 450 in (3) near middle increased minimum prison term from 2 years to 4 years and after "years" inserted "unless the judge makes a written finding that there is good cause to impose a term of less than 4 years and imposes a term of less than 4 years"; and made minor changes in style. Amendment effective October 1, 2003.

1999 Amendment: Chapter 84 inserted (5)(a) concerning ineffective consent by incarcerated person; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 550 in (3), near middle after "shall be", substituted "punished by life imprisonment or by imprisonment" for "imprisoned" and near end, after "more than", substituted "100" for "20"; and made minor changes in style.

1991 Amendments: Chapter 564 near end of (3), before "20 years", substituted "less than 2 years or more than" for "to exceed".

Chapter 687 in (1), after "another", substituted "person" for "not his spouse". Amendment effective April 27, 1991.

1985 Amendment: At end of (2) inserted "or both".

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section provides sanctions for nonconsensual sexual contact which falls short of sexual intercourse. There is no counterpart under the old law. The section deals with acts of sexual aggression which do not involve the element of "penetration", which is covered by MCA, 45-5-503. The central terms, "sexual intercourse" and "sexual contact", are defined in § 45-2-101.

Subsection (1) describes the substantive offense and provides that it must be done "knowingly", defined in § 45-2-101. This requirement eliminates the possibility of prosecution for inadvertent or accidental touching. It should be noted that the definition of "without consent" contained in 45-5-501 does not apply to this section. As used in this section, the phrase "without consent" has its normal grammatical meaning. The legislative intent was to prohibit any sexual contact to which the victim did not give an informed consent which he or she was legally capable of giving. The 1979 amendment added subsection (5) making consent ineffective where the victim is less than 14 years old and the offender is 3 or more years older. There may still be some cases involving juveniles which would not be covered even by this subsection although it appears that a majority of situations would be. In those instances not covered by subsection (5), section 45-5-201(1)(c) (assault by contact of an insulting or provoking nature) should apply, and the mental state or consent of the victim is not an issue. The combination of this section and § 45-5-201(1)(c) should cover all of the conduct formerly prohibited as "Lewd and Lascivious Conduct" where the victim is a minor.

The definition of "sexual contact", supra, imposes the requirement of a physical touching. Further, such touching must be done with the purpose of sexual arousal or gratification. "Purpose" is defined in MCA, 45-2-101.

Subsection (2) provides that sexual assault shall be a misdemeanor in the absence of any of the aggravating circumstances enumerated in subsection (3).

The much more severe maximum penalty in subsection (3) is reserved for cases of infliction of "bodily injury", defined at § 45-2-101, and for cases where a person exploits a juvenile 3 or more years younger than himself. This age differential protects any person less than 16 years old from exploitation by anyone over 18 years old whether or not force is used. If the offender is between the ages of 16 and 18, he will ordinarily be subject to youth court jurisdiction. Thus, this subsection applies to the adult over 18 who is 3 or more years older than the under 16-year-old victim.

Subsection (4) extends the applicability of the more severe penalty of subsection (3) by broadly defining the time period during which the infliction of bodily injury will cause that penalty to apply. Thus the offender may be subject to the more severe penalty whether or not the assault is completed by a touching and even if the bodily injury is inflicted subsequent to the commission of the offense or the attempt.

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CONSTITUTIONAL ISSUES

Handwritten Notes Used to Create Report — Motion to Dismiss Case Based on Destruction of Notes Denied — Motion In Limine Disallowing Evidence of Destruction Proper: The defendant was charged with sexually assaulting his two stepdaughters. During discovery, the defendant learned that a caseworker had taken handwritten notes of an interview with the stepdaughters, which were shredded after being used to create a digital report. The defendant filed a motion to dismiss the charges against him, arguing that the state had deliberately destroyed evidence. The District Court denied the motion and prohibited the defendant from presenting evidence to the jury about the destruction of the handwritten notes. The defendant was convicted and appealed to the Supreme Court, arguing that his right to present a complete defense had been violated. However, the Supreme Court upheld both the denial of the motion to dismiss and the granting of the motion in limine, concluding that the caseworker's digital report was comparable evidence and that the District Court properly excluded evidence of the notes later being shredded. St. v. Villanueva, 2021 MT 277, 406 Mont. 149, 497 P.3d 586.

No Showing That Evidence Exculpatory or Intentionally Withheld — Summary Dismissal Proper: Hiebert sued the county and several county officials for withholding exculpatory evidence in Hiebert's trial for sexual assault. The District Court dismissed the suit on summary judgment, and Hiebert appealed. The prosecution has a duty to disclose all favorable evidence to the defense, and when considering the withholding of exculpatory evidence from the defense, a due process violation of Brady v. Md., 373 US 83 (1963), occurs if: (1) the evidence at issue is favorable to the accused, either because it has exculpatory or impeachment value; (2) the evidence was willfully or inadvertently suppressed by the state; and (3) the suppression resulted in prejudice to the accused. In this case, Hiebert failed to demonstrate that evidentiary transcripts were exculpatory or withheld intentionally, other than by speculating that one official lied in testifying that the transcript was not withheld, and speculation is insufficient to avoid summary judgment. The Supreme Court affirmed summary judgment. Hiebert v. Cascade County, 2002 MT 233, 311 M 471, 56 P3d 848 (2002).

Negligent, Not Intentional, Failure to Provide Defendant With Witness Interview Transcript — No Showing of Materiality of Evidence in Light of Defendant's Confession of Crime: Three taped interviews were conducted with a sexual assault victim. The first two related to Baker's alleged assault of the victim, while the third related to separate allegations that the victim had also been abused by a family member, although Baker's name was also mentioned. Baker was not provided with a copy or transcript of the third interview prior to trial. When that information came out at trial, Baker was provided a copy and viewed it during a recess. Following the break and Baker's review of the transcript, Baker moved for a mistrial on grounds that the prosecution's failure to provide a transcript had denied him exculpatory evidence and impaired his ability to cross-examine witnesses, violating his right to due process and a fair trial. The motion was denied, and Baker appealed. Citing St. v. Brown, 1999 MT 133, 294 M 509, 982 P2d 468 (1999), the Supreme Court noted that an intentional suppression of exculpatory evidence by the prosecution is a per se violation of due process. However, in this case, the state's failure to provide Baker with a transcript of the third interview was negligent rather than intentional, so it did not amount to a due process violation unless the evidence was material, of substantial use, vital to the defense, and exculpatory. In light of the fact that Baker had admitted during one interview that he assaulted the victim and related details of the incident, there was no reasonable probability that the outcome of the trial would have been different had the state disclosed the third interview prior to trial. Baker failed to meet the burden of establishing materiality, so his due process right was not violated, nor did the court err in denying his motion for a mistrial. St. v. Baker, 2000 MT 235, 301 M 323, 8 P3d 817, 57 St. Rep. 976 (2000). See also St. v. Buckles, 1999 MT 79, 294 M 95, 979 P2d 177 (1999).

Alleged Error Part of Defense Strategy — Trial Not Constitutionally Defective — Plain Error and Cumulative Error Doctrines Held Inapplicable: Hanson was charged with sexual assault of and deviate sexual conduct with his former girlfriend's son, Aaron. Hanson alleged that the testimony of his victim and certain witnesses was unreliable, that certain testimony was incorrectly presented on rebuttal, that the state introduced evidence of other acts in violation of both Rule 404(b), M.R.Ev. (Title 26, ch. 10), and his constitutional right to due process, that the state's cross-examination of him went too far, that he was improperly impeached by certain state evidence, and that the prosecutor incorrectly commented on the veracity of a witness. For these reasons, Hanson argued that he was deprived of a fair trial in violation of the constitutional guaranty of a fair trial and that the doctrines of plain error and cumulative error applied so as to require a new trial even though he had not objected to the evidence before the District Court. The Supreme Court reviewed the trial record and pointed out that either Hanson failed to object to testimony by Aaron, Aaron's therapist, and a Deputy Sheriff or he actually solicited their testimony himself in an effort to show their lack of credibility. The Supreme Court held, citing St. v. Campbell, 241 M 323, 787 P2d 329 (1990), and St. v. Finley, 276 M 126, 915 P2d 208 (1996), that the alleged errors did not rise to the level of a manifest miscarriage of justice, did not leave unsettled the question of the fundamental fairness of the trial, and did not compromise the integrity of the judicial system. Therefore, the court refused to invoke the plain or cumulative error doctrine to review issues raised for the first time on appeal. St. v. Hanson, 283 M 316, 940 P2d 1166, 54 St. Rep. 678 (1997).

Failure to Request Not Ineffective Assistance of Counsel — Tactical Decision Supported by Defendant: The District Court properly denied a petition for postconviction relief based on claimed ineffective assistance of counsel in that counsel did not request an instruction that misdemeanor sexual assault was a lesser included offense of the charged offense of sexual intercourse without consent. Counsel's decision to not offer the instruction was a tactical one based on all the facts and on defendant's strident proclamations of innocence. Counsel stated that he believed that he had put on a strong defense and that he and defendant decided to force the jury to either convict or acquit on the charged offense. The courts will not second guess the tactical and strategic decisions of counsel. St. v. Sheppard, 270 M 122, 890 P2d 754, 52 St. Rep. 106 (1995).

Incest Conviction Reversed — Retrial for Sexual Assault Barred by Double Jeopardy: The prosecution's proof of sexual contact is the same in both the incest statute and the sexual assault statute. The prosecution in the original trial on a charge of incest, reversed on appeal, barred retrial on a charge of sexual assault. A defendant whose conviction was reversed because the evidence was insufficient as a matter of law could not be retried. The U.S. Supreme Court reversed, holding the constitution permits a retrial after a conviction is reversed because of a defection in the charging instrument. St. v. Hall, 224 M 187, 728 P2d 1339, 43 St. Rep. 2120 (1986), reversed, 481 US 400, 95 L Ed 2d 354, 107 S Ct 1825 (1987).

Constitutionality: The Legislature has the power to prohibit the commission of lewd and lascivious acts upon children under certain ages, and 94-4106, R.C.M. 1947 (since repealed), defining and prescribing punishment for such offense was constitutional. St. v. Jensen, 153 M 489, 458 P2d 782 (1969); St. v. Kocher, 112 M 511, 119 P2d 35 (1941).

ELEMENTS

Failure to Object to Erroneous Jury Instruction on Age of Consent — Ineffective Assistance of Counsel — Conviction Reversed and Remanded for New Trial: The defendant was charged with sexual intercourse without consent and felony sexual assault against a 14-year-old victim. At trial, the jury was incorrectly instructed that the victim could not have consented to either charge due to her age, even though she was old enough to consent to the sexual assault charge. The jury found the defendant guilty of felony sexual assault and not guilty of sexual intercourse without consent. On appeal, the defendant claimed that his attorney had provided him ineffective assistance of counsel because he had not objected to the clearly erroneous jury instruction. The

Supreme Court agreed that there was no plausible reason for the attorney's failure to object to the instruction and reversed the conviction and remanded for a new trial. St. v. Resh, 2019 MT 220, 397 Mont. 254, 448 P.3d 1100.

Sexual Assault Lesser Included Offense of Sexual Intercourse Without Consent — Conviction of Both Crimes Arising From Same Act Precluded: The definition of "without consent" in the crime of sexual assault falls squarely within the scope of sexual intercourse without consent, so sexual assault qualifies as a lesser included offense of sexual intercourse without consent. Therefore, pursuant to 46-11-401, the state may not convict a defendant of both sexual intercourse without consent and sexual assault when the charges arise from the same attack as alleged in the information. St. v. Williams, 2010 MT 58, 355 Mont. 354, 228 P.3d 1127. See also St. v. Beavers, 1999 MT 260, 296 Mont. 340, 987 P.2d 371, St. v. Becker, 2005 MT 75, 326 Mont. 364, 110 P.3d 1, St. v. Russell, 2008 MT 417, 347 Mont. 301, 198 P.3d 271, and St. v. Weatherell, 2010 MT 37, 355 Mont. 230, 225 P.3d 1256.

Misdemeanor Assault Not Lesser Included Offense of Sexual Assault — Denial of Lesser Included Offense Instruction Not Error: In a sexual assault trial, Cameron requested a jury instruction that misdemeanor assault was a lesser included offense of sexual assault. The request was denied. On appeal, Cameron raised several arguments regarding the lesser included offense and claimed error in denial of the instruction. The Supreme Court noted that under St. v. Martinez, 1998 MT 265, 291 M 306, 968 P2d 705 (1998), two criteria must be met before a defendant is entitled to a lesser offense instruction: (1) the offense must actually constitute a lesser included offense of the offense charged; and (2) there must be sufficient evidence to support the lesser included offense instruction. The court examined the elements of both offenses and concluded that the elements of misdemeanor assault and sexual assault are not similar and do not overlap. Thus, misdemeanor assault is not a lesser included offense of sexual assault. The jury was therefore properly instructed, and the sexual assault conviction was affirmed. St. v. Cameron, 2005 MT 32, 326 M 51, 106 P3d 1189 (2005), followed in St. v. Gerstner, 2009 MT 303, 353 M 86, 219 P3d 866 (2009). See also St. v. Denny, 2021 MT 104, 404 Mont. 116, 485 P.3d 1227.

Sufficient Proof of Elements of Sexual Assault — Conviction Affirmed: Earl contended that the state failed to prove the elements of sexual assault. Although Earl denied the victims' accounts of the events, the state offered sufficient victim testimony to show that sexual assaults occurred, and when viewed in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proved. Earl's conviction was affirmed. St. v. Earl, 2003 MT 158, 316 M 263, 71 P3d 1201 (2003).

Supreme Court Reduction of Offense of Sexual Intercourse Without Consent to Sexual Assault — Relevance of Testimony of Victims Regarding Belief That Massage Therapist's Actions Were Criminal: Stevens was convicted of two counts of sexual intercourse without consent after having sexual contact with two female patients at his massage clinic. The Supreme Court determined that there was insufficient proof that the offenses were committed without consent and, without addressing whether sexual assault was a lesser included offense of sexual intercourse without consent, reduced the offenses to sexual assault. Even though Stevens was not specifically charged with sexual assault, there was no question that he was reasonably apprised of the sexual assault charges against him. Stevens offered a jury instruction, which was given without objection, stating that sexual intercourse without consent necessarily included the offense of sexual assault. Evidence clearly showed that Stevens had sexual contact with the victims, and testimony from the victims regarding whether they considered sexual contact by a massage professional to be criminal was relevant and admissible, tending to make the existence of a material element of the crime, namely whether the crime was committed without consent, more likely than without the evidence. St. v. Stevens, 2002 MT 181, 311 M 52, 53 P3d 356 (2002), distinguishing St. v. Black, 270 M 329, 891 P2d 1162 (1995).

Age Factors Related to Sentencing, Not Element of Offense of Sexual Assault: Baker was charged with sexual assault. The information alleged that the victim was less than 16 years old and that Baker was 3 or more years older than the victim. After the state's case in chief, Baker moved for a directed verdict, arguing that, although the evidence showed that he knowingly subjected the victim to sexual contact without consent, the state had failed to present any evidence regarding his age or that he was 3 or more years older than the victim and thus had failed to prove the elements of the offense of sexual assault as charged. The Supreme Court disagreed, holding that the age-related circumstances that enhance the penalty for sexual assault pertain only to sentencing and cannot be considered an element of the offense that the state is required to prove. The motion for a directed verdict was properly denied. St. v. Baker, 2000 MT 235, 301 M 323, 8 P3d 817, 57 St. Rep. 976 (2000).

Petition for Postconviction Relief Filed Twelve Years After Conviction Time Barred — Guillaume Inapplicable: Charlo was convicted of aggravated assault in 1986 and sentenced to 20 years plus 10 years for use of a weapon, and the sentence was affirmed in 1987 (see St. v. Charlo, 226 M 213, 735 P2d 278 (1987)). Following the decision in St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999), Charlo petitioned for postconviction relief in 1999 on grounds that the imposition of the additional 10-year weapon enhancement sentence violated his double jeopardy rights. The District Court concluded that Guillaume did not apply and that no miscarriage of justice would occur if the court applied the 5-year statute of limitations on postconviction relief provided in 46-21-102 (now 1 year). The Supreme Court concurred. A petition filed 12 years after final conviction clearly violated the statute of limitations in 46-21-102. The court relied on St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966, 57 St. Rep. 120 (2000), for the holding that application of the weapon enhancement provision in 46-18-221 to a conviction in which the underlying offense does not require use of a weapon as an element of the crime does not constitute a double jeopardy violation. The offense of aggravated assault does not require use of a weapon, so Guillaume did not apply. The court also declined to apply the fundamental miscarriage of justice exception in St. v. Redcrow, 1999 MT 95, 294 M 252, 980 P2d 622 (1999). Guillaume was the sole basis of Charlo's petition, so Charlo could not show that the Redcrow exception would apply. St. v. Charlo, 2000 MT 192, 300 M 435, 4 P3d 1201, 57 St. Rep. 761 (2000).

Assumption of Sexual Assault as Lesser Included Offense of Sexual Intercourse Without Consent — No Due Process Violation: Black was charged with sexual intercourse without consent. The court found insufficient evidence to convict on that charge but instead found him guilty of felony sexual assault. Black appealed on the grounds that he was convicted of an offense with which he was not charged, relying on St. v. Copenhaver, 35 M 342, 89 P 61 (1907). Neither Black nor the state raised the issue of whether sexual assault was a lesser included offense of sexual intercourse without consent, either at trial or directly on appeal. Although the issue was not properly before the Supreme Court on appeal and the court specifically declined to address it, the court nevertheless assumed for purposes of this opinion that sexual assault is a lesser included offense of sexual intercourse without consent. The court distinguished Copenhaver, in which defendant was convicted of a separate, independent offense that was not a lesser included offense. In this case, pursuant to the court's assumption and 46-16-607(1), the court found that the charging document provided a sufficient basis for Black's conviction of sexual assault. Black's arguments that he was convicted of a crime with which he was not charged, that the charging document did not provide notice of the crime of which he was convicted, and that his due process rights were violated were thus rendered ineffective. St. v. Black, 270 M 329, 891 P2d 1162, 52 St. Rep. 215 (1995).

"Sexual Contact" — Rubbing Young Girl's Belly and Chest: The Supreme Court reversed the District Court's decision to grant defendant's motion for dismissal under 46-16-403 of a sexual assault charge and held that the sexual contact proscribed by 45-5-502 is not limited to a touching of the anal or genital area of a male or female or the breast of a female. Looking to the purpose of the statute, the court found that the definition of "sexual contact" encompasses the rubbing of the belly and chest of a prepubescent female child because of the societal concern for such impositions and their resultant outrage, disgust, or shame in the victim. St. v. Weese, 189 M 464, 616 P2d 371, 37 St. Rep. 1620 (1980), followed in St. v. Gilpin, 232 M 56, 756 P2d 445, 45 St. Rep. 863 (1988), and distinguished in St. v. Kestner, 220 M 41, 713 P2d 537, 43 St. Rep. 155 (1986).

Assault and Attempted Rape Distinguished: Aggressive, indecent, immoral, and grossly offensive contact without the consent of the female and with intent to induce her consent to sexual intercourse constituted simple assault but did not constitute attempt to rape in violation of 94-4101, R.C.M. 1947 (a forerunner of 45-5-503), where defendant could have accomplished his purpose by force but desisted when the female resisted. St. v. Hennessy, 73 M 20, 234 P 1094 (1925).

TRIAL

Test Whether Witness May Testify as Expert on Child Abuse: Factors in the three-part test set out in St. v. Scheffelman, 250 M 334, 820 P2d 1293 (1991), for whether a witness may testify as an expert on child abuse are: (1) the expert must have extensive first-hand experience with children who both have and have not been sexually abused; (2) the expert must have a thorough and current knowledge of the professional literature on child abuse; and (3) the expert must have objectivity and neutrality regarding individual cases. In Riggs's case, the state called a child abuse expert who met the qualifications but who had a therapeutic relationship with one of the victims to testify concerning interviewing techniques applied in a sexual abuse investigation.

Riggs contended that the trial court erred by allowing the expert to testify and by limiting the defense's ability to cross-examine the expert. The Supreme Court disagreed on both issues. Given the limited scope of the expert's testimony, the objectivity with which the expert could testify regarding interviewing techniques was not susceptible to being compromised by the therapeutic relationship with one of the victims, so the trial court did not err in qualifying the witness as an expert. Additionally, Riggs was afforded a fair and full opportunity to expose any potential bias of the expert, so Riggs's right to confront witnesses was not infringed. St. v. Riggs, 2005 MT 124, 327 M 196, 113 P3d 281 (2005). See also St. v. Whitlow, 285 M 430, 949 P2d 239 (1997).

No Error in Trial Court's Failure to Sever Counts of Sexual Assault and Sexual Abuse of Children — Defendant's Failure to Show Prejudice: Prior to trial, Yecovenko moved to sever charges of sexual abuse of his stepdaughters from charges of sexual abuse of children related to Yecovenko's downloading of child pornography from the Internet, asserting that prejudice would result, but failing to assert the type of prejudice that would occur if the charges were not severed, as required by St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002). Because Yecovenko failed in District Court to satisfy the threshold requirement of alleging the nature or type of prejudice that would occur, the Supreme Court declined to consider Yecovenko's prejudice arguments on appeal, and denial of the motion to sever was affirmed. St. v. Yecovenko, 2004 MT 196, 322 M 247, 95 P3d 145 (2004).

Discretion of Trial Court to Allow Testimony to Be Read to Jury After Deliberations Begun — No Error: During deliberations in Thompson's trial on charges of sexually assaulting his child, the jury requested a copy of the child's testimony. The trial judge denied the request, explaining that the court could not repeat the testimony after deliberations had begun because it would place undue emphasis on the testimony. The jury explained that the child had spoken so softly during the hearing that several jury members were unable to hear the testimony. The judge reconsidered, determining that the child's testimony was both exculpatory and inculpatory, and discussed the jury's request with counsel for both parties. No objections were made, and after cautioning the jury not to give more weight to the child's testimony than any other testimony, the court allowed the child's testimony to be read to the jury. Thompson was convicted and appealed on grounds that allowing the testimony after jury deliberations had begun violated 46-16-503. The Supreme Court noted that it is within the discretion of the trial court whether to allow a jury to rehear testimony. In this case, the jury could not hear the child in the courtroom, and the child's testimony was an essential part of the case and included evidence favorable to both parties, so the trial court did not err in allowing the jury to hear the testimony during deliberations. St. v. Thompson, 2001 MT 119, 305 M 342, 28 P3d 1068 (2001). See also St. v. Harris, 247 M 405, 808 P2d 453 (1991), and St. v. Greene, 2015 MT 1, 378 Mont. 1, 340 P.3d 551.

Negligent, Not Intentional, Failure to Provide Defendant With Witness Interview Transcript — No Showing of Materiality of Evidence in Light of Defendant's Confession of Crime: Three taped interviews were conducted with a sexual assault victim. The first two related to Baker's alleged assault of the victim, while the third related to separate allegations that the victim had also been abused by a family member, although Baker's name was also mentioned. Baker was not provided with a copy or transcript of the third interview prior to trial. When that information came out at trial, Baker was provided a copy and viewed it during a recess. Following the break and Baker's review of the transcript, Baker moved for a mistrial on grounds that the prosecution's failure to provide a transcript had denied him exculpatory evidence and impaired his ability to cross-examine witnesses, violating his right to due process and a fair trial. The motion was denied, and Baker appealed. Citing St. v. Brown, 1999 MT 133, 294 M 509, 982 P2d 468 (1999), the Supreme Court noted that an intentional suppression of exculpatory evidence by the prosecution is a per se violation of due process. However, in this case, the state's failure to provide Baker with a transcript of the third interview was negligent rather than intentional, so it did not amount to a due process violation unless the evidence was material, of substantial use, vital to the defense, and exculpatory. In light of the fact that Baker had admitted during one interview that he assaulted the victim and related details of the incident, there was no reasonable probability that the outcome of the trial would have been different had the state disclosed the third interview prior to trial. Baker failed to meet the burden of establishing materiality, so his due process right was not violated, nor did the court err in denying his motion for a mistrial. St. v. Baker, 2000 MT 235, 301 M 323, 8 P3d 817, 57 St. Rep. 976 (2000). See also St. v. Buckles, 1999 MT 79, 294 M 95, 979 P2d 177 (1999).

Change in Diagnosis Not Constituting Surprise: Defendant claimed he was substantially prejudiced through surprise when during a second trial the state's expert witness changed the diagnosis of a child sexual assault victim from "post-traumatic stress disorder with a major depressive episode and identity disorder" to "an evolving diagnosis of emerging multiple personality disorder". However, the changed diagnosis did not represent exculpatory and material information that the prosecution had a constitutional or statutory duty to disclose, nor did the changed diagnosis alter the ultimate conclusion at both trials that the child had been sexually abused. Because the victim was expressly made available for recall, the claim of surprise was unfounded. St. v. Donnelly, 244 M 371, 798 P2d 89, 47 St. Rep. 1600 (1990), overruled in St. v. Imlay, 249 M 82, 813 P2d 979, 48 St. Rep. 588 (1991), with regard to augmentation of sentence for failure to admit guilt.

Hostility of Crime Victim on Prosecution's Witness List Testifying for Defendant: Sex offense victim was listed, but not called, as a prosecution witness. She was called as a witness in defendant's case in chief. The trial court properly ruled that she could not be examined as a hostile witness unless her cross-examination testimony showed hostility toward defendant. Hostility was not shown merely because she was listed as a prosecution witness. That listing was irrelevant, since her testimony absolved defendant. St. v. Anderson, 211 M 272, 686 P2d 193, 41 St. Rep. 1357 (1984).

Sex Crime Defendant's Character Testimony — Rebuttal by Minor Nonvictim Female: The major aim of the testimony for defendant charged with sexual assault was that he never engaged in improper sexual activity with the victims or anyone else and that he was a person of high morality. Thus, the state could use the testimony of a minor nonvictim female to rebut his testimony. She testified to sleeping in defendant's bed while he was present and naked. St. v. Anderson, 211 M 272, 686 P2d 193, 41 St. Rep. 1357 (1984).

ADMISSIBILITY OF EVIDENCE

Explicit Photographs Inadmissible Under Transaction Rule: Sexually explicit photos that underscored the defendant's interest in the alleged victim and women in general provided context to the circumstances under which the offense occurred but were not evidence of facts in dispute and did not explain how the defendant had sexual intercourse without consent or committed sexual assault. As such, the Supreme Court concluded that the photos were not intrinsic to or inextricably intertwined with the charges and that the District Court erroneously admitted them under the transaction rule. St. v. Sage, 2010 MT 156, 357 Mont. 99, 235 P.3d 1284.

Search of Residence on Permission of Minor Child Violative of Parent's Right to Privacy — Evidence Properly Suppressed — Exception: Police were dispatched to a residence in response to a report of a sexual assault on a young woman, who was discovered to be a minor. Following questioning in the living room, the girl led the police to her bedroom, where an alleged assault by her father had occurred. Because police believed that the minor had lawfully granted permission to search the residence, they seized items from the bedroom, including the sheets, comforter, and blanket from the bed and the victim's pajamas. They also had the victim change clothes so they could take possession of the underwear that the victim was wearing at the time of the alleged assault. The girl later signed a form granting permission to search the residence. The father's DNA was found on the bedding and he was charged with felony sexual assault. The father argued that the search and seizure were unconstitutional because they were conducted without his consent or a search warrant. The state contended that in a case such as this where the child granting entrance to the home was the possible victim of a sexual assault, a warrant was unnecessary. The District Court, citing St. v. Schwarz, 2006 MT 120, 332 M 243, 136 P3d 989 (2006), held that because the minor did not have actual authority to consent to a search, police were obligated to obtain consent from the parent or a search warrant prior to seizing items from the bedroom. Because neither consent nor warrant was obtained, the court suppressed all evidence seized from the house. The state appealed. The Supreme Court cited St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008), for the factors used to determine whether a state action constitutes an unreasonable or unlawful search or seizure: (1) whether the person challenging the state's action has an actual subjective expectation of privacy; (2) whether society is willing to recognize that subjective expectation as objectively reasonable; and (3) the nature of the state's intrusion. The court also noted that warrantless searches conducted inside a home are per se unreasonable, subject only to a few specifically established and well-delineated exceptions, none of which were present here. The court affirmed the holding in Schwarz, holding that the child did not have authority to consent to the search of her parent's home. The focus was on the violation of the privacy rights of the parent in control of the home, not the general privacy rights of the child, except where, as with the underwear the victim was wearing during the alleged assault, society would recognize as reasonable a person's privacy interest in the intimate apparel that she was wearing at the time. Therefore, the evidence seized from the residence must be suppressed because it was the product of an illegal search and seizure, with the exception of the daughter's underwear, because the father did not have an actual subjective expectation of privacy in the underwear that his daughter was wearing at the time the alleged assault occurred that society would find objectively reasonable. The District Court did not err in granting the motion to suppress all the evidence, with the exception of the underwear. The case was remanded for further proceedings. St. v. Ellis, 2009 MT 192, 351 M 95, 210 P3d 144 (2009).

Certain Relevant Evidence of Defendant's Conduct Following Sexual Assault Properly Admitted Under Transaction Rule: Immediately following a sexual assault, defendant went into the victim's daughter's room, then came back into the living room wearing a pair of the daughter's panties. Prior to trial, defendant moved in limine to exclude this evidence, as well as evidence that he then masturbated in front of the victim while wearing the panties. The District Court granted defendant's motion excluding testimony about the alleged masturbation, but allowed testimony about the panties and allowed the panties into evidence. Defendant contended on appeal that allowing the evidence was prejudicial and designed to inflame the jury. The Supreme Court held that the evidence was admissible under the transaction rule in 26-1-103. The conduct occurred immediately after the assault and was intertwined with the crime and relevant as part of the transaction, plus the victim testified that the conduct made her fearful. The evidence was highly probative, and the jury had the right to evaluate the evidence in the context in which the crime occurred. St. v. Detonancour, 2001 MT 213, 306 M 389, 34 P3d 487 (2001).

Improper Admission of Rape Examination Evidence as Not Probative of Issue of Consent — Error Harmless in Light of Other Admissible Evidence on Consent: At defendant's trial for sexual assault, the District Court admitted the testimony of a nurse practitioner regarding the mechanics of completing a rape kit. Defendant maintained on appeal that the evidence was not probative of the ultimate issue of consent, and the Supreme Court agreed. The evidence was irrelevant and admitted erroneously. However, the jury was presented with enough cumulative admissible evidence on the issue of consent as to render introduction of the inadmissible rape examination evidence harmless. Qualitatively, and in comparison to the victim's testimony concerning the examination, there was no reasonable possibility that the erroneously admitted evidence contributed to defendant's conviction or resulted in prejudice. St. v. Detonancour, 2001 MT 213, 306 M 389, 34 P3d 487 (2001).

Sexual Abuse and Violence Against Women Act — Limitation of Evidence of Inappropriate Touching of Another: Evert sought damages against Swick based on Swick's alleged sexual abuse and violation of the federal Violence Against Women Act of 1994 (42 U.S.C. 13981). The District Court excluded proffered testimony of Evert's sister that Swick had also sexually and physically abused her. Swick was ultimately acquitted. Evert asserted on appeal that her sister's testimony was admissible to show opportunity, identity, or absence of mistake, that it was part of the res gestae, and that it should have been allowed as rebuttal testimony. The Supreme Court found no issue of opportunity, identity, or mistake because Swick and Evert had lived together, so the opportunity for abuse clearly existed. Moreover, the sister's testimony did not fall within any of the hearsay exceptions in Rule 803, M.R.Ev. (Title 26, ch. 10). The res gestae argument, when properly phrased in the context of the transaction rule, showed no evidence that Swick's contact with the sister involved part of the same transaction contained in Evert's complaint, a necessary element under 26-1-103. The Supreme Court also concluded that the testimony had no rebuttal value that would outweigh its prejudicial effect. The District Court correctly deduced that the evidence of other inappropriate touching was offered to impugn Swick's credibility and bolster Evert's credibility, which is not permitted under Rule 404, M.R.Ev. (Title 26, ch. 10), and the modified Just rule. The court properly exercised its discretion in weighing the probative value of the testimony against its prejudicial effect in limiting the sister's testimony to the allegations contained in the complaint and excluding the portion of her testimony regarding other acts. Evert v. Swick, 2000 MT 191, 300 M 427, 8 P3d 773, 57 St. Rep. 757 (2000).

Proper Termination of Parental Rights Based on Conviction for Sexual Assault of Child and Sexual Intercourse Without Consent With Child: Snyder pleaded guilty to sexual assault on a child and sexual intercourse without consent with a child based on his involvement with three young girls. His marriage was dissolved 6 months later and custody was awarded to his former wife, who remarried and then petitioned for termination of Snyder's parental rights so that their son could be adopted by her new husband. The petition was granted, and Snyder appealed. The plain language of 42-2-608 provides that the court may terminate a parent's rights and make the child available for adoption if a parent is convicted of sexual assault on a child or sexual intercourse without consent with a child. There is no statutory requirement that the sexual assault on a child or sexual intercourse without consent with a child has been committed on the adoptee. The trial court did not err when it held that clear and convincing evidence supported the termination of the father's parental rights based on his prior convictions. In re Adoption of Snyder, 2000 MT 61, 299 M 40, 996 P2d 875, 57 St. Rep. 288 (2000), following In re J.N. & A.N., 1999 MT 64, 293 M 524, 977 P2d 317, 56 St. Rep. 269 (1999).

Alleged Error Part of Defense Strategy — Trial Not Constitutionally Defective — Plain Error and Cumulative Error Doctrines Held Inapplicable: Hanson was charged with sexual assault of and deviate sexual conduct with his former girlfriend's son, Aaron. Hanson alleged that the testimony of his victim and certain witnesses was unreliable, that certain testimony was incorrectly presented on rebuttal, that the state introduced evidence of other acts in violation of both Rule 404(b), M.R.Ev. (Title 26, ch. 10), and his constitutional right to due process, that the state's cross-examination of him went too far, that he was improperly impeached by certain state evidence, and that the prosecutor incorrectly commented on the veracity of a witness. For these reasons, Hanson argued that he was deprived of a fair trial in violation of the constitutional guaranty of a fair trial and that the doctrines of plain error and cumulative error applied so as to require a new trial even though he had not objected to the evidence before the District Court. The Supreme Court reviewed the trial record and pointed out that either Hanson failed to object to testimony by Aaron, Aaron's therapist, and a Deputy Sheriff or he actually solicited their testimony himself in an effort to show their lack of credibility. The Supreme Court held, citing St. v. Campbell, 241 M 323, 787 P2d 329 (1990), and St. v. Finley, 276 M 126, 915 P2d 208 (1996), that the alleged errors did not rise to the level of a manifest miscarriage of justice, did not leave unsettled the question of the fundamental fairness of the trial, and did not compromise the integrity of the judicial system. Therefore, the court refused to invoke the plain or cumulative error doctrine to review issues raised for the first time on appeal. St. v. Hanson, 283 M 316, 940 P2d 1166, 54 St. Rep. 678 (1997).

Admissibility of Counselor's Testimony About Victim's Behavior During Counseling: In a prosecution for sexual assault and sexual intercourse without consent, testimony of the victim's high school and psychological counselors as to their personal observations regarding the victim's behavior during counseling sessions was relevant to the issue of whether the charged offenses occurred, which in turn was relevant to the jury's determination of whether defendant had committed the offenses. Thus, the testimony was admissible. St. v. Mason, 283 M 149, 941 P2d 437, 54 St. Rep. 539 (1997).

Sexual Assault of Child — Expert Witness: Expert testimony is admissible for the purpose of helping the jury to assess the credibility of a child sexual assault victim. Generally, such testimony is admissible when the child testifies at trial and the child's credibility is brought into question. St. v. McLain, 249 M 242, 815 P2d 147, 48 St. Rep. 664 (1991).

Evidence of Other Crimes — Admission of Prior Sexual Assault Conviction Upheld to Prove Defendant Acted Knowingly: In 1989, the defendant was charged with sexually assaulting his 15-year-old daughter. At trial, the defendant was convicted after evidence of a 1984 conviction of sexual assault upon the same daughter was admitted into evidence. On appeal, the state argued that admission of the 1984 conviction was appropriate to prove that the defendant acted knowingly because it showed the defendant's motive, intent, absence of mistake or accident, and knowledge. The Supreme Court examined the factors required by St. v. Just, 184 M 262, 602 P2d 957 (1979), balanced the probative value of the evidence against the possibility of prejudice, and concluded that evidence of the 1984 conviction was properly admitted by the District Court. St. v. Medina, 245 M 25, 798 P2d 1032, 47 St. Rep. 1832 (1990).

Admissibility of Expert Testimony in Assessing Credibility of Child Sexual Assault Victim: Expert testimony was admissible for the purpose of helping the jury assess the credibility of a child sexual assault victim since the jury had the discretion to accept or reject the testimony and the testimony merely enlightened the jurors on the subject without impinging on the jury's right to decide the victim's credibility. St. v. Geyman, 224 M 194, 729 P2d 475, 43 St. Rep. 2125 (1986), followed in St. v. French, 233 M 364, 760 P2d 86, 45 St. Rep. 1557 (1988), and in St. v. Donnelly, 244 M 371, 798 P2d 89, 47 St. Rep. 1600 (1990). See also St. v. Hall, 244 M 161, 797 P2d 183, 47 St. Rep. 1501 (1990), and see St. v. Imlay, 249 M 82, 813 P2d 979, 48 St. Rep. 588 (1991), which overruled Donnelly with regard to augmentation of sentence for failure to admit guilt.

Evidence That Offense Occurred a Few Months After Charge Alleged It Did: Evidence, in trial for sexually assaulting a 10- and an 11-year old girl, that the offenses took place in the spring of 1984 was not error when complaint alleged the offenses occurred in the summer of 1984, nor did introduction of that evidence constitute prosecutorial misconduct. Section 46-11-401 does not require an allegation of the exact time, date, month, or even year of the charged offense. St. v. Cornell, 220 M 433, 715 P2d 446, 43 St. Rep. 505 (1986).

Evidence of Prior Acts — Remoteness Overcome by Pattern of Conduct: Although an isolated incident occurring 9 years previously was too remote to be admissible, evidence showing that defendant on several occasions committed or attempted to commit sexual acts with young girls for a period of 9 years up to the time of the alleged offense was sufficient to establish a common scheme or plan and rendered the evidence admissible. St. v. Tecca, 220 M 168, 714 P2d 136, 43 St. Rep. 264 (1986), followed in St. v. Romero, 261 M 221, 861 P2d 929, 50 St. Rep. 1296 (1993).

Qualified Sexual Assault Victim Expert — Psychologist: In prosecution for sexual assault, witness was a qualified expert where she was educated, trained, and experienced in a relevant area; testified that the victim fit the statistical picture of assaulted juveniles; had counseled the victim for some time; was a certified psychologist; and had a doctorate in psychology. St. v. Berg, 215 M 431, 697 P2d 1365, 42 St. Rep. 518 (1985), followed in St. v. Eiler, 234 M 38, 762 P2d 210, 45 St. Rep. 1710 (1988). See also St. v. Dahms, 252 M 1, 825 P2d 1214, 49 St. Rep. 106 (1992).

Sexual Assault — Evidence of Previous Crimes: The District Court did not commit a reversible error by not excluding testimony relating to other incidents of sexual assault. The court had granted a motion to suppress testimony by the minors involved in the above incidents, but the judge specifically restricted his ruling to testimony by as opposed to testimony relating to the minors and the defense attorney did not object. Further, he did not object at the trial when the testimony of the prosecutrix relating to statements made by the defendant about the previous incidents was introduced. The testimony was relevant not to prove the occurrence of the incidents but to prove the intent of the accused. The testimony was of sufficient probative value to outweigh any possible prejudicial effect of its introduction. St. v. Patton, 183 M 417, 600 P2d 194 (1979). See also St. v. Eiler, 234 M 38, 762 P2d 210, 45 St. Rep. 1710 (1988), clarified, with regard to the applicability of the corpus delicti rule, in St. v. Hansen, 1999 MT 253, 296 M 282, 989 P2d 338, 56 St. Rep. 997 (1999).

Evidence of Other Offenses:

Where defendant was charged with violation of 94-4106, R.C.M. 1947 (since repealed), testimony of other women concerning similar improper acts committed by defendant on them was admissible, since such testimony showed continuous pattern of behavior on part of defendant. St. v. Jensen, 153 M 233, 455 P2d 631 (1969), clarified, with regard to the applicability of the corpus delicti rule, in St. v. Hansen, 1999 MT 253, 296 M 282, 989 P2d 338, 56 St. Rep. 997 (1999).

In prosecution for attempted statutory rape, evidence that defendant could have been charged on a previous occasion and had been warned against association with underage girls was inadmissible and its prejudice could not be overcome either by warnings to jury or by rebuttal evidence produced by defendant. St. v. Tiedemann, 139 M 237, 362 P2d 529 (1961), distinguished in St. v. Callaghan, 144 M 401, 396 P2d 821 (1964), and St. v. Quigg, 155 M 119, 467 P2d 692 (1970).

In prosecution under 94-4106, R.C.M. 1947 (since repealed), for lewd and lascivious acts upon the person of a child below the age of 16 years, it was improper to permit State to show similar acts because of the remoteness in time. St. v. Nicks, 134 M 341, 332 P2d 904, 77 ALR 2d 836 (1958).

WEIGHT AND CREDIBILITY OF EVIDENCE

Recantation of Sexual Assault Victim's Testimony — Remand for Consideration of New Trial — Perry Partially Overruled: Following Clark's conviction of sexual assault against his stepdaughter, she recanted her testimony and Clark moved for a new trial, citing St. v. Perry, 232 M 455, 758 P2d 268 (1988). The Supreme Court overruled Perry to the extent that it stands for the proposition that a trial judge is required to grant a new trial only when satisfied that the recantation of the witness is true. However, the Perry proposition that the weight to be given to recanted testimony is for the trial judge to determine was retained as authoritative precedent to be considered as part of the analysis set out in Berry v. St., 10 Ga. 511 (Ga. 1851), describing when it is proper to grant a new trial based on newly discovered evidence, as adopted in St. v. Greeno, 135 M 580, 342 P2d 1052 (1959). In applying the restated Berry test, a District Court is not to make factual determinations as to the veracity of the recantation, but should evaluate the recantation for materiality and its tendency to be cumulative or impeaching and should determine whether there is a reasonable probability that a new trial would produce a different outcome, keeping in mind the aspects of recantations that make them inherently suspect. If the Berry elements are met, a new trial is warranted; if not, the prior judgment stands. Here, the record was not clear as to the District Court's reasons for denying a new trial and whether the court correctly applied the law, so the case was remanded to allow the District Court to readdress Clark's motion for a new trial. St. v. Clark, 2005 MT 330, 330 M 8, 125 P3d 1099 (2005), followed in Crosby v. St., 2006 MT 155, 332 M 460, 139 P3d 832 (2006), and St. v. Jones, 2020 MT 7, 398 Mont. 309, 459 P.3d 841.

On remand, the District Court found that evidence of the victim's recanted testimony was neither cumulative nor impeaching and that a new trial based on the testimony had no reasonable probability of resulting in a different outcome, so Clark's motion for a new trial was denied. Clark appealed, but the Supreme Court affirmed. In the first trial, the jury had already heard Clark's theory, which was essentially confirmed by the recanted testimony, but had rejected the theory and convicted Clark. Thus, there was no probability that a new trial based on the same theory would result in a different outcome, so a new trial was unwarranted. St. v. Clark, 2008 MT 391, 347 M 113, 197 P3d 977 (2008), following Crosby v. St., 2006 MT 155, 332 M 460, 139 P3d 832 (2006). In Marble v. St., 2015 MT 242, 380 Mont. 366, 355 P.3d 742, the Supreme Court held that it erred in applying the Clark factors to a petition for postconviction relief, in particular the fifth factor, and overruled three cases to the extent they applied that factor to a petition for postconviction relief.

Sexual Abuse and Violence Against Women Act — Limitation of Evidence of Inappropriate Touching of Another: Evert sought damages against Swick based on Swick's alleged sexual abuse and violation of the federal Violence Against Women Act of 1994 (42 U.S.C. 13981). The District Court excluded proffered testimony of Evert's sister that Swick had also sexually and physically abused her. Swick was ultimately acquitted. Evert asserted on appeal that her sister's testimony was admissible to show opportunity, identity, or absence of mistake, that it was part of the res gestae, and that it should have been allowed as rebuttal testimony. The Supreme Court found no issue of opportunity, identity, or mistake because Swick and Evert had lived together, so the opportunity for abuse clearly existed. Moreover, the sister's testimony did not fall within any of the hearsay exceptions in Rule 803, M.R.Ev. (Title 26, ch. 10). The res gestae argument, when properly phrased in the context of the transaction rule, showed no evidence that Swick's contact with the sister involved part of the same transaction contained in Evert's complaint, a necessary element under 26-1-103. The Supreme Court also concluded that the testimony had no rebuttal value that would outweigh its prejudicial effect. The District Court correctly deduced that the evidence of other inappropriate touching was offered to impugn Swick's credibility and bolster Evert's credibility, which is not permitted under Rule 404, M.R.Ev. (Title 26, ch. 10), and the modified Just rule. The court properly exercised its discretion in weighing the probative value of the testimony against its prejudicial effect in limiting the sister's testimony to the allegations contained in the complaint and excluding the portion of her testimony regarding other acts. Evert v. Swick, 2000 MT 191, 300 M 427, 8 P3d 773, 57 St. Rep. 757 (2000).

Expert Opinion on Medical Evidence Not an Opinion on Weight and Credibility of Victim's Evidence: A physician's opinion that his medical findings led him to believe victim had been sexually assaulted did not constitute a comment on the weight and credibility of the evidence given by the victim or on the ultimate issue of whether it was defendant who was involved in the rape. St. v. Laird, 225 M 306, 732 P2d 417, 44 St. Rep. 254 (1987).

SUFFICIENCY OF EVIDENCE

Elements of Sexual Assault Not Sentence Enhancement — Observation of Defendant and Victim During Testimony Sufficient Corroboration of Ages: The District Court found that a defendant could not be sentenced under 45-5-502(3) concerning sexual assault if the victim is less than 16 years old and the offender is 3 or more years older than the victim because the jury had not made a specific factual finding concerning the ages of the defendant and the minor, which is required for sentence enhancements by Apprendi v. N.J., 530 US 466 (2000). The Supreme Court reversed and remanded, holding that 45-5-502(3) was not a sentence enhancement because it did not contain any aggravating elements that increased the prescribed penalty for a conviction under that subsection. Because the District Court properly instructed the jury, the ages of the defendant and the victim were entered into evidence through a police interview, and both the defendant and the victim testified, the jury was entitled to infer that the ages were sufficiently established to fulfill the requirements of 45-5-502(3) by returning a guilty verdict. St. v. Ghostbear, 2014 MT 192A, 376 Mont. 500, 338 P.3d 25, opinion amended.

Conviction Based on Victim's Uncorroborated Testimony — Evidence Sufficient to Go to Jury: At Swenson's trial for sexual assault, Swenson asserted that the evidence was insufficient to go to the jury because the victim testified that she did not hear or see anything during the alleged incident, and her minor cousin who was present at the time testified that he saw Swenson simply wake the victim and then leave the room. However, the victim testified at trial that she kept her eyes closed and pretended to sleep during the touching, then pretended to wake up and saw Swenson standing over her. A conviction for a sex offense may be based entirely on the uncorroborated testimony of the victim, and the victim's testimony, combined with both circumstantial and direct evidence, was sufficient to submit the issue to the jury and to support a conviction. St. v. Swenson, 2008 MT 308, 346 M 34, 194 P3d 625 (2008). See also St. v. Maetche, 2008 MT 184, 343 M 464, 185 P3d 980 (2008).

Sufficient Evidence of Sexual Assault to Submit Case to Jury: Bomar was charged with sexual intercourse without consent or alternatively with sexual assault. Following presentation of the state's case, Bomar contended that there was insufficient evidence to send the case to the jury. The trial court disagreed, and the jury found Bomar guilty of sexual assault. On appeal, Bomar reasserted his claim of insufficient evidence, but the Supreme Court affirmed. Despite some inconsistencies in the testimony of the child victim regarding whether penetration occurred, the evidence was sufficient to show that Bomar had sexual contact with the child and to send the case to the jury on the sexual assault charge. St. v. Bomar, 2008 MT 91, 342 M 281, 182 P3d 47 (2008), following St. v. York, 2003 MT 349, 318 M 511, 81 P3d 1277 (2003).

Evidence of Arousal Not Required to Prove Sexual Contact — Arousal Properly Inferred From Defendant's Acts: Rogers moved for a directed verdict at trial for felony sexual assault on two minor victims on grounds that the state failed to present sufficient evidence that Rogers touched the victims for the purpose of arousing or gratifying his sexual response or desire. However, the state need not prove direct evidence of arousal or intent to be aroused in order to prove the sexual contact element of sexual assault. The jury may infer intent of sexual arousal from the defendant's acts. In this case, the jury could infer arousal from Rogers' multiple acts of putting his hand inside the victims' underwear and touching them intimately in a manner that was not casual during an ordinary act. Denial of the motion for a directed verdict was not error. St. v. Rogers, 2007 MT 227, 339 M 132, 168 P3d 669 (2007), following St. v. Skinner, 2007 MT 175, 338 M 197, 163 P3d 399 (2007).

Sufficient Probable Cause in Affidavit to Warrant Charge of Sexual Assault: Kern contended that the state failed to establish probable cause in its affidavit charging sexual assault. The Supreme Court noted that pursuant to St. v. Arrington, 260 M 1, 858 P2d 343 (1993), an affidavit in support of a motion to file an information need not make out a prima facie case that a defendant committed an offense; rather, a mere probability is sufficient. Evidence to establish probable cause need not be as complete as the evidence necessary to establish guilt, and the determination whether a motion to file an information is supported by probable cause is left to the discretion of the trial court. Here, the factual allegations that defendant forced the victim to engage in sexual conduct were sufficient to establish the mere probability that defendant committed the offense. Kern also asserted that it was necessary that the affidavit require allegations that he committed the touching and that he did so to gratify his sexual response. The Supreme Court disagreed with both arguments. Nothing in this section requires that a defendant commit the actual touching, nor was the affidavit required to allege the purpose of the sexual contact because that element is incorporated by reference in the statute. St. v. Kern, 2003 MT 77, 315 M 22, 67 P3d 272 (2003), following St. v. Steffes, 269 M 214, 887 P2d 1196 (1994).

When Sexual Assault Occurred Question for Jury — Sufficient Evidence to Show That Incident Occurred When Alleged to Preclude New Trial: Longhorn was convicted of a sexual assault that allegedly occurred in 1992. He moved for a new trial based on testimony by the victim and witnesses at trial that seemed to indicate that the assault occurred in 1991. In denying the motion, the District Court noted that the jury was properly instructed that the incident occurred in 1992 or not at all and that a reasonable juror could easily find beyond a reasonable doubt that the incident occurred in 1992. The Supreme Court examined the record and agreed. The question of when the incident occurred was one for the jury, and there was substantial evidence for the jury to conclude that the assault happened in 1992. The Supreme Court declined to second-guess the jury, holding that denial of the motion for a new trial was not an abuse of discretion. St. v. Longhorn, 2002 MT 135, 310 M 172, 49 P3d 48 (2002).

Substantial Evidence of Sexual Assault:

The Supreme Court considered the following evidence sufficient to support a conviction of sexual assault, despite the lack of physical signs of sexual abuse: (1) the child victim testified that she wanted to tell the truth so that her father could get help and that her father touched her in the wrong places; (2) the child's mother testified that the child confirmed that the father touched her and had asked for protection from him; (3) although there was only a short period of time when the father was alone with the child during the time in question, the opportunity existed for the assault to occur; (4) the physician who examined the child testified that physical signs of sexual abuse are generally not evident in fondling cases; (5) the child was noticeably more quiet and withdrawn after the alleged assault occurred; and (6) an expert testified that abuse was suspected and that it is common among children who have been sexually abused to make inconsistent statements regarding the identity of the perpetrator. St. v. Thompson, 2001 MT 119, 305 M 342, 28 P3d 1068 (2001).

The Supreme Court considered the following evidence substantial and credible to support the conviction of a 14-year-old boy for sexual assault: (1) a 5-year-old witness and 6-year-old victim described the assault and identified the defendant; (2) two doctors testified that defendant exhibited characteristics typical of adolescent sexual offenders; and (3) defendant confessed to a doctor and the interrogating officer. In re J.W.K., 223 M 1, 724 P2d 164, 43 St. Rep. 1483 (1986).

Uncorroborated Testimony of Child Victim of Sexual Assault Held Sufficient for Conviction — No Requirement for Consistency With Other Evidence — Rogers, D.B.S., and Medina Overruled: Olson was convicted of sexual assault of a child and appealed his conviction. The Supreme Court noted that it had held in St. v. Rogers, 213 M 302, 692 P2d 2 (1984), St. v. D.B.S., 216 M 234, 700 P2d 630 (1985), and St. v. Medina, 245 M 25, 798 P2d 1032 (1990), that a conviction for sexual assault may be based entirely upon the uncorroborated testimony of the victim only if the victim's testimony is consistent with other evidence. However, the Supreme Court also noted that it had held in St. v. Howie, 228 M 497, 744 P2d 156 (1987), that a sexual assault conviction may be based entirely upon the victim's uncorroborated testimony without requiring that the victim's testimony be consistent with other evidence. After reviewing the foregoing opinions, the Supreme Court held that the decisions in Rogers, D.B.S., and Medina were incorrectly decided and, for that reason, overruled those three cases to the extent that they were different from the holding in Howie. As that decision applied to the case before it, the Supreme Court held that Olson's conviction could be based entirely upon the testimony of the child victim and that whether the child victim's testimony is consistent with other evidence affects the weight and credibility of the child's testimony. St. v. Olson, 286 M 364, 951 P2d 571, 54 St. Rep. 1449 (1997).

Journal Entries and Statements to County Attorney Detailing Incidents Supported Sex Crimes Charges: An affidavit in support of the information charging sexual intercourse without consent and sexual assault, which contained a long excerpt from the victim's journal detailing the abuse and vividly recounting the progression of the abuse and the particular incidents and which also contained the County Attorney's statements that the victim had told him that sexual contact took place during one incident and penetration took place during another incident, constituted more than sufficient probable cause to support the information. St. v. Mason, 283 M 149, 941 P2d 437, 54 St. Rep. 539 (1997).

Attempted Sexual Assault Conviction Reversed Absent Showing of Intended Contact: Fuller followed three elementary school girls in his vehicle, making comments of a sexual nature. He was convicted of three counts of attempted sexual assault. On appeal, the Supreme Court noted the lack of any testimony that Fuller ever stopped the car, opened his door, or reached out for the girls in any way. A necessary element of the underlying offense of sexual assault requires that a person knowingly subject another to sexual contact without consent. Attempted sexual contact requires proof that the defendant, with the purpose of committing the underlying offense, took any action toward commission of the offense. Because the evidence did not show beyond a reasonable doubt that Fuller intended to actually touch the victims, the convictions were reversed and Fuller was acquitted of all charges. St. v. Fuller, 266 M 420, 880 P2d 1340, 51 St. Rep. 890 (1994).

Circumstantial Inferences of Time of Assault of Child Victim — No Error: The information charged defendant with sexual assault of a child between October 1989 and April 1990, but no witness provided direct testimony that the assault occurred on a particular date within that time span. Defendant asserted that he was entitled to acquittal because the state did not prove beyond a reasonable doubt that the offense occurred within the time alleged. However, unrebutted circumstantial evidence reflected that: (1) as of September 5, 1989, the child did not know defendant; (2) on April 4, 1990, she did know defendant; (3) defendant was incarcerated between September 5 and October 2, 1989, and thus had no access to the victim during that time; and (4) defendant was out on bail from October 2, 1989, until April 10, 1990. The circumstantial inference drawn by the District Court that defendant's contact with the child had to have occurred within the precise period alleged in the information was not clearly erroneous, and the motion for acquittal was properly denied. St. v. Davis, 253 M 50, 830 P2d 1309, 49 St. Rep. 342 (1992).

Corroborated Evidence Sufficient to Support Conviction: Evidence was sufficient to support a guilty verdict on counts of robbery, sexual assault, and sexual intercourse without consent by accountability when the victim's testimony was corroborated by: (1) two people who came to an accomplice's apartment during the assault; (2) a police officer who interviewed the victim immediately after the assault; (3) the physician who examined the victim; and (4) two investigating officers who searched the apartments of defendant and accomplice. St. v. Powers, 233 M 54, 758 P2d 761, 45 St. Rep. 1286 (1988).

Conviction on Uncorroborated Testimony of Five-Year-Old Victim: A 5-year-old sexual assault victim's testimony did not require corroboration before it could be used to convict defendant. The verdict was supported by substantial evidence when the victim testified extensively by videotape about her sexual activities with defendant. She provided details about the surrounding circumstances, and her testimony was consistent with earlier interviews. A psychologist testified that she was capable of providing reliable information, that her description of sexual activities far exceeded that which could be expected from someone who had not engaged in those activities, and that her description used terminology consistent with that of a 5- or 6-year-old child. St. v. A.D.M., 216 M 419, 701 P2d 999, 42 St. Rep. 916 (1985). See also St. v. Howie, 228 M 497, 744 P2d 156, 44 St. Rep. 1711 (1987), St. v. Gilpin, 232 M 56, 756 P2d 445, 45 St. Rep. 863 (1988), St. v. Biehle, 251 M 257, 824 P2d 268, 49 St. Rep. 47 (1992), St. v. Howell, 254 M 438, 839 P2d 87, 49 St. Rep. 759 (1992), St. v. Little, 260 M 460, 861 P2d 154, 50 St. Rep. 1124 (1993), St. v. Ford, 278 M 353, 926 P2d 245, 53 St. Rep. 947 (1996), and St. v. Olson, 286 M 364, 951 P2d 571, 54 St. Rep. 1449 (1997).

Consent — Circumstantial Evidence: Prior to the 1979 amendment this statute did not provide that consent is ineffective if the victim is under a certain age, thus the State must have proved the lack of consent regardless of the age of the victim. Though the State failed to ask a direct question of the boy, as the defense contended was necessary, the Supreme Court found sufficient circumstantial evidence to establish that the boy did not consent to the sexual touching. Lack of consent can be proven by circumstantial evidence. St. v. Price, 191 M 1, 622 P2d 160, 37 St. Rep. 1926 (1980).

Findings and Conclusions — Incapacity to Consent: A District Court in a criminal bench trial is under no statutory duty, except in death penalty cases, to make findings. Absent findings, the conclusions of law reached by the court could be construed to mean that the court found lack of the victim's consent to sexual contact from his incapacity as a 10-year-old to consent, or that in any event the boy did not consent. In that the conclusions of law reached by a trial court do not enjoy the level of inviolability that findings of fact are accorded on appeal, in that the State concedes the inapplicability of the incapacity statutes, and in that there was found sufficient evidence to support a conclusion that the boy did not in fact consent, the conviction on the sexual assault counts is sustained on the basis of the boy not having consented. St. v. Price, 191 M 1, 622 P2d 160, 37 St. Rep. 1926 (1980). See also St. v. Ogle, 255 M 246, 841 P2d 1133, 49 St. Rep. 932 (1992).

Intent:

Evidence that defendant, while intoxicated, attempted to induce children to enter his automobile, entered their car and sat with them, trying to get them to shake hands with him, but departed when told to by one of the children did not prove intent to arouse or gratify passions within the meaning of 94-4106, R.C.M. 1947 (since repealed), even when bolstered by psychiatric testimony that defendant was a sexual deviate and ought to be confined. St. v. Green, 143 M 234, 388 P2d 362 (1964).

Evidence that defendant invited a 9-year-old girl, a stranger to him, to his room, locked the door, asked her to remove her dress, and placed his hand on her shoulder as if to unbutton her dress, showed that he had intent to arouse or gratify the passions of himself or the girl, and it was not essential that there be "flesh-to-flesh" contact. St. v. Kocher, 112 M 511, 119 P2d 35 (1941).

INSTRUCTIONS

District Court's Failure to Offer Specific-Act Unanimity Instruction to Jury Did Not Merit Reversal Under Plain Error — Common Law Doctrine of Plain Error — Burden on Appeal Heavy — Totality of Evidence Considered on Appeal. St. v. Mathis, 2022 MT 156, 409 Mont. 348, 515 P.3d 758.

Defendant's Offensive Sexual Photos Prejudicial Despite Cautionary Jury Instruction: The admission of inadmissible sexually explicit photos was not harmless error since the state could not establish that there was no reasonable possibility their admission might have contributed to the defendant's conviction and it was not possible to conclude that cautionary jury instructions mitigated the prejudicial impact. St. v. Sage, 2010 MT 156, 357 Mont. 99, 235 P.3d 1284.

Jury Instruction on Mental State of Knowingly With Respect to Sexual Contact Proper: At Gerstner's trial for sexual assault, the court instructed the jury that a person who knowingly subjects another person to sexual contact without consent commits the offense of sexual assault and that sexual contact means the touching of the sexual or other intimate parts of the person of another, directly or through clothing, in order to purposely or knowingly cause bodily injury to or to humiliate, harass, or degrade another or to arouse or gratify the sexual response or desire of either party. Gerstner admitted touching the intimate parts of a minor but contended that because the touching was not sexual in nature, giving the instruction on sexual contact was error. The Supreme Court disagreed. The trial court further instructed the jury that to convict, the state had to prove beyond a reasonable doubt that Gerstner made sexual contact with the victim, so the court gave the correct definition of sexual contact. Gerstner's intent to gratify his sexual desire could be inferred from his conduct alone, and it was not necessary that the jury be instructed that Gerstner had to know that it was highly probable that Gerstner's contact would be sexual contact. The jury's conclusion that Gerstner's actions constituted sexual contact and its rejection of Gerstner's contention that the contact was not sexual necessarily meant that the state proved that Gerstner knew that the conduct was sexual in nature. Taken as a whole, the jury instructions fully and fairly instructed the jury as to the applicable law and Gerstner was not prejudiced by the instructions. The trial court was affirmed. St. v. Gerstner, 2009 MT 303, 353 M 86, 219 P3d 866 (2009).

No Right to Be Informed of Possibility of Lesser Included Offense When No Such Possibility Exists: Defendant was charged with felony attempted sexual assault, but ultimately pleaded nolo contendere to a charge of felony attempted kidnapping. After being sentenced to 10 years in prison, defendant appealed the conviction on grounds that the trial court erred by failing to inform defendant that he could have been convicted on a lesser charge of unlawful restraint and by failing to allow withdrawal of the guilty plea. However, only those lesser included offenses applicable to the charge of felony attempted sexual assault were relevant to defendant's decision to plead nolo contendere. The court and the state could not be faulted for failing to inform defendant of any lesser included offense that was not relevant to defendant's decision, and defendant had no right to be informed of the possibility of submitting a lesser included offense instruction to the jury when no such possibility existed. Absent anything in the record that an omission, misinformation, or mental incapacity hindered defendant's ability to enter knowingly and intelligently into a plea agreement, the trial court did not err in holding that defendant failed to establish good cause to withdraw the plea, and the Supreme Court affirmed. St. v. Iafornaro, 2007 MT 77, 336 M 489, 155 P3d 1238 (2007).

Definition of Sexual Contact Allowing Two Means of Satisfying Mental State, Not Two Separate Offenses: Following trial for sexual assault, Clark asserted that the District Court erred in failing to instruct the jury that it was required to unanimously find that Clark had subjected his stepdaughter to sexual contact for purposes of either 45-2-101(67)(a) or (67)(b) and that failure to do so should be reviewed under the plain error doctrine. The Supreme Court held that the definition allows for two means of satisfying the purposely or knowingly element of sexual contact, rather than articulating two separate offenses. Therefore, the District Court did not err in instructing the jury as to any unanimity required regarding the elements of sexual contact, and the Supreme Court declined to implement the plain error doctrine to discuss the issue. St. v. Clark, 2005 MT 330, 330 M 8, 125 P3d 1099 (2005), distinguishing St. v. Weldy, 273 M 68, 902 P2d 1 (1995), and St. v. Weaver, 1998 MT 167, 290 M 58, 964 P2d 713 (1998).

Jury Instruction on Sexual Contact Containing Language Regarding Touching Through Clothing Considered Fair Presentation of Law: Earl objected to a jury instruction defining sexual contact as the touching of the intimate parts of another directly or through clothing because the language regarding touching through clothing was not added to the definition until October 1, 1999, after Earl committed sexual assault. Earl contended that the jury was improperly instructed, which prejudiced his case. The Supreme Court disagreed. In criminal cases, jury instructions are reviewed as a whole, and if they fully and fairly present the law, the jury is considered to have been properly instructed. Although the statutory language regarding touching through clothing was not added until after Earl's offense, in St. v. Olson, 286 M 364, 951 P2d 571 (1997), the Supreme Court held that touching through clothing did constitute sexual contact. Olson was in effect when Earl committed the offense, so including that language in the jury instruction accurately represented the law and was a proper jury instruction. St. v. Earl, 2003 MT 158, 316 M 263, 71 P3d 1201 (2003).

Criteria Required Before Lesser Included Offense Instruction Required: Two criteria must be met before a defendant is entitled to a lesser included offense instruction: (1) the offense must actually constitute a lesser included offense of the offense charged; and (2) there must be sufficient evidence to support the lesser included offense instruction. In regard to the second criterion, a lesser included offense instruction is not supported by the evidence when the defendant's evidence or theory, if believed, would require an acquittal. In this case, Hamby was charged with felony sexual assault on a 10-year-old girl with Down syndrome. Hamby contended that he was wrestling with the girl rather than sexually assaulting her and thus was entitled to a lesser included instruction for misdemeanor assault. However, if the evidence supported Hamby's theory that he was merely wrestling, there would not be sufficient evidence to establish that he knowingly made physical contact of an insulting or provoking nature to constitute a misdemeanor assault, so an acquittal would result. The evidence did not support Hamby's proposed jury instruction, and the District Court did not err in refusing to give it. St. v. Hamby, 1999 MT 319, 297 M 274, 992 P2d 1266, 56 St. Rep. 1272 (1999). See also St. v. Martinez, 1998 MT 265, 291 M 306, 968 P2d 705, 55 St. Rep. 1093 (1998).

Offered Jury Instructions Covered by Given Instructions — Case Properly Tendered: The District Court properly refused defendant's offered jury instructions regarding uncorroborated accomplice testimony, reasonable doubt, and mental state because the offered instructions were stated and covered in the jury instructions that were actually given, which as a whole properly tendered the case to the jury. St. v. Gilpin, 232 M 56, 756 P2d 445, 45 St. Rep. 863 (1988), distinguishing St. v. Keckonen, 107 M 253, 84 P2d 341 (1938).

Jury Instruction Using Statutory Language — No Prejudice: In trial for sexual assault, the Supreme Court found no support for the allegation that instructing the jury on the definition of "sexual contact" in the verbatim language used in 45-2-101 unduly influenced the jury as to defendant's status as a witness. St. v. Cornell, 220 M 433, 715 P2d 446, 43 St. Rep. 505 (1986).

"Sexual Contact" Instruction Too Broad Where Defendant Admitted Touching the Back: In a criminal prosecution for sexual assault when the testimony indicated that defendant had touched the breasts, buttocks, and vaginal areas of the alleged victims, a jury issue was created under 45-2-101(60). Because defendant admitted touching the backs of two of the alleged victims (to help them up after they fell in a hot tub), the Supreme Court ruled that a jury instruction taken from St. v. Weese, 189 M 464, 616 P2d 371, 37 St. Rep. 1620 (1980), concerning the interpretation of "sexual contact" was too broad. The instruction stated, "The term 'sexual or other intimate parts of another' is intended to be given broad application and is not intended to restrict the crime to a touching of the genitalia or female breast and includes intimate impositions upon the victim". In this case, nothing broader than the statute itself should have been given as an instruction. St. v. Kestner, 220 M 41, 713 P2d 537, 43 St. Rep. 155 (1986).

"Easy to Charge but Difficult to Defend" Instruction Improper: The cautionary jury instruction providing that sexual intercourse without consent is an easy charge to make but is difficult to defend is an improper instruction. The Supreme Court, in holding that the instruction is an unwarranted and improper comment on the evidence which is not required by law or public policy, specifically overruled St. v. Smith, 187 M 245, 609 P2d 696, 37 St. Rep. 583 (1980). St. v. Liddell, 211 M 180, 685 P2d 918, 41 St. Rep. 1293 (1984).

Burden of Proving Defense: The court did not err in instructing the jury that defendant had the burden of proving the defense of reasonable belief of age by a preponderance of the evidence. St. v. Smith, 176 M 159, 576 P2d 1110 (1978).

SENTENCING

Psychosexual Evaluation as Condition of Probation for Misdemeanor Sexual Assault Not Prohibited — Condition Reasonable Given Offender and Offense: The defendant pleaded guilty to two counts of misdemeanor sexual assault, for which he received a deferred sentence. As a condition of probation, the Municipal Court required the defendant to obtain a psychosexual evaluation. The defendant objected, arguing that the court lacked authority to order a psychosexual evaluation under 46-18-111 and that this condition of probation was unreasonable. The District Court affirmed the Municipal Court's sentencing, and the defendant appealed. The Supreme Court concluded that 46-18-111 did not proscribe a court from requiring a psychosexual evaluation as a condition of probation and that, given the offender and the offense, the evaluation was a reasonable condition. City of Bozeman v. Cantu, 2013 MT 40, 369 Mont. 81, 296 P.3d 461.

Restriction on Financial Transactions as Condition for Suspended Sentence for Sexual Assault Affirmed: As a condition for a suspended sentence for sexual assault of a child, Hernandez was required to obtain permission from the probation officer before engaging in financial transactions to finance or purchase a vehicle, engage in business, or incur debt. Hernandez appealed on grounds that the condition was unrelated to the crime. The Supreme Court noted that the sentencing condition was authorized by statute and Department of Corrections rule, so the Ashby requirement of a nexus to the offender or the offense did not apply. The financial transaction restriction was considered a standard condition of the Department, and Hernandez offered nothing indicating that the condition would impose a hardship; because Hernandez's priority financial obligations while serving the suspended sentence would be restitution, child support, fines, and fees, the imposition of the condition was appropriate and not an abuse of discretion. The District Court was affirmed. St. v. Hernandez, 2009 MT 341, 353 M 111, 220 P3d 25 (2009), followed in St. v. Holt, 2011 MT 42, 359 Mont. 308, 249 P.3d 470.

Two-Year Mandatory Sentence Under 2001 Statute — Four-Year Sentence Remanded: At the time Clark was charged with violating this section in 2002, the mandatory minimum sentence was 2 years (amended to 4 years in 2003). Nevertheless, the sentencing court applied the 4-year mandatory minimum when sentencing Clark in 2003. The Supreme Court vacated the sentence and remanded for resentencing on grounds that Clark's 4-year sentence was illegal under the law in effect at the time the crime was committed. St. v. Clark, 2008 MT 391, 347 M 113, 197 P3d 977 (2008).

Order That Defendant Pay "Assessments" to Community Entities as Part of Sentence for Sexual Assault Illegal: As part of Krum's sentence for two counts of felony sexual assault, the District Court ordered Krum to pay a $5,000 assessment to the Park County Court Automation Fund, $2,500 to the Tri-County Network for Domestic Violence, and $2,500 to the Park County Big Brothers and Sisters in order to give back to society and to those who assist victims of these types of crimes. Krum appealed the assessments, and the Supreme Court reversed. Although the sentencing court had authority to fine Krum up to $50,000 for each conviction, the court did not include a fine per se in Krum's sentence, but instead ordered the payment of assessments to the community entities. However, 46-18-235 provides that all fines and costs collected from a criminal defendant be paid to the Department of Revenue for deposit in the general fund, and a District Court may not redirect money collected from a defendant simply by labeling the money as an assessment instead of a fine. The state argued that the assessments were authorized as a condition of sentencing pursuant to 46-18-202 because the assessments were reasonably related to the underlying crimes, but the Supreme Court held that 46-18-202 does not provide the necessary authority for imposing assessments in the first place. The assessments were not limitations on Krum's conduct and could not be considered restitution because the money was not payable to the victims. Thus, the assessment portion of the sentence was unauthorized and illegal. The remainder of the sentence was affirmed, but the case was remanded with instructions to strike the illegal assessments from the sentence. St. v. Krum, 2007 MT 229, 339 M 154, 168 P3d 658 (2007), followed in St. v. Stephenson, 2008 MT 64, 342 M 60, 179 P3d 502 (2008), to the extent that a fine or surcharge payable to the community service program that is imposed without statutory authority is illegal. Stephenson was followed in St. v. VanWinkle, 2008 MT 208, 344 M 175, 186 P3d 1258 (2008).

Sentence for Sexual Assault Within Statutory Parameters and Adequately Explained: Rogers asserted that his sentence of 20 years with 10 years suspended for two counts of felony assault upon a minor was improperly based on his refusal to participate in a court-ordered psychosexual evaluation. However, nothing in the record indicated that the sentencing court even referenced Rogers' refusal to participate. The court's reasons for its sentence were many and were supported by the evidence. The sentence was within statutory parameters and thus was affirmed. St. v. Rogers, 2007 MT 227, 339 M 132, 168 P3d 669 (2007).

Portion of Sentence Imposed Beyond Sentencing Authority Illegal — Timely Petition to Revoke: The District Court sentenced DeShields to 4 years for sexual assault and deferred imposition of the sentence for 4 years subject to certain terms and conditions. The state twice petitioned to revoke DeShields' sentence for violation of the deferred sentence. Both petitions were filed within the 4-year period of deferral. DeShields filed for postconviction relief. The Supreme Court held that the initial 4-year sentence was illegally imposed because the maximum time that the sentence could be deferred was 3 years, but DeShields' argument that the entire sentence was void was mistaken. The mere fact that the District Court exceeded its statutory authority in imposing an improper deferred sentence did not render the sentence void ab initio. Only the portion of the sentence beyond the court's authority was illegal. Additionally, the state filed its petitions within the allowable 3-year deferral period, so DeShields' deferred sentence was properly revoked. DeShields v. St., 2006 MT 58, 331 M 329, 132 P3d 540 (2006).

Misinformation in Plea Agreement and Incomplete Information Provided by District Court Raising Doubt as to Intelligent Guilty Plea — Denial of Withdrawal of Plea Reversed: Rave was charged with sexual assault with bodily injury. Following advice of counsel, Rave accepted a plea agreement and pleaded guilty. Prior to sentencing, Rave moved to withdraw the guilty plea, but the motion was denied, and Rave was sentenced pursuant to the plea agreement. On appeal, the Supreme Court found that the plea agreement erroneously advised Rave that sexual assault may be a lesser included felony offense and that the penalty was the same as for sexual assault with bodily injury when, in fact, the lesser included offense was a misdemeanor. In addition, the District Court did not correct the misinformation in the plea agreement when accepting the guilty plea, so Rave could not have made a knowing, intelligent, and voluntary plea. Thus, the Supreme Court reversed the denial of Rave's motion to withdraw the guilty plea and remanded for further proceedings. St. v. Rave, 2005 MT 78, 326 M 398, 109 P3d 753 (2005).

Community Risk by Sex Offender — Sentencing Court Consideration of Information in Presentence Report Unrelated to Crime Charged Not Erroneous: Legg pleaded not guilty to felony sexual assault of a 9-year-old girl. The initial mental examination revealed that Legg was severely depressed but competent to understand the charges and appreciate the consequences of possible incarceration. Legg's counsel then requested a psychosexual evaluation of Legg. The analyst categorized Legg as a low-level offender and suggested that community placement and outpatient sexual offender treatment would be appropriate. Legg then entered a plea bargain wherein the state agreed to recommend sentencing in accordance with the evaluations. Legg pleaded guilty, and the District Court ordered a presentence investigation (PSI). The investigator discovered information that Legg had not revealed previously, including the fact that Legg was permanently prohibited from contact with his ex-wife and children and that there were other secondary victims of Legg's sexual abuse. The analyst who performed Legg's psychosexual evaluation then reclassified Legg as a moderate risk offender and recommended confinement rather than community placement because the risk was too great to treat Legg as an outpatient. Legg filed a motion in limine to exclude any evidence from the PSI from persons other than the victim, her family, or her therapists. The motion was not ruled upon, so the challenged evidence was not excluded. The state recommended a 30-year sentence with 25 years suspended, and Legg consented to the recommendation. However, after hearing from the victim's family, doctor, and counselor and from the analyst, the court sentenced Legg to 50 years with none suspended. Legg appealed, but the Supreme Court affirmed. Consideration of all materials in the PSI was required under 46-18-111, and the District Court did not abuse its discretion in doing so. Further, the statements by the sentencing court that the 50-year sentence was both to punish Legg and to protect society from Legg in the future were a sufficient explanation of the reasons for the sentence, as required under 46-18-115. St. v. Legg, 2004 MT 26, 319 M 362, 84 P3d 648 (2004).

Punitive Damages Owing for Fraud Connected With Sexual Assault: Following a sexual assault by a coworker, Beaver sought punitive damages. The District Court held that the coworker was unable to control his impulses, but was not guilty of fraud or malice and thus was not liable for punitive damages. The Supreme Court disagreed and reversed. The record showed that the coworker's actions were not a spur-of-the-moment development but that the coworker had worked for several hours to place Beaver in a position in which she would be vulnerable to sexual advances, including making false representations of work-related necessity. These acts constituted actual fraud, and the coworker was liable for punitive damages under 27-1-220 and 27-1-221. Beaver v. Dept. of Natural Resources and Conservation, 2003 MT 287, 318 M 35, 78 P3d 857 (2003).

Correction of Sentence for Imprisonment Not Erroneous: Kern was convicted of felony sexual assault against a minor. The District Court sentenced Kern to a 15-year commitment to the Department of Corrections, with all but 7 years suspended. However, 46-18-201 requires that a sentence to the Department include suspension of all but 5 years of the commitment. The District Court corrected its mistake and committed Kern to the state prison for 15 years, with all but 7 years suspended. Kern contended that the court erred in correcting the sentence. Under the version of 46-18-117 in effect at the time that the crime was committed (prior to repeal in 2001), the court was allowed to correct the erroneous sentence within 120 days of sentencing. Although Kern might have preferred commitment to the Department for 15 years with all but 5 years suspended, the District Court was not restricted from pursuing the option that it chose and did not err in timely correcting the sentence pursuant to former 46-18-117. St. v. Kern, 2003 MT 77, 315 M 22, 67 P3d 272 (2003).

Failure to Complete Sexual Offender Treatment Sufficient to Warrant Suspended Sentence Revocation and Continued Incarceration: Vallier received 5 years for felony assault and 20 years for felony sexual assault of an 11-year-old child, with 10 years suspended if Vallier completed the prison sexual offender program. Vallier failed to complete the program by the time of scheduled discharge of the active sentence, so the District Court revoked the suspended portion of the sentence, further classifying Vallier as a level 3 sexual offender at a high risk to reoffend. On appeal, the Supreme Court affirmed, finding Vallier's failure to complete the sexual offender program of such a nature as to require Vallier's continued incarceration. Sufficient evidence was offered to prove that Vallier continued to be a serious community threat until the treatment was received, and Vallier did not meet the burden of showing that the District Court abused its discretion in revoking the suspended sentence. St. v. Vallier, 2000 MT 225, 301 M 228, 8 P3d 112, 57 St. Rep. 928 (2000).

Sentencing Without Consideration of Presentence Report — Reversible Error: The District Court's refusal to continue sentencing in order to allow inclusion in the presentencing investigation of a sex offender evaluation that had not been completed prior to the sentencing hearing, as required by 46-18-111, constituted reversible error warranting remand for resentencing in order that the report be considered. St. v. Alexander, 265 M 192, 875 P2d 345, 51 St. Rep. 474 (1994), followed in St. v. Barnhart, 283 M 518, 942 P2d 718, 54 St. Rep. 772 (1997).

Seven-Year-Old Victim — Twenty-Year Sentence Affirmed: The District Court properly considered the age of a 7-year-old victim and did not abuse its discretion in sentencing defendant to the maximum 20 years in prison. St. v. Mason, 253 M 419, 833 P2d 1058, 49 St. Rep. 506 (1992).

Sentence for Felony Assault (now Assault With a Weapon) and Knowing Use of Firearm — Sentence Within Statutory Guideline Not Excessive: Defendant was sentenced to 10 years in prison for felony assault (now assault with a weapon) and to a consecutive term of 10 years with 5 years suspended for the knowing use of a firearm during commission of the offense, was designated a dangerous offender for purposes of parole eligibility, and was fined $50,000 to be paid out of proceeds recovered in a pending civil suit. Defendant contended the sentence was excessive given the nature of the offense and his prior record. However, the sentence was within the statutory guidelines for the offense and therefore did not violate the constitutional ban on cruel and unusual punishment. St. v. Dahms, 252 M 1, 825 P2d 1214, 49 St. Rep. 106 (1992).

Assault and Sexual Intercourse Without Consent — Grandparent-Grandchild Relationship — Sentencing Under Incest Statute Not Required: When defendant was charged and convicted of sexual assault and sexual intercourse without consent, the District Court properly sentenced defendant under the sexual assault and sexual intercourse without consent statutes. Defendant's argument that he should have been sentenced under the incest statute because he and the victim had a grandparent-grandchild relationship has no merit. Such a relationship would not serve to alter the charges, convictions, or sentences against the defendant. St. v. Walters, 247 M 84, 806 P2d 497, 48 St. Rep. 102 (1991).

Consecutive Terms Allowable for Sexual Assault: The District Court did not err in sentencing defendant to two consecutive terms upon conviction of sexual assault when the factors in 46-18-101 were considered and the sentence fell within the legal limits of this section. St. v. Gilpin, 232 M 56, 756 P2d 445, 45 St. Rep. 863 (1988).

Punishment: A defendant convicted of a lewd and lascivious act upon a child under 94-4106, R.C.M. 1947 (since repealed), was properly sentenced to a term of not less than 10 years pursuant to the second offense law, on proof that he had previously been convicted of lewd and lascivious acts upon a child. In re Davis' Petition, 139 M 622, 365 P2d 948 (1961).

STANDARD OF REVIEW

Standard of Review in Sexual Assault Case — Conviction Upheld: Defendant was convicted of sexual assault of his 15-year-old daughter. At trial, the evidence consisted of testimony by the victim, which was consistent with the testimony of other witnesses. On appeal, defendant argued that the testimony of the victim was so fraught with inconsistencies with the testimony of other witnesses that the victim's testimony was not credible. The Supreme Court held that the elements of the offense of sexual assault could be proved by the uncorroborated testimony of the victim if consistent with other evidence. The Supreme Court's job was not to decide the weight of the evidence. If the evidence conflicts, it is the job of the trier of fact, in this case the jury, to choose whom to believe. St. v. Medina, 245 M 25, 798 P2d 1032, 47 St. Rep. 1832 (1990), overruled, as to the requirement for consistency with other evidence, in St. v. Olson, 286 M 364, 951 P2d 571, 54 St. Rep. 1449 (1997).

45-5-503. Sexual intercourse without consent.

Criminal Law Commission Comments

Source: M.P.C., 1962, § 213.0.

The section provides no age limit on the male offender but section 94-2-109 [now MCA, 45-2-203] and the juvenile law, R.C.M. 1947, Title 10 [now MCA, Title 41 and Title 53, Chapter 6], provide jurisdictional limitations. Deviate forms of sexual intercourse are included by definition (see section 94-2-1010(56) [now MCA, 45-2-101(61)]) since these forms of sexual aggression are equally abhorrent. Sexual relations between married people are excluded. [See 1985 amendment by Ch. 356.] The section imposes an increased penalty if bodily injury occurs or there is a three or more year variation between the age of an under sixteen-year-old victim and the actor.

Compiler's Comments

2019 Amendment: Chapter 228 in (4)(a)(i) in two places substituted "25 years" for "10 years". Amendment effective October 1, 2019.

Applicability: Section 4, Ch. 228, L. 2019, provided: "[This act] applies to offenses committed on or after October 1, 2019."

2017 Amendments — Composite Section: Chapter 277 in (2) near end inserted reference to subsection (5); inserted (5) relating to a victim who is at least 14 years of age and an offender who is 18 years of age or younger; in (7) after "to commit the offense or" inserted "the act of"; and made minor changes in style. Amendment effective October 1, 2017.

Chapter 279 in (1) near beginning substituted "has sexual intercourse with another person without consent or with another person who is incapable of consent" for "has sexual intercourse without consent with another person" and at end of second sentence substituted "45-5-501(1)(b)(iv)" for "45-5-501(1)(a)(ii)(D)"; in (2) substituted "term of not more than 20 years" for "term of not less than 2 years or more than 100 years"; in (4)(a) after "offender" inserted "in the course of committing a violation of this section"; and made minor changes in style. Amendment effective October 1, 2017.

Chapter 321 in (4)(a)(i) in two places substituted "10 years" for "25 years", substituted "46-18-222(1) through (5)" for "46-18-222", and inserted last sentence concerning exception. Amendment effective July 1, 2017.

Applicability: Section 4, Ch. 277, L. 2017, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective October 1, 2017.

Section 8, Ch. 279, L. 2017, provided: "[This act] applies to crimes committed on or after [the effective date of this act]." Effective October 1, 2017.

Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

2013 Amendment: Chapter 149 inserted (7) concerning forfeiture of parental and custodial rights. Amendment effective October 1, 2013.

Preamble: The preamble attached to Ch. 149, L. 2013, provided: "WHEREAS, sexual assault is a deviant, criminal act punishable under the laws of the state of Montana; and

WHEREAS, the most vicious form of sexual assault is sexual intercourse without consent; and

WHEREAS, sexual intercourse without consent may result in an unwanted pregnancy and the mother may choose to carry the child to term; and

WHEREAS, the mother may choose to allow adoption of the child or retain custody and raise the child; and

WHEREAS, under current Montana law there is no provision to prevent a person convicted of sexual intercourse without consent who is also the biological father of the child from claiming parental rights related to the child; and

WHEREAS, other states in the United States of America have enacted laws to prevent a person convicted of sexual intercourse without consent who is also the biological parent of a child resulting from the act of sexual intercourse without consent from claiming any parental rights to the child; and

WHEREAS, a claim for custody or other type of parental rights by a person convicted of sexual intercourse without consent may cause serious emotional trauma to the child and the mother who is also a crime victim."

2007 Amendments — Composite Section: Chapter 335 deleted former (3)(d) that read: "(d) If the victim was incarcerated in an adult or juvenile correctional, detention, or treatment facility at the time of the offense and the offender had supervisory or disciplinary authority over the victim, the offender shall be punished by imprisonment in the state prison for a term of not more than 5 years or fined an amount not to exceed $50,000, or both". Amendment effective October 1, 2007.

Chapter 483 in (2) at end after "46-18-222" inserted "and subsections (3) and (4) of this section"; in (3)(a) near beginning increased age of offender from 3 years to 4 years or more older than the victim; inserted (4) providing punishment if the victim was 12 years of age or younger and the offender was 18 years of age or older at the time of the offense; in (6) near beginning after "used in" substituted "subsections (3) and (4)" for "subsection (3)"; and made minor changes in style. Amendment effective May 11, 2007.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

2003 Amendment: Chapter 114 in (1) at end substituted "45-5-501(1)(b)(iv)" for "45-5-501(1)(b)(iii)". Amendment effective October 1, 2003.

1999 Amendments — Composite Section: Chapter 84 inserted (3)(d) concerning incarcerated victim. Amendment effective October 1, 1999.

Chapter 523 in (3)(c)(i) inserted "unless the offender is less than 18 years of age at the time of the commission of the offense"; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendment: Chapter 312 inserted (3)(c) providing that a person with two convictions of sexual intercourse without consent who inflicted serious bodily injury on any person during the commission of each offense must on the second conviction be punished by death or by life in prison without possibility of release.

1995 Amendments: Chapter 482 in version effective July 1, 1997, in (2), near end, in (3)(a), near end, and in (3)(b), near end, inserted reference to 46-18-219.

Chapter 550 in (2), after "shall be", substituted "punished by life imprisonment or by imprisonment" for "imprisoned" and after "more than" substituted "100" for "20"; in (3)(a), near middle after "shall be", substituted "punished by life imprisonment or by imprisonment" for "imprisoned", after "less than" substituted "4" for "2", and after "more than" substituted "100" for "40" and deleted second sentence that read: "An act "in the course of committing sexual intercourse without consent" includes an attempt to commit the offense or flight after the attempt or commission"; in (3)(b), near middle, substituted "punished by life imprisonment or by imprisonment" for "imprisoned" and after "more than" substituted "100" for "40"; inserted (5) defining in the course of committing sexual intercourse without consent; and made minor changes in style.

Coordination Instruction — Effective Dates: Section 21, Ch. 482, L. 1995, provided: "(1) If House Bill No. 357 and [this act] [Senate Bill No. 66] are both passed and approved:

(a) [sections 1 through 18] of [this act] are effective July 1, 1997; and

(b) the sentencing commission shall include recommendations for implementing the public policy contained in [sections 1 through 18] of [this act].

(2) [Sections 19, 20, and this section] [enacted as codification and coordination instructions] are effective July 1, 1995.

(3) If House Bill No. 357 is not passed and approved, then this section is void." House Bill No. 357 was approved March 31, 1995, as Ch. 306, L. 1995. Therefore, the amendments to 45-5-503, enacted as sec. 8 of Senate Bill No. 66, are effective July 1, 1997.

1993 Amendment: Chapter 85 inserted (3)(b) regarding the penalty for sexual intercourse without consent when two or more offenders are involved; near middle of (4) inserted requirement that offender pay victim's reasonable medical costs; and made minor changes in style.

1991 Amendments: Chapter 175 in (1) substituted "another person" for "a person of the opposite sex".

Chapter 218 at end of (1) changed subsection reference to 45-5-501.

Chapter 687 in (1), in first sentence, substituted "another person" for "a person of the opposite sex" and at end of second sentence changed subsection reference to 45-5-501. Amendment effective April 27, 1991.

1985 Amendments: Chapter 172 deleted former (5) through (7) that read: "(5) No evidence concerning the sexual conduct of the victim is admissible in prosecutions under this section, except:

(a) evidence of the victim's past sexual conduct with the offender;

(b) evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease which is at issue in the prosecution under this section.

(6) If the defendant proposes for any purpose to offer evidence described in subsection (5)(a) or (5)(b), the trial judge shall order a hearing out of the presence of the jury to determine whether the proposed evidence is admissible under subsection (5).

(7) Evidence of failure to make a timely complaint or immediate outcry does not raise any presumption as to the credibility of the victim."

Chapter 356 in (1) after "opposite sex", deleted "not his spouse", and inserted second sentence that read: "A person may not be convicted under this section based on the age of his spouse as provided in 45-5-501(2)(c)."

Chapter 644 inserted (4) concerning court requiring offender to pay victim's counseling costs that result from offense.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section provides for sanctions against a sexual offender who goes beyond touching and accomplishes at least a slight penetration of the vulva, anus, or mouth of the victim. The "slight penetration" requirement of section 94-4103 has been retained by incorporation in the definition of "sexual intercourse", section 45-2-101. The definition of "without consent", 45-5-501, includes all but one of the situations in which the old offense of rape, R.C.M. 1947, § 94-4101, could be committed. It does not include submission by the victim under the false belief that the actor is the victim's spouse. "Without consent" includes incapacity to give legal consent because the victim is "mentally defective", defined at 45-2-101 or "mentally incapacitated", defined at 45-2-101. The old code attempted to describe the mental incapacity to give legal consent as "lunacy or other unsound-soundness of mind" and "unconsciousness of the nature of the act" but it did not define these terms. Another change from the old code is that the age limit for statutory rape has been reduced from 18 to 16 years. This change is consistent with the realities of a more sexually permissive society.

As originally worded, this section in the 1973 Criminal Code precluded the commission of the offense of sexual intercourse without consent by a female upon a male. This was changed in 1975 by substitution of the neutral term "person" for "male person" and "female". However, this created the possibility that the offense could then be committed by one person upon another of the same sex, an offense intended by the Legislature to be covered by deviate sexual conduct, 45-5-505, or sexual assault, 45-5-502, or even simple assault, 45-5-201. This possibility was erased by the 1977 amendment which added "of the opposite sex" to the phrase "with a person".

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CONSTITUTIONAL ISSUES

Mazurek Hearing — Rape Shield Exception Regarding Victim's Prior False Accusation of Sexual Assault — District Court Properly Excluded Evidence of Minor's Statement — Forensic Interview and Testimony Unclear — Probative Value of Minor's Statement Limited — District Court Balanced Minor's Rights and Defendant's Right to Confront Accuser. St. v. Hansen, 2022 MT 163, 409 Mont. 495, 515 P.3d 799.

Argument of Prosecutor and Confusing DNA Testimony Held Not Due Process Violation: The defendant was convicted of sexual intercourse without consent and appealed his conviction, arguing that the testimony of the forensic scientist and the prosecutor's argument were so false as to constitute a due process violation. The Supreme Court held, citing Hayes v. Brown, 399 F.3d 972 (9th Cir., 2005), that in order for these matters to rise to the level of a due process violation, the defendant must show that the testimony was actually false, that the prosecutor knew or should have known it was false, and that the false testimony was material. The court held that, in light of all of the evidence and argument, the defendant had failed to meet this burden of proof. St. v. Wright, 2011 MT 92, 360 Mont. 246, 253 P.3d 838.

Life Sentence for Sexual Intercourse Without Consent Affirmed: Thorp was convicted of sexual intercourse without consent after having been previously convicted of the same offense in another state and was sentenced to life imprisonment without parole. Thorp contended that the sentence amounted to cruel and unusual punishment, but the Supreme Court disagreed. The sentence was within the statutory guidelines and could not be seen as so disproportionate to the crime as to shock the conscience or to outrage the moral sense of the community or of justice and thus was not considered cruel and unusual punishment. St. v. Thorp, 2010 MT 92, 356 Mont. 150, 231 P.3d 1096, following St. v. Shults, 2006 MT 100, 332 Mont. 130, 136 P.3d 507.

Procedural Change in Statute of Limitations Not Violative of Ex Post Facto Protection: At the time that Duffy was alleged to have committed sexual intercourse without consent and incest with his daughter in 1986, the applicable statute of limitations provided that a prosecution be commenced within 5 years after the offense if the victim was less than 16 years old at the time that the offense occurred. In 1989, the statute was amended to provide that a prosecution be commenced within 5 years after the victim reached 18 years of age if the victim was less than 18 at the time of the offense. In Duffy's case, if the statute of limitations had not been amended, prosecution would have been barred, so Duffy maintained that applying the 1989 statute of limitations was an unlawful application of the constitutional ex post facto provisions. The Supreme Court applied the ex post facto test in St. v. Leistiko, 256 M 32, 844 P2d 97 (1992), which established that an ex post facto violation occurs when: (1) the law is retrospective; and (2) the law disadvantages the offender. Duffy failed to satisfy the second part of the Leistiko test because the 1989 change in the statute of limitations did not alter the definition of or punishment for the crimes, but merely expanded the time in which the punishment might be imposed and thus did not violate constitutional ex post facto provisions. The conduct of which Duffy was accused was illegal and punishable both before and after the statute of limitations was extended. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000). See also U.S. v. Marrow, 177 F3d 272 (5th Cir. 1999).

Testimonial Privilege Not Extended to Nonclerical Church Member — No Prejudice in Admission of Member's Testimony: Testimonial privileges must be strictly construed because they contravene the fundamental principle that the public has the right to everyone's evidence; however, the clergy-penitent privilege in 26-1-804 will not be so strictly construed as to violate the right to freedom of religion in Art. II, sec. 5, Mont. Const. Here, Gooding claimed that testimony regarding his confessions of sexual molestation of his stepdaughter in the presence of the wife of a nonordained junior minister was privileged. However, nothing in the record indicated that the wife was a clergy member acting in a professional character, a counselor, or anything more than an ordinary confidant. The Supreme Court declined to extend the clergy-penitent privilege to nonclerical church members and, in light of overwhelming uncontradicted evidence of Gooding's guilt, affirmed his conviction regardless of the wife's testimony. St. v. Gooding, 1999 MT 249, 296 M 234, 989 P2d 304, 56 St. Rep. 977 (1999). See also St. v. MacKinnon, 1998 MT 78, 288 M 329, 957 P2d 23, 55 St. Rep. 331 (1998).

Character of Victim — Right to Witness and Confrontation — Sexual Intercourse Without Consent: While the sixth amendment to the United States Constitution guarantees a criminal the right to testimony of witnesses in his favor, it does not guarantee him the right to any and all witnesses, regardless of their competency or knowledge. There is the competing interest of the fairness and reliability of the trial. Here, in a sexual intercourse without consent case, the defendant was precluded by these rules from calling witnesses to establish the victim's sexual views and from cross-examining the victim concerning a quote on her jacket ("Liquor in the front, poker in the back"). Since the victim's character is not in issue and her sexual views are not probative of her truthfulness, it is clearly within the judge's discretion to exclude this evidence if it is irrelevant or too prejudicial. The Supreme Court found no merit in defendant's argument that he was denied his right to confront witnesses. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980), followed in State ex rel. Mazurek v. District Court, 277 M 349, 922 P2d 474, 53 St. Rep. 678 (1996).

Constitutionality:

Pre-1975 statute defining offense of sexual intercourse without consent, whereby only a male could commit the offense, was not a violation of the equal protection of the law or an arbitrary distinction based solely upon sex where historically such attacks have been by men upon women. St. v. Craig, 169 M 150, 545 P2d 649 (1976).

This section is not unconstitutionally vague and ambiguous since the terms used are all defined in the Criminal Code. St. v. Ballew, 166 M 270, 532 P2d 407 (1975).

GENERALLY

No Affirmative Duty for Police to Conduct Rape Exam or Fingernail Scrapings — Claim of Ineffective Assistance of Counsel Denied: A client reported to the police that the defendant, a massage therapist, had penetrated her with his finger during a massage. The alleged victim was not asked to submit to a rape exam and the police did not perform a fingernail scraping test on the defendant. Following his conviction for sexual intercourse without consent and unsuccessful appeal of his conviction, the defendant filed a petition for postconviction relief. In it, he claimed that he had received ineffective assistance of counsel because his attorney had neither sought dismissal of the charge nor requested a jury instruction regarding the lack of a rape exam or fingernail scrapings. The Supreme Court rejected the argument that his counsel was ineffective and emphasized that the police do not have an affirmative duty to collect potentially exculpatory evidence. Taylor v. St., 2014 MT 142, 375 Mont. 234, 335 P.3d 1218.

Acquittal of Sexual Intercourse Without Consent Not Requiring Dismissal of Charge of Attempted Evidence Tampering: Scheffer was charged with sexual intercourse without consent and with attempting to tamper with physical evidence related to the sexual intercourse without consent charge. Scheffer was acquitted of the sexual intercourse without consent charge but convicted of attempted evidence tampering. On appeal, Scheffer contended that the attempted evidence tampering charge should be vacated because it was irrationally inconsistent with acquittal of the sexual intercourse without consent charge, inasmuch as acquittal of sexual intercourse without consent meant that the alleged rape never occurred. The Supreme Court disagreed. Even if an actual rape never occurred, it was not a practical impossibility for Scheffer to attempt to tamper with evidence related to the events and acts in question. Scheffer's conviction of attempting to alter, destroy, conceal, or remove physical evidence related to the pending official proceeding or investigation into sexual intercourse without consent was not irrationally inconsistent with the ultimate acquittal of the underlying charge. The conviction for attempted evidence tampering was affirmed. St. v. Scheffer, 2010 MT 73, 355 Mont. 523, 230 P.3d 462.

Conviction of Sexual Exploitation of Children and Child Pornography in Federal Court Barring State Prosecution of Sexual Intercourse Without Consent: Neufeld began having sexual intercourse with a 13-year-old child in 2002 or 2003, which continued until Neufeld joined the army in 2005. Neufeld was charged with sexual intercourse without consent in Montana in 2006, and the same day he was charged in federal court with sexual exploitation of children and receipt and possession of child pornography. Neufeld was ultimately convicted in federal court and sentenced to 262 months in federal prison. Neufeld moved to dismiss the state charges, and the motion was granted. The state appealed, but the Supreme Court affirmed. Neufeld's sexual contacts with the minor constituted a crime under both state and federal law, and the federal sentence incorporated the same prohibited conduct. Therefore, the Montana prosecution was barred under 46-11-504. St. v. Neufeld, 2009 MT 235, 351 M 389, 212 P3d 1063 (2009), distinguished in St. v. Fox, 2012 MT 172, 366 Mont. 10, 285 P.3d 454.

Extension of Criminal Statute of Limitations Not Considered Retroactive: The 1989 version of 45-1-205 provided that if the victim of sexual intercourse without consent was a minor at the time of the offense, the offender could be prosecuted up to 5 years after the victim turned 18 years old. In 2001, the Legislature extended the statute of limitations to expire 10 years after the victim turned 18 years old. The victim in this case turned 18 in 2001, and Mordja was charged in 2007, 5 years and 10 months after the victim turned 18. Mordja moved to dismiss the charges against him on grounds that the statute of limitations had expired. The District Court denied the motion, holding that because 45-1-205 was amended before the original statute of limitations expired in Mordja's case, the new limitations period applied to Mordja. On appeal, the Supreme Court affirmed. A defendant cannot have a vested right in a statute of limitations that has not yet expired. The statute of limitations did not expire in Mordja's case before 45-1-205 was amended, so Mordja did not have any vested right in an affirmative defense. Application of the 2001 amendment to Mordja's case was not retroactive within the meaning of 1-2-109 because it did not affect Mordja's vested rights or impose any additional obligations or detriments on Mordja. Thus, the state had the right to prosecute Mordja at any time within the newly extended limitations period, and the District Court did not err in denying Mordja's motion to dismiss. Mordja v. District Court, 2008 MT 24, 341 M 219, 177 P3d 439 (2008), following St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001), and Stogner v. Calif., 539 US 607 (2003).

Denial of Motion to Withdraw Voluntary Guilty Plea Proper: Pursuant to a plea agreement, defendant pleaded guilty to sexual intercourse without consent. Some 4 years after entering the plea, defendant moved to withdraw the guilty plea, but the motion was denied. On appeal, the Supreme Court held that the District Court's plea colloquy adequately addressed the elements of the offense and laid the factual basis for acceptance of the plea and that defendant's guilty plea, which was entered after defendant signed an acknowledgment of waiver of rights and after engaging in a proper colloquy with counsel and the court, was voluntary. Thus, denial of the motion to withdraw the plea was proper. St. v. Muhammad, 2005 MT 234, 328 M 397, 121 P3d 521 (2005).

Youth Court Jurisdiction Improperly Extended for Youth Charged With Crime Punishable by Life in Prison: In the case of a youth charged with felony sexual intercourse without consent, the Youth Court was without legal basis to extend its jurisdiction beyond the youth's 21st birthday because the youth was charged with a crime punishable by life imprisonment. In re N.V., 2004 MT 80, 320 M 442, 87 P3d 510 (2004).

Incest Not Included Offense of Sexual Intercourse Without Consent: McQuiston contended that his conviction for both incest and sexual intercourse without consent violated double jeopardy protections because under 46-11-410, a defendant may not be convicted of more than one offense if one offense is an included offense in another, as defined in 46-1-202. The Supreme Court held that incest is not an included offense of sexual intercourse without consent but rather is a distinct and wholly separate offense, each crime requiring proof of distinct elements that the other does not have. McQuiston's conviction for both crimes was not a double jeopardy violation. St. v. McQuiston, 277 M 397, 922 P2d 519, 53 St. Rep. 729 (1996), following St. v. Sor-Lokken, 247 M 343, 805 P2d 1367 (1991).

Sexual Intercourse Without Consent Not Lesser Included Offense of Aggravated Kidnapping: Under the rationale of 46-11-502 (renumbered 46-11-410) and the standard set out in St. v. Thornton, 218 M 317, 708 P2d 273 (1985), sexual intercourse without consent is not a lesser included offense of aggravated kidnapping. St. v. Clawson, 239 M 413, 781 P2d 267, 46 St. Rep. 1792 (1989).

Requirements of Time and Place in Charged Offense — Definiteness: Defendant was reunited with his wife and three stepchildren in April 1981. During a family argument in July, defendant's 12-year-old stepdaughter alleged he had raped her. Defendant battered the child and her mother. Defendant was arraigned in December on an information charging him with eight counts of sexual intercourse without consent. The information specified the days on which the rapes occurred. Defendant pleaded not guilty and on March 9, 1982, noticed an alibi defense. On April 9, 1982, the state noticed its intent to amend the information to allege the time of the rapes less precisely. Defendant objected, but the trial judge permitted the amended information to be filed. Defendant was found guilty on all counts and appealed. Defendant contended that while time is generally not a material element to the crime charged, the substituting of periods of time for specific dates precluded his use of his alibi defense. The Supreme Court stated that both informations set forth facts alleging a series of rapes by the stepfather upon the child. Where a continuing course of such conduct is alleged, further specificity is not required. Children are less likely to distinguish times and dates with specificity. Defendant's notice of intent to rely on alibi did not change the nature of the crime charged or incorporate time as a necessary element of the state's proof. The amended information stated the time and place of the charged offenses as definitely as could be done under the circumstances of the case. St. v. Clark, 209 M 473, 682 P2d 1339, 41 St. Rep. 833 (1984).

Sufficiency of Information: The information filed in this case was sufficient since each count followed the language of the statutes for deliberate homicide, aggravated kidnapping, and sexual intercourse without consent. The State's attempt to amend the information did not aid the defendant in claiming the information was not sufficient. St. v. Coleman, 177 M 1, 579 P2d 732 (1978). For full appellate history of Coleman, see case note at 45-2-101, SERIOUS BODILY INJURY, *Evidence*.

Federal Law as to Indians: In the prosecution of an Indian under 94-4101, R.C.M. 1947 (a forerunner of this section), for the crime of rape committed upon a 13-year-old female Indian on a reservation, an information which failed to charge that force had been employed or that consent of the victim was lacking failed to state an offense under the federal law which adopted the state law definition of rape. U.S. v. Rider, 282 F2d 476 (9th Cir. 1960).

ELEMENTS

Jury Instruction Adequate Description of Definitions and Law of Case: Thorp contended that the trial court erred in instructing the jury on the definition of "without consent" in the context of a sexual intercourse without consent charge. The trial court accepted the state's instruction that defined the term as the victim being incapable of consent based on being under the age of 16, but Thorp pointed out that the information filed by the state alleged force. However, 45-5-501 defines "without consent" as the victim either being compelled to submit by force or being incapable of consent for a variety of reasons, including age. Thorp did not dispute the victim's age as under 16 years, so the "without consent" element was settled, leaving the jury to resolve any dispute about whether sexual contact had occurred. Thorp also did not challenge jury instructions regarding the knowing, intentional, or sexual intercourse elements of the offense. Therefore, the jury was fully and fairly instructed on the law applicable to the case, and the trial court was affirmed. St. v. Thorp, 2010 MT 92, 356 Mont. 150, 231 P.3d 1096, distinguishing St. v. Hardaway, 2001 MT 252, 307 Mont. 139, 36 P.3d 900.

Sexual Assault Lesser Included Offense of Sexual Intercourse Without Consent — Conviction of Both Crimes Arising From Same Act Precluded: The definition of "without consent" in the crime of sexual assault falls squarely within the scope of sexual intercourse without consent, so sexual assault qualifies as a lesser included offense of sexual intercourse without consent. Therefore, pursuant to 46-11-401, the state may not convict a defendant of both sexual intercourse without consent and sexual assault when the charges arise from the same attack as alleged in the information. St. v. Williams, 2010 MT 58, 355 Mont. 354, 228 P.3d 1127. See also St. v. Beavers, 1999 MT 260, 296 Mont. 340, 987 P.2d 371, St. v. Becker, 2005 MT 75, 326 Mont. 364, 110 P.3d 1, St. v. Russell, 2008 MT 417, 347 Mont. 301, 198 P.3d 271, and St. v. Weatherell, 2010 MT 37, 355 Mont. 230, 225 P.3d 1256.

Sleeping Victim of Sexual Intercourse Without Consent Considered Physically Helpless: A sleeping victim of sexual intercourse without consent is physically helpless within the definitions in 45-2-101 and 45-5-501. The statutory definition of physically helpless is broadly worded to encompass a person who is sleeping because a sleeping person is temporarily unconscious or otherwise physically unable to communicate unwillingness to act. Therefore, a sleeping person cannot consent to sexual intercourse. Whether a person was indeed sleeping, and thus physically helpless, is a question of fact for the jury to decide. St. v. Stevens, 2002 MT 181, 311 M 52, 53 P3d 356 (2002).

Supreme Court Reduction of Offense of Sexual Intercourse Without Consent to Sexual Assault — Relevance of Testimony of Victims Regarding Belief That Massage Therapist's Actions Were Criminal: Stevens was convicted of two counts of sexual intercourse without consent after having sexual contact with two female patients at his massage clinic. The Supreme Court determined that there was insufficient proof that the offenses were committed without consent and, without addressing whether sexual assault was a lesser included offense of sexual intercourse without consent, reduced the offenses to sexual assault. Even though Stevens was not specifically charged with sexual assault, there was no question that he was reasonably apprised of the sexual assault charges against him. Stevens offered a jury instruction, which was given without objection, stating that sexual intercourse without consent necessarily included the offense of sexual assault. Evidence clearly showed that Stevens had sexual contact with the victims, and testimony from the victims regarding whether they considered sexual contact by a massage professional to be criminal was relevant and admissible, tending to make the existence of a material element of the crime, namely whether the crime was committed without consent, more likely than without the evidence. St. v. Stevens, 2002 MT 181, 311 M 52, 53 P3d 356 (2002), distinguishing St. v. Black, 270 M 329, 891 P2d 1162 (1995).

Guilty Verdict on Incest Charge Not Inconsistent With Acquittal of Sexual Intercourse Without Consent: Harris contended that because the jury acquitted him of a charge of sexual intercourse without consent with his adopted daughter, it could not then find him guilty of incest during the same period. However, the period of time covered under the incest charge included an additional 5-year period that was not included in the sexual intercourse without consent charge, so it was not legally inconsistent to acquit Harris of sexual intercourse without consent and find him guilty of incest. St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881, 56 St. Rep. 481 (1999).

Assumption of Sexual Assault as Lesser Included Offense of Sexual Intercourse Without Consent — No Due Process Violation: Black was charged with sexual intercourse without consent. The court found insufficient evidence to convict on that charge but instead found him guilty of felony sexual assault. Black appealed on the grounds that he was convicted of an offense with which he was not charged, relying on St. v. Copenhaver, 35 M 342, 89 P 61 (1907). Neither Black nor the state raised the issue of whether sexual assault was a lesser included offense of sexual intercourse without consent, either at trial or directly on appeal. Although the issue was not properly before the Supreme Court on appeal and the court specifically declined to address it, the court nevertheless assumed for purposes of this opinion that sexual assault is a lesser included offense of sexual intercourse without consent. The court distinguished Copenhaver, in which defendant was convicted of a separate, independent offense that was not a lesser included offense. In this case, pursuant to the court's assumption and 46-16-607(1), the court found that the charging document provided a sufficient basis for Black's conviction of sexual assault. Black's arguments that he was convicted of a crime with which he was not charged, that the charging document did not provide notice of the crime of which he was convicted, and that his due process rights were violated were thus rendered ineffective. St. v. Black, 270 M 329, 891 P2d 1162, 52 St. Rep. 215 (1995).

Victim Threatened With Nongraduation From High School: The principal of a high school threatened a student with nongraduation if she did not submit to his sexual advances. The Supreme Court held that the state had to show that the victim submitted due to physical force or threats of physical force. The court held that under the present definition of "without consent", the state could not prove all the elements of the crime. (See 1991 amendment to 45-5-501.) St. v. Thompson, 243 M 28, 792 P2d 1103, 47 St. Rep. 1065 (1990).

Complete Vaginal Penetration Unnecessary to Prove Intercourse: Defendant's claim of insufficient evidence to prove intercourse based on inconclusive testimony of recurrent internal and complete vaginal penetration did not acknowledge the statutory definition or other evidence that would allow the jury to conclude that penetration, however slight, had occurred. St. v. French, 233 M 364, 760 P2d 86, 45 St. Rep. 1557 (1988).

Continuous Resistance Unnecessary: Law did not require that a woman put her life into jeopardy by continuous resistance to rape; testimony of victim that she submitted only after being told that her struggles would be futile because defendant would not let her go until he had finished was sufficient to show lack of consent. St. v. Glidden, 165 M 470, 529 P2d 1384 (1974).

Force and Violence:

Under 94-4101, R.C.M. 1947 (a forerunner of this section), an information charging rape accomplished by violence and force and against the will and consent of the prosecuting witness was sufficient and warranted proof either of resistance overcome by violence or superior force or of threats of a nature to excuse nonresistance. St. v. Whitmore, 94 M 119, 21 P2d 58 (1933).

Under 94-4101, R.C.M. 1947 (a forerunner of this section), there was no variance between an information charging the commission of rape by violence and force and the evidence of the prosecutrix that she was rendered helpless by a blow in the face which stunned her prior to the commission of the offense, even though she was unconscious or semiconscious during its commission; such proof of her condition as a reason for nonresistance brought the case within subsection (3) of that section, i.e., rape, where the resistance of the female is overcome by violence or force. St. v. Whitmore, 94 M 119, 21 P2d 58 (1933).

Evidence adduced in a prosecution for an attempted rape by force under 94-4104, R.C.M. 1947 (now in 45-5-502), was insufficient to sustain a verdict of guilty, it presenting a case of urgent solicitation rather than of an intention by the use of force to overcome the resistance of the prosecutrix. St. v. Hennessy, 73 M 20, 234 P 1094 (1925).

To warrant conviction for an attempt to commit rape by force under 94-4101, R.C.M. 1947 (a forerunner of this section), the evidence had to be sufficient to establish beyond a reasonable doubt that the defendant assaulted the prosecutrix with the intention to accomplish his purpose at all events and notwithstanding any resistance on her part; acquittal was required absent intent in the mind of the assailant to overcome by force all resistance which might be offered. St. v. Hennessy, 73 M 20, 234 P 1094 (1925).

An information for rape under 94-4101, R.C.M. 1947 (a forerunner of this section), alleging that the act was committed by force and against the will and consent of the female, was sufficient under subsections (3) and (4) of that section and authorized proof that the act was committed under the circumstances provided for in either subsection. St. v. Morrison, 46 M 84, 125 P 649 (1912).

Evidence was insufficient to justify a conviction for rape charged to have been accomplished by violence and force, where it appeared that the prosecuting witness failed to make any outcry or to offer any physical resistance which required force to overcome, within the meaning of subsection (3) of 94-4101, R.C.M. 1947 (a forerunner of this section). St. v. Needy, 43 M 442, 117 P 102 (1911).

Indictment and Information: In an indictment for rape under 94-4101, R.C.M. 1947 (a forerunner of this section), it was not necessary to allege that the female injured was not the wife of the defendant. St. v. Morrison, 46 M 84, 125 P 649 (1912); St. v. Williams, 9 M 179, 23 P 335 (1890).

TRIAL

Amendment to Information Allowed Midtrial — Change to Form, Not Substance — District Court Affirmed. St. v. LaFournaise, 2022 MT 36, 407 Mont. 399, 504 P.3d 486.

Denial of Motion to Remove Juror for Cause Not Error Absent Showing of Juror Bias: During voir dire in Marble's trial for sexual intercourse without consent, defense counsel asked the panel whether the act of anal intercourse between two males would be considered so abhorrent as to affect their ability to view and weigh the evidence fairly. One juror responded that his religious convictions made the idea of such an act morally repugnant. Defense counsel moved to remove the juror for cause, but the motion was denied. After further questioning, counsel again moved to remove the juror for cause, but the motion was again denied. Counsel ultimately used a peremptory challenge to remove the juror. On appeal, Marble asserted that the trial court abused its discretion in denying the motions to remove the juror for cause. Analyzing the juror challenges in light of the statutory language and the totality of the circumstances, the Supreme Court held that the juror did not exhibit an actual bias during voir dire that would have prohibited the juror from acting with impartiality and without prejudice. Absent a showing of bias, denial of the motion to remove the juror for cause was not an abuse of discretion, and the Supreme Court affirmed. St. v. Marble, 2005 MT 208, 328 M 223, 119 P3d 88 (2005), following St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002).

Test Whether Witness May Testify as Expert on Child Abuse: Factors in the three-part test set out in St. v. Scheffelman, 250 M 334, 820 P2d 1293 (1991), for whether a witness may testify as an expert on child abuse are: (1) the expert must have extensive first-hand experience with children who both have and have not been sexually abused; (2) the expert must have a thorough and current knowledge of the professional literature on child abuse; and (3) the expert must have objectivity and neutrality regarding individual cases. In Riggs's case, the state called a child abuse expert who met the qualifications but who had a therapeutic relationship with one of the victims to testify concerning interviewing techniques applied in a sexual abuse investigation. Riggs contended that the trial court erred by allowing the expert to testify and by limiting the defense's ability to cross-examine the expert. The Supreme Court disagreed on both issues. Given the limited scope of the expert's testimony, the objectivity with which the expert could testify regarding interviewing techniques was not susceptible to being compromised by the therapeutic relationship with one of the victims, so the trial court did not err in qualifying the witness as an expert. Additionally, Riggs was afforded a fair and full opportunity to expose any potential bias of the expert, so Riggs's right to confront witnesses was not infringed. St. v. Riggs, 2005 MT 124, 327 M 196, 113 P3d 281 (2005). See also St. v. Whitlow, 285 M 430, 949 P2d 239 (1997).

No Error in Denying Challenges for Cause for Two Jurors With Sex Crime Counseling or Evaluation Experience Absent Clearly Stated Bias or Coaxed Recantation — Fixed Opinion of Guilt Rule: During voir dire in Heath's trial for sexual intercourse without consent, Heath moved to dismiss for cause one juror who had been a victim of a sex crime and had counseled other sex crime victims and another juror with education and desire to become a sex offender evaluator. The motions were denied. On appeal, the Supreme Court noted that jurors may be challenged for cause based on a state of mind depriving impartiality but also on a fixed opinion of guilt or innocence depriving impartiality and took the opportunity to clarify the "fixed opinion of guilt" rule, holding that it is but one argument that can be asserted under the statutory state of mind basis for a challenge for cause. Further, challenges for cause must be determined pursuant to both the statutory language of 46-16-115 and the totality of the circumstances presented. In this case, both jurors indicated that they could look at the facts and not allow their experiences to affect their judgment. Despite Heath's argument that the jurors' responses were coaxed, their initial and spontaneous responses did not raise a serious question of bias, and Heath's allegations that the jurors would identify with the victim were purely speculative. The jurors' experience and training did not establish a state of mind that would prevent them from acting with impartiality and without affecting Heath's substantial rights; thus, the District Court was affirmed. St. v. Heath, 2004 MT 58, 320 M 211, 89 P3d 947 (2004), following St. v. DeVore, 1998 MT 340, 292 M 325, 972 P2d 816 (1998), St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002), and St. v. Falls Down, 2003 MT 300, 318 M 219, 79 P3d 797 (2003), and followed in St. v. Rogers, 2007 MT 227, 339 M 132, 168 P3d 669 (2007).

Juror Statements of Actual Bias Against Defense That Sex Crime Victim Was Old Enough to Consent — Reversal Warranted for Failure to Grant Challenge for Cause: Freshment's defense to charges of sexual intercourse without consent with a victim under age 16 was that he believed that the victim was old enough to give consent. During voir dire, two prospective jurors gave straightforward, consistent statements of actual bias against Freshment's legal defense. Following trial counsel's attempts to rehabilitate the jurors, the District Court denied Freshment's challenges for cause, so Freshment was required to use peremptory challenges to remove the jurors from the panel, ultimately exhausting all of his peremptory challenges. Under St. v. DeVore, 1998 MT 340, 292 M 325, 972 P2d 816 (1998), abuse of discretion occurs if a court fails to excuse a prospective juror when actual bias is discovered during voir dire, so both jurors should have been dismissed for cause. Under the rule in St. v. Good, 2002 MT 59, 309 M 113, 43 P3d 948 (2002), the District Court's error was conclusively prejudicial and automatic reversal was required. St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002).

Similarities in Character of Two Counts of Sexual Intercourse Without Consent Sufficient to Warrant Joinder of Charges: Freshment moved to sever two counts of sexual intercourse without consent into separate trials because the counts were not similar, involving separate victims on separate occasions. The motion was denied, and Freshment appealed. The Supreme Court affirmed. The counts satisfied most of the factors for the similarity in character test set out in St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3 (1999), so joinder was proper. Both counts involved inebriated 15-year-olds; both victims were initially introduced to Freshment through mutual friends; both alleged crimes occurred within 2 days; both crimes occurred in Billings; and in both instances, Freshment was alleged to know the ages of the victims. St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002).

Standard of Review for Severance of Counts: A criminal defendant seeking to sever counts into separate trials has the burden of proving that severing the counts is necessary to prevent unfair prejudice. It is not enough to prove that some prejudice will result from a joint trial or that a better chance of acquittal would be realized from separate trials; rather, defendant has the burden to prove that prejudice will prevent a fair trial. As enumerated in St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3 (1999), there are three types of prejudice that defendant may prove that must be considered by a trial court: (1) the accumulation of evidence may be such that a jury would find defendant to be a bad person and wish to convict defendant of something; (2) a jury might use evidence of guilt on one count to convict on another count, even though that evidence would be inadmissible at a separate trial on the latter count; and (3) defendant may suffer prejudice by wanting to testify on one count but not another. If the District Court fails to properly weight these types of prejudice against the judicial economy resulting from a new trial, an abuse of discretion occurs. In this case, Freshment conceded the third factor and failed to meet his burden to show prejudice under the other two factors, so although the case was reversed on other grounds, no abuse of discretion was ascribed to the denial of Freshment's motion to sever. St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002), followed in St. v. Yecovenko, 2004 MT 196, 322 M 247, 95 P3d 145 (2004), and St. v. Holt, 2006 MT 151, 332 M 426, 139 P3d 819 (2006).

No Prosecutorial Misconduct in Eliciting Facts to Aid Witness Recollection, Disclosing Prior Witness Conversations, or Offering Statements in Rebuttal Based on Testimony: Defendant alleged several instances of prosecutorial misconduct in his trial for sexual intercourse without consent and incest with his daughter. The prosecutor had instructed the daughter that the assault occurred in Montana rather than Idaho, thereby avoiding Duffy's challenge to Montana's jurisdiction. However, the prosecutor was not prohibited from discovering facts to aid the daughter's recollection of where the incident occurred and doing so was not misconduct. Duffy also contended that the prosecutor's questioning of a detective about a telephone call to Duffy was misconduct because the prosecutor did not disclose the conversation, but the trial court cured any potential for violating Duffy's substantial rights by instructing the jury to disregard the testimony and by refusing to give the prosecution's flight instruction that was the basis for that line of inquiry. Lastly, Duffy claimed misconduct when the prosecutor elicited testimony from the daughter regarding her desire to see Duffy convicted and then later reiterated that testimony during rebuttal. However, Duffy's own counsel opened the door for the testimony, and the prosecutor was then free to reexamine the daughter for the purpose of discovering the daughter's motive; therefore, the prosecutor's subsequent comments were not construed as misconduct warranting a mistrial. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000), followed in St. v. Hayden, 2008 MT 274, 345 M 252, 190 P3d 1091 (2008). See also St. v. Berger, 1998 MT 170, 290 M 78, 964 P2d 725 (1998), and St. v. Soraich, 1999 MT 87, 294 M 175, 979 P2d 206 (1999).

Limited Statements by Expert and Comparisons of Objectively Observable Behavior Not Considered Opinion on Credibility: Generally, an expert may not comment on the credibility of an alleged victim. Here, an emergency room physician who treated an alleged rape victim carefully limited his testimony to observations of the victim as compared to other women in his professional experience who reported being raped but did not state that the victim's emotions were consistent with and appropriate for women who had been raped. Such limited statements and comparisons of objectively observable behavior do not constitute an opinion on credibility, and the District Court did not abuse its discretion in admitting the physician's testimony. St. v. Rogers, 1999 MT 305, 297 M 188, 992 P2d 229, 56 St. Rep. 1228 (1999).

Improper Admission of Hearsay Regarding Rape Victim's Prior Statements — Harmless Error: Four requirements must be met before a witness may testify as to a declarant's prior testimony. It was undisputed that in Mensing's trial for rape, the first three requirements were met: (1) the victim testified at trial; (2) the victim was available for cross-examination about her prior statements; and (3) the victim's statements to which arresting officers were testifying were consistent with the victim's testimony. However, the fourth requirement, that the statements must rebut an express or implied charge of fabrication, improper influence, or motive, was not met. Mensing made none of the requisite charges against the victim, and as a result, the officers' testimony regarding the victim's testimony was inadmissible hearsay and was improperly admitted. However, the hearsay statements were separately admitted through the victim's testimony, and Mensing had an opportunity to cross-examine regarding the statements at issue. Therefore, although the District Court abused its discretion in allowing the officers' testimony regarding prior consistent statements made by the victim, the error did not prejudice Mensing and was harmless. St. v. Mensing, 1999 MT 303, 297 M 172, 991 P2d 950, 56 St. Rep. 1220 (1999), following St. v. Veis, 1998 MT 162, 289 M 450, 962 P2d 1153 (1998).

Joinder of Criminal Counts of Similar Character — Factors in Determining Similarity of Crimes: Southern was charged with two counts of kidnapping, one count of burglary, one count of theft, and five counts of sexual intercourse without consent. Southern moved to sever the nine counts in the information into four separate trials, pursuant to 46-13-211, based on there being four different victims. Southern claimed a lack of similarity of the alleged crimes. The motion to sever was denied, and Southern was convicted on all nine counts and subsequently appealed. Although not determinative, some factors that are relevant to whether charges in an information are of the same or similar character include whether: (1) the charges are brought under the same statute; (2) the charges involve similar victims, locations, or modus operandi; (3) the conduct charged occurred in a narrow timeframe; and (4) the conduct charged occurred in a limited geographical area. Southern sought to differentiate the crimes by pointing out that the rapes occurred at different times of day, that some involved use of a knife while others did not, and that not all the rapes took place in the victims' homes. The Supreme Court held that despite these differences, the five counts of sexual intercourse without consent were properly joined because the crimes were of sufficiently similar character, being charged under the same statute. Counts may also be joined if the offenses constitute parts of a common scheme or plan. Thus, the kidnapping, burglary, and theft counts were also properly joined because, by definition, they were part of a common scheme linked by motive and because one charge precipitated the second charge, so overlapping proof would have been required regarding those counts and the accompanying counts of sexual intercourse without consent. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999), following St. v. Richards, 274 M 180, 906 P2d 222, 52 St. Rep. 1176 (1995).

Joinder of Criminal Counts of Similar Character — No Prejudice: Southern was charged with two counts of kidnapping, one count of burglary, one count of theft, and five counts of sexual intercourse without consent. Southern moved to sever the nine counts in the information into four separate trials, pursuant to 46-13-211, based on there being four different victims. Southern asserted that joinder of the counts under 46-11-404 would result in unfair prejudice. However, it is not sufficient for a criminal defendant to prove that the defendant will face some prejudice as a result of a joint trial or that the defendant stands a better chance of acquittal in separate trials; rather, the defendant must prove that prejudice is so great as to prevent a fair trial. Applying the three basic kinds of prejudice outlined in St. v. Orsborn, 170 M 480, 555 P2d 509 (1976), the Supreme Court found no unfair prejudice and affirmed, deferring to the trial court's discretion in balancing the possibility of prejudice against the judicial economy resulting from a joint trial. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999), following St. v. Martin, 279 M 185, 926 P2d 1380, 53 St. Rep. 1109 (1996), and followed in St. v. Riggs, 2005 MT 124, 327 M 196, 113 P3d 281 (2005), and St. v. Harlson, 2006 MT 312, 335 M 25, 150 P3d 349 (2006).

Wearing "Women Against Rape" Buttons at Trial — Risk to Fair Trial: If it occurred, the presence of at least 20 women wearing "Women Against Rape" buttons at a kidnapping and rape trial posed, for various reasons, an unacceptable risk to a fair trial. The case was remanded for an evidentiary hearing on whether the allegation was true and, if true, whether a fair trial was denied. Norris v. Risley, 878 F2d 1178 (9th Cir. 1989).

Specific Objection Required to Evidence in Persistent Felony Offender Hearing: Defendant by failing to make a specific objection waived his right to assert that the State's certificate of prior conviction without proof, that he was the person named in the certificate, was not competent evidence. Defendant was informed well in advance of the time he entered his guilty plea that he would be tried as a persistent felony offender. At the hearing to determine whether defendant was a persistent felony offender, the defendant had an opportunity to object to the State's lack of identification but he failed to do so. St. v. Metz, 184 M 533, 604 P2d 102 (1979).

ADMISSIBILITY OF EVIDENCE

Mazurek Hearing — Rape Shield Exception Regarding Victim's Prior False Accusation of Sexual Assault — District Court Properly Excluded Evidence of Minor's Statement — Forensic Interview and Testimony Unclear — Probative Value of Minor's Statement Limited — District Court Balanced Minor's Rights and Defendant's Right to Confront Accuser. St. v. Hansen, 2022 MT 163, 409 Mont. 495, 515 P.3d 799.

Defendant Assault of Victim 5 Years Earlier — Motion In Limine to Exclude Evidence of Assault Denied: The defendant was charged with incest for raping his minor half-sister. At trial, the defendant filed a motion in limine to exclude evidence about him sexually assaulting her 5 years earlier. The District Court denied the motion to exclude the evidence, and the defendant was convicted. On appeal, the defendant argued that unfair prejudice toward him substantially outweighed the evidentiary value of the earlier assault. The Supreme Court affirmed the denial of the motion, holding that the probative value of the defendant's earlier assault while a juvenile substantially outweighed the danger of unfair prejudice. St. v. Murphy, 2021 MT 268, 406 Mont. 42, 497 P.3d 263.

Blanket Exclusion of Victim's Use of Drugs Prior to Reporting Rape — Abuse of Discretion in He-Said/She-Said Case — New Trial Granted: The defendant was charged with sexual intercourse without consent. He claimed that the alleged victim had consented. At trial, the defendant sought to introduce a redacted version of the victim's toxicology report that indicated high levels of THC in her blood and testimony that the victim had ingested a THC-concentrated marijuana product shortly before reporting the alleged rape to police. The District Court disallowed the report, finding that the evidence would unfairly confuse and distract the jury. On appeal, the Supreme Court concluded that the District Court's total exclusion of the victim's marijuana use for impeachment purposes was an abuse of discretion in a classic "he-said/she-said" case. Accordingly, the Supreme Court reversed and remanded the matter for a new trial. St. v. Pelletier, 2020 MT 249, 401 Mont. 454, 473 P.3d 991.

Prior Uncharged Sexual Assaults Admitted — Evidence to Support Allegations of Spousal Abuse Excluded — No Abuse of Discretion: After evidence of a sexual assault against a family member in Washington State arose, the mother of the victim informed her sister, who also had a daughter. The first victim's cousin indicated that she had also been a victim of sexual acts by her uncle. In a trial over a decade later concerning the sexual assaults involving the cousin, the District Court did not abuse its discretion when it admitted evidence of the prior uncharged sexual assault because the evidence was introduced to show the timing of the victim's disclosure and because the District Court had tightly controlled the admission of the evidence to limit the danger of unfair prejudice. The District Court also did not abuse its discretion when it refused to admit evidence of bruising on the victim after she was married because the evidence did not show that the victim had been abused by the victim's husband, contrary to her statements denying spousal abuse at trial; and even if it did show that the victim had lied about whether her husband abused her, it did not establish that she had lied about the earlier sexual assaults, nor did it show that the victim erroneously attributed the cause of her emotional injuries to the sexual assaults. St. v. Pulst, 2015 MT 184, 379 Mont. 494, 351 P.3d 687.

Defense Claims Brutal Rape Accidental — Evidence of Prior Bad Acts Admissible to Refute Argument: The defendant was charged with brutally raping his girlfriend. During discovery, the state informed the defendant that it intended to introduce earlier police reports of alleged physical abuse by the defendant against the victim and his former girlfriend. At trial, the defendant made a motion in limine to prevent the prosecutor from presenting evidence regarding prior bad acts. The District Court denied the motion and the defendant was convicted. On appeal, the defendant argued that the District Court had erred in allowing the evidence, but the Supreme Court disagreed. Because the defendant had argued that he and the victim had consensual but very rough sex and that any harm to her was accidental, evidence of prior bad acts was probative to refute his claim. St. v. Crider, 2014 MT 139, 375 Mont. 187, 328 P.3d 612.

Evidence of Prior Rape Conviction Introduced at Trial — Violation of Right to Fair Trial: During his trial on charges of sexual intercourse without consent, the defendant gave notice that he intended to establish that the victim, with whom he had been in a long-term relationship, had a violent character. The defendant was advised that were he to discuss her character, his own full criminal history could be discussed at trial. During the trial, the prosecutor mentioned the defendant's prior rape conviction. After his conviction, the defendant appealed, arguing that the discussion of his prior rape conviction violated his right to a fair trial. The Supreme Court agreed, noting that there was a reasonable possibility that the evidence of his prior rape conviction had influenced the defendant's conviction, and remanded the matter for a new trial. St. v. Rogers, 2013 MT 221, 371 Mont. 239, 306 P.3d 348.

Attempted Sexual Intercourse Without Consent — Evidence of Conversations Leading up to Violation Properly Excluded — Photos of Other Women Sent by Victim to Defendant Irrelevant and Prejudicial: After the defendant was convicted of attempted sexual intercourse without consent, he claimed that his due process rights were violated based on the District Court's exclusion of evidence that included alleged sexual conversations between the defendant and the victim in the days leading up to the violation and photos of semiclothed women that were allegedly sent from the victim's cell phone to the defendant. The Supreme Court determined that the rape shield law exception in 45-5-511 does not extend to alleged conversations leading up to the date of the violation. Moreover, the Supreme Court held that the exclusions were proper on the basis that the alleged conversations and photos were irrelevant or more prejudicial than probative under Rules 401 through 403, M.R.Ev. (Title 26, ch. 10). The District Court struck the appropriate balance between the defendant's right to develop his case and the rules of evidence. St. v. Bishop, 2012 MT 259, 367 Mont. 10, 291 P.3d 538.

Explicit Photographs Inadmissible Under Transaction Rule: Sexually explicit photos that underscored the defendant's interest in the alleged victim and women in general provided context to the circumstances under which the offense occurred but were not evidence of facts in dispute and did not explain how the defendant had sexual intercourse without consent or committed sexual assault. As such, the Supreme Court concluded that the photos were not intrinsic to or inextricably intertwined with the charges and that the District Court erroneously admitted them under the transaction rule. St. v. Sage, 2010 MT 156, 357 Mont. 99, 235 P.3d 1284.

Failure of State to Provide Defendant With Exhibit List at Trial — Substantial Rights Not Affected: Despite the fact that the trial court had ordered the state to provide Hicks with an exhibit list 20 days before Hicks's trial for sexual intercourse without consent, the state did not comply. On the first morning of trial, Hicks moved to exclude all of the state's proposed exhibits, but the motion was denied, and Hicks later appealed on grounds of unfair surprise and prejudice. However, Hicks did not refer to specific exhibits or analyze why the exhibits were prejudicial, and Hicks's mere conclusory statement was insufficient to establish that the defense was prejudiced. In addition, the state contended that Hicks knew about the exhibits well prior to trial, that he had been provided copies of the exhibits, and that he knew the state intended to introduce the exhibits, so Hicks could not argue surprise despite not being provided with an exhibit list. Hicks's substantial rights were not affected, and denial of the motion to exclude the exhibits was affirmed. St. v. Hicks, 2006 MT 71, 331 M 471, 133 P3d 206 (2006).

Expert Testimony Not Targeting Defendant's State of Mind During Crimes Properly Admitted: In Sandrock's trial for sexual intercourse without consent, incest, and witness tampering, Sandrock maintained that he was suffering from a mental disease or defect and could not have committed the crimes because he could not have formed the requisite mental state. A medical expert testified that although Sandrock was an oddball, he knew right from wrong when he wrote several letters to his wife outlining his intended actions. Sandrock moved for a mistrial because the expert's testimony violated the prohibition on ultimate issue testimony. The motion was denied, and on appeal, the Supreme Court affirmed. Although a medical expert may not offer an opinion on the ultimate issue of whether a defendant had a particular state of mind that is an element of an offense, the expert may state the nature of a medical examination and the medical or psychological diagnosis of the defendant's mental condition, and testimony in the form of an opinion or inference that would otherwise be admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact. Here, the expert's testimony did not target the ultimate issue of whether Sandrock actually possessed the requisite mental states at the time that the crimes were committed, so the mistrial motion was properly denied. St. v. Sandrock, 2004 MT 195, 322 M 231, 95 P3d 153 (2004). See also St. v. Santos, 273 M 125, 902 P2d 510 (1995).

Generalized Expert Testimony Regarding Sexual Abuse and Religious Manipulation and Control Properly Admitted in Sexual Intercourse Without Consent, Incest, and Witness Tampering Case: In Sandrock's trial for sexual intercourse without consent, incest, and witness tampering, an expert testified regarding sexual abuse and religious manipulation and control based on experiences in a Christian sect. Sandrock moved for mistrial on grounds that the testimony was irrelevant and tended to supplant the state's need to prove Sandrock's mental state. The motion was denied, and on appeal, the Supreme Court affirmed. The expert did not provide any testimony specific to Sandrock, but rather provided the jury a context within which to understand the intricacies of religious groups in general, so the court concluded that the testimony was relevant. Further, the testimony did not prejudice Sandrock because Sandrock himself admitted to controlling his wife and daughters, and the expert never stated that Sandrock exhibited or performed the beliefs that were typical of the religious groups about which the expert testified in general. The mistrial motion was properly denied. St. v. Sandrock, 2004 MT 195, 322 M 231, 95 P3d 153 (2004).

Admissibility of Prior Statements Made Before Motivation to Fabricate Arose: Teters contended that prior statements made by his stepdaughter to a child protective services worker regarding Teters' sexual contact with her were inadmissible because she may have been improperly influenced by her mother, who was involved in a contested divorce with Teters. The Supreme Court applied the four factors in St. v. Mensing, 1999 MT 303, 297 M 172, 991 P2d 950 (1999), to determine whether the prior statements were admissible. The first three factors were met because the declarant testified at trial and was subject to cross-examination and because the witness's statements were consistent with the declarant's testimony. The fourth factor requires that the statement rebut an express or implied charge of subsequent fabrication, improper influence, or motive. Here, the fourth factor was also met because the statements were made prior to the time that the alleged motive to fabricate arose, i.e., the beginning of divorce proceedings. Testimony regarding the prior statements was therefore properly admitted. St. v. Teters, 2004 MT 137, 321 M 379, 91 P3d 559 (2004). See also St. v. Lunstad, 259 M 512, 857 P2d 723 (1993).

Reasonableness of In Camera Review of Exculpatory Evidence in Balancing Defendant's Right to Review With Victim's Right to Confidentiality: Duffy sought access to confidential reports, many of which were handwritten notes from mental health professionals who were involved in the treatment of Duffy's daughters whom Duffy was alleged to have assaulted. The District Court examined the documents in camera and ordered a redacted one-page copy to be disclosed to defense counsel. Duffy asserted that the in camera procedure was unfair because review by a judge is no substitute for review by the defendant's advocate. However, equally important to the defendant's right to discover exculpatory evidence is the victim's right to protect confidential relations. When these competing interests conflict, they must be balanced by the District Court through in camera review, and the court did not err in doing so. To allow defense counsel general access to a victim's confidential records could adversely affect the state's interest in uncovering and treating abuse. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000), following St. v. Donnelly, 244 M 371, 798 P2d 89 (1990). See also Pa. v. Ritchie, 480 US 39 (1986).

Proper Termination of Parental Rights Based on Conviction for Sexual Assault of Child and Sexual Intercourse Without Consent With Child: Snyder pleaded guilty to sexual assault on a child and sexual intercourse without consent with a child based on his involvement with three young girls. His marriage was dissolved 6 months later and custody was awarded to his former wife, who remarried and then petitioned for termination of Snyder's parental rights so that their son could be adopted by her new husband. The petition was granted, and Snyder appealed. The plain language of 42-2-608 provides that the court may terminate a parent's rights and make the child available for adoption if a parent is convicted of sexual assault on a child or sexual intercourse without consent with a child. There is no statutory requirement that the sexual assault on a child or sexual intercourse without consent with a child has been committed on the adoptee. The trial court did not err when it held that clear and convincing evidence supported the termination of the father's parental rights based on his prior convictions. In re Adoption of Snyder, 2000 MT 61, 299 M 40, 996 P2d 875, 57 St. Rep. 288 (2000), following In re J.N. & A.N., 1999 MT 64, 293 M 524, 977 P2d 317, 56 St. Rep. 269 (1999).

Child Sexual Abuse — Admissibility of Corroborating Evidence: Osborne was tried for sexual intercourse without consent with his minor stepdaughter. At the trial, the state introduced hearsay statements of the stepdaughter and testimony by a medical examiner that physical injuries to the stepdaughter were consistent with sexual abuse, but it could not be determined from those injuries who the perpetrator was. The District Court, on its own motion, prepared instructions, taken from the child hearsay guidelines set forth in St. v. J.C.E., 235 M 264, 767 P2d 309 (1988), admonishing the jury to consider, with regard to hearsay statements of the stepdaughter's testimony, "whether there is any corroboration for the statements" and "if the statement identifies a perpetrator, whether such identification can be corroborated". Osborne claimed that these instructions were given in violation of the U.S. Supreme Court's decision in Idaho v. Wright, 497 US 805 (1990), that "corroboration of a child's allegations of sexual abuse by medical evidence of abuse" should not be considered when assessing the reliability of the statements. The state argued that Wright applies only to the determination of admissibility of the hearsay statements and not to whether the jury is entitled to consider corroborating evidence. The Supreme Court held that medical evidence of abuse that does not identify the abuser should not be considered by the District Court when it assesses the admissibility of the hearsay statements and pointed out that the instruction given in this case by the District Court distinguished between evidence that corroborates the occurrence of an act and evidence corroborating that Osborne was the perpetrator. Because the medical examiner testified that it was impossible to identify the perpetrator from the medical evidence, the Supreme Court held that within the context of the instruction taken as a whole, the instruction did not allow the jury to "bootstrap" the medical evidence onto Cassie's identification of Osborne as the perpetrator. St. v. Osborne, 1999 MT 149, 295 M 54, 982 P2d 1045, 56 St. Rep. 589 (1999).

Unsupported Testimony of Sexual Activity Occurring After Offense: It was not an abuse of discretion or a violation of defendant's due process and confrontation of witnesses rights for the court to refuse to allow testimony that the victim had been thrown out by her boyfriend because of her sexual conduct with other men. The alleged breakup was several months after the offense, and the allegation was unsupported. St. v. Johnson, 1998 MT 107, 288 M 513, 958 P2d 1182, 55 St. Rep. 408 (1998).

Admissibility of Counselor's Testimony About Victim's Behavior During Counseling: In a prosecution for sexual assault and sexual intercourse without consent, testimony of the victim's high school and psychological counselors as to their personal observations regarding the victim's behavior during counseling sessions was relevant to the issue of whether the charged offenses occurred, which in turn was relevant to the jury's determination of whether defendant had committed the offenses. Thus, the testimony was admissible. St. v. Mason, 283 M 149, 941 P2d 437, 54 St. Rep. 539 (1997).

Sexual Preference Relevant to and Probative of Issue of Same Gender Sex Offense: The question of Ford's sexual preference was raised during cross-examination and in closing arguments of his trial for sexual intercourse without consent committed upon a person of the same gender. Ford asserted on appeal that the question was so prejudicial as to deprive him of a fair trial. However, the question was probative of whether Ford fit the profile of a person who would commit such an act and did not prejudice Ford's substantial rights. The possible impact of the jury's knowledge that Ford was a bisexual paled by comparison to the likely impact of the overwhelming evidence of his guilt. St. v. Ford, 278 M 353, 926 P2d 245, 53 St. Rep. 947 (1996).

Evidence of Prior Indecent Exposure Not Admissible: In a trial for sexual intercourse without consent, the only issue of contention was consent. A prior act in which defendant asked a woman to go outside a bar and while outside exposed himself and stated that he wanted intercourse was not similar to defendant's actions in this case and was not admissible on the issue of victim's consent. In addition, innuendos that could be drawn from the evidence would improperly tend to go to defendant's character and propensity to act in a certain way, and defendant's motive or intent was not the issue. Remand for a new trial was necessary. St. v. Keys, 258 M 311, 852 P2d 621, 50 St. Rep. 547 (1993), followed, with regard to inadmissibility of evidence of prior crimes or acts insufficiently similar or relevant to prove the crime charged, in St. v. Garn, 264 M 296, 871 P2d 878, 51 St. Rep. 285 (1994).

Counselor's Opinion on Truthfulness of Child Witness — Motion for Mistrial Denied: In light of the holding in St. v. Geyman, 224 M 194, 729 P2d 475, 43 St. Rep. 2125 (1986), the trial court did not abuse its discretion in denying defendant's motion for a mistrial based on a school counselor's opinion as to whether an 8-year-old victim was telling the truth. St. v. French, 233 M 364, 760 P2d 86, 45 St. Rep. 1557 (1988).

Sex Crime Victim's Past Sexual Conduct and False Accusations — Admissibility — Veracity of Victim: Although there is a compelling interest in favor of preserving the integrity of a sex crime trial and preventing it from becoming a trial of the alleged victim and a general policy against sordid probes into a victim's sexual past, evidence on an alleged victim's past sexual conduct is admissible on the issue of veracity. To limit or bar cross-examination when there is evidence of prior false accusations by the alleged victim restricts the constitutional right to confront witnesses. The evidence is admissible only if the prior accusations were proven false or admitted to be false. If the prior charge was not adjudicated, the evidence is inadmissible. A separate hearing on the issue should be held outside the jury's presence. The evidence is properly barred when its only value is to prejudice the alleged victim's character and reputation. St. v. Anderson, 211 M 272, 686 P2d 193, 41 St. Rep. 1357 (1984), modifying St. v. McSloy, 127 M 265, 261 P2d 663 (1953), and followed in St. v. Fitzgerald, 238 M 261, 776 P2d 1222, 46 St. Rep. 1253 (1989), St. v. Van Pelt, 247 M 99, 805 P2d 549 (1991), St. v. Greytak, 262 M 401, 865 P2d 1096, 50 St. Rep. 1610 (1993), St. v. Steffes, 269 M 214, 887 P2d 1196, 51 St. Rep. 1463 (1994), and State ex rel. Mazurek v. District Court, 277 M 349, 922 P2d 474, 53 St. Rep. 678 (1996).

Rape-Trauma Syndrome — Expert Testimony Admissible on Whether There Was Consent: Testimony of experts on whether the complaining witness in a sexual intercourse without consent case suffers from rape-trauma syndrome is admissible to aid a jury in determining whether there was consent to engage in the sexual intercourse that all parties acknowledge occurred. St. v. Liddell, 211 M 180, 685 P2d 918, 41 St. Rep. 1293 (1984), followed in St. v. Brodniak, 221 M 212, 718 P2d 322, 43 St. Rep. 755 (1986).

Photograph of Rape Victim Held Admissible: Where the defendant was charged with sexual intercourse without consent and offered the defense of consent by the prosecutrix, the trial court did not err in admitting into evidence a photograph depicting linear abrasions or scratches on the victim's back. The longstanding rule in Montana is that a photograph is admissible if it fairly and accurately represents relevant evidence, and it is within the discretion of the trial court to allow into evidence duly verified photographs to aid the jury in factfinding. The prosecution presented a sufficient foundation through the testimony of the nurse who took the pictures. St. v. Mackie, 191 M 138, 622 P2d 673, 38 St. Rep. 86 (1981).

Evidence — Similarity of Acts of Intercourse Without Consent: Numerous rapes follow the pattern of barroom pickup, voluntary entry into defendant's vehicle by victim, driving to a remote area, advances, resistance, and forcible intercourse. The sequence of events has no distinctive qualities that distinguish the acts from other rapes as necessary to bring the events within the purview of the similarity element of the "other crimes" admission rule exception. St. v. Hansen, 187 M 91, 608 P2d 1083 (1980), followed in St. v. Rogers, 1999 MT 305, 297 M 188, 992 P2d 229, 56 St. Rep. 1228 (1999).

Admissibility of Evidence of Prior Crimes or Acts: The court did not commit error in admitting prosecutrix's uncorroborated testimony of prior uncharged sexual assaults by prosecutrix's stepfather for the limited purpose of showing plan, scheme, or design, as there was no showing of substantial prejudice to the defendant by admitting such evidence. St. v. Just, 184 M 263, 602 P2d 957 (1979), following St. v. Jensen, 153 M 233, 455 P2d 631 (1969), and clarified, with regard to the applicability of the corpus delicti rule, in St. v. Hansen, 1999 MT 253, 296 M 282, 989 P2d 338, 56 St. Rep. 997 (1999).

WEIGHT AND CREDIBILITY OF EVIDENCE

Weight and Credibility of Victim Testimony Jury Question: Hicks asserted that because the victim at a sexual intercourse without consent trial had testified falsely at trial, Hicks's due process rights were violated, necessitating a new trial. However, even though Hicks pointed to inconsistencies between the victim's trial testimony and earlier statements to law enforcement officers, Hicks could not actually establish that the trial testimony was false and thus failed to establish a due process violation. The Supreme Court noted that the trial court properly determined that the testimonial inconsistencies went to the weight and credibility of the victim's testimony and were properly left to the jury. The jury was correctly instructed regarding witness testimony, so Hicks's motion to dismiss was properly denied. St. v. Hicks, 2006 MT 71, 331 M 471, 133 P3d 206 (2006).

Minor Victim's Testimony Not Inherently Incredible — Contradictory but Substantial Evidence: Defendant contended that it was inherently incredible that a 45-year-old man could perform sexual intercourse on a 15-year-old girl with other people in the apartment; that if such act occurred, the victim could have protested loudly enough to attract the attention of others in the apartment; and that it was incredible that other people in the apartment had difficulty getting the victim out of the apartment over the threats of the defendant. The Supreme Court noted that part of the witnesses' testimony supported the victim and part contradicted her. However, the weight of evidence and credibility of witnesses were within the exclusive province of the jury, which determines what evidence prevails. St. v. Lamping, 231 M 288, 752 P2d 742, 45 St. Rep. 616 (1988).

SUFFICIENCY OF EVIDENCE

Massage Therapist Guilty of Sexual Intercourse Without Consent — Totality of Circumstances — Definition of Sexual Intercourse — Penetration Analyzed — Threat of Physical Force Supported: A jury found the defendant, a licensed massage therapist, guilty of sexual intercourse without consent while giving his victim a massage. The defendant argued on appeal that the prosecution did not present sufficient evidence to the jury to support the elements of penetration and force. The defendant further argued that testimony of clitoral rubbing did not prove that the vulva was penetrated. The Supreme Court determined that the defendant's arguments that clitoral rubbing did not constitute penetration under the law were without legal merit pursuant to the definition of sexual intercourse in 45-2-101. The Supreme Court held that viewed in a light most favorable to the prosecution, a rational trier of fact could conclude that the totality of the circumstances communicated a threat to the defendant's victim: the two were isolated in an empty office building after hours, the defendant was much larger than his victim, and the defendant persisted in his assault despite the victim's repeated objections. The victim testified that she told the defendant she was uncomfortable before he digitally penetrated her. After the penetration, she told the defendant pointedly to stop. Instead, the defendant returned to her groin area and started rubbing her clitoris. Montana law did not require the victim to push the defendant away, strike out at him, or attempt to flee. A rational jury could find that the defendant's actions communicated a threat of physical force to the victim. Viewing the evidence in the light most favorable to the prosecution, the Supreme Court affirmed the District Court's decision that a rational trier of fact could find all elements of sexual intercourse without consent beyond a reasonable doubt. St. v. Lerman, 2018 MT 5, 390 Mont. 117, 408 P.3d 1008, distinguishing St. v. Haser, 2001 MT 6, 304 Mont. 63, 20 P.3d 1, and St. v. Stevens, 2002 MT 181, 311 Mont. 52, 53 P.3d 356.

Sufficient Evidence That Victim Did Not Consent to Intercourse to Allow Determination of Defendant's Culpability: Fish contended that evidence of sexual intercourse without consent was insufficient to sustain conviction because the victim's story of the event was unbelievable. However, none of Fish's arguments regarding the victim's testimony were essential to a determination of Fish's culpability. The only element of the crime that was in dispute was whether the victim consented. The evidence was sufficient to allow a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt, and the Supreme Court declined to substitute its evaluation of the evidence and credibility of the witnesses for that of the trial court. The conviction was affirmed. St. v. Fish, 2009 MT 47, 349 M 286, 204 P3d 681 (2009). See also In re J.W., 2021 MT 291, 406 Mont. 224, 498 P.3d 211.

Sufficient Evidence of Sexual Assault to Submit Case to Jury: Bomar was charged with sexual intercourse without consent or alternatively with sexual assault. Following presentation of the state's case, Bomar contended that there was insufficient evidence to send the case to the jury. The trial court disagreed, and the jury found Bomar guilty of sexual assault. On appeal, Bomar reasserted his claim of insufficient evidence, but the Supreme Court affirmed. Despite some inconsistencies in the testimony of the child victim regarding whether penetration occurred, the evidence was sufficient to show that Bomar had sexual contact with the child and to send the case to the jury on the sexual assault charge. St. v. Bomar, 2008 MT 91, 342 M 281, 182 P3d 47 (2008), following St. v. York, 2003 MT 349, 318 M 511, 81 P3d 1277 (2003).

Acquittal of One Count of Sexual Intercourse Without Consent and Conviction of Second Count Committed on Same Day Not Inconsistent — Sufficient Evidence of Crimes: Hicks was charged with two counts of sexual intercourse without consent with the same victim at different times of the same day. The jury acquitted Hicks on the first count, but found Hicks guilty on the second count. Hicks had argued consensual contact on both counts and argued that it was inconsistent for the jury to acquit on one count and not the other. The Supreme Court disagreed. The question was not whether a criminal verdict was inconsistent, but whether the verdict was supported by sufficient evidence. The information alleged two separate acts, and the jury was instructed to decide each count separately and was instructed that the state had to prove guilt as to each charge. In this case, the jury weighed the conflicting testimony and decided that the state had not proved guilt beyond a reasonable doubt on the first count but had on the second count. The verdict was not inconsistent, sufficient evidence supported conviction on the second count, and the verdict was affirmed. St. v. Hicks, 2006 MT 71, 331 M 471, 133 P3d 206 (2006). See also St. v. Bailey, 2003 MT 150, 316 M 211, 70 P3d 1231 (2003).

Jury Question as to Whether Rape Victim Asleep and Physically Helpless — Conflicting and Uncorroborated Victim Testimony: Shields contended that the state failed to show that Shields had sexual intercourse with a woman by force. The victim testified that she was asleep and did not realize what was happening until she awoke and did not realize who was in the room with her until she turned on the light, while Shields testified that the victim was not asleep, but was in fact an active participant in the act. However, the mere existence of conflicting evidence did not render the state's evidence insufficient to support a guilty verdict, nor was Shields' conviction rendered infirm by the fact that the state presented no evidence corroborating the victim's testimony that she was asleep. It was within the province of the jury to decide which of the conflicting evidence would prevail, and only in cases in which a witness's testimony is so inherently improbable, or is so nullified by material self-contradiction that no fair-minded person could believe it, will the Supreme Court say that no firm foundation exists for a verdict based on that testimony. In this case, any rational trier of fact could have found that the victim was asleep during the sexual intercourse, despite the fact that the victim may have had some sensory perception during the incident, and was therefore physically helpless and incapable of consent. Shields' conviction was affirmed. St. v. Shields, 2005 MT 249, 328 M 509, 122 P3d 421 (2005).

Sufficient Evidence of Penetration Based on Victim's Testimony and Defendant's Confession: Grindheim moved for a directed verdict in a felony sexual intercourse without consent trial on grounds that the state introduced insufficient evidence of penetration. The motion was denied. On appeal, the Supreme Court affirmed, finding that the victim's testimony that her mouth was on Grindheim's penis and that Grindheim's penis was in the victim's mouth was not ambiguous and that, when coupled with Grindheim's own confession that his penis was in the victim's mouth twice for about 30 seconds, there was sufficient evidence of penetration to support the conviction. St. v. Grindheim, 2004 MT 311, 323 M 519, 101 P3d 267 (2004).

Massage Patients Not Incapable of Consent Because of Force or Physical Helplessness — Conviction for Sexual Intercourse Without Consent Improper: Stevens was convicted of two counts of sexual intercourse without consent after having sexual contact with two female patients at his massage clinic. Stevens appealed on grounds that the state failed to prove the "without consent" element beyond a reasonable doubt. Stevens asserted that the victims were not physically helpless even though they were in a dream state of total relaxation and that there was no evidence that Stevens used any force or threat of force even though the victims were surprised or fearful. The Supreme Court agreed, concluding that no rational trier of fact could have found that the victims were unconscious or otherwise physically unable to communicate unwillingness to act or that the victims' fear was a result of Stevens' infliction, attempted infliction, or threatened infliction of bodily injury. The court reduced the offenses to sexual assault and remanded for further proceedings. St. v. Stevens, 2002 MT 181, 311 M 52, 53 P3d 356 (2002). See also St. v. Haser, 2001 MT 6, 304 M 63, 20 P3d 100 (2001).

Evidence of Slight Oral Penetration Sufficient to Prove Sexual Intercourse: In Duffy's trial for sexual intercourse without consent and incest with his daughter, she testified that she did not touch Duffy's penis, even though she had it in her mouth. Duffy contended that there was insufficient evidence for conviction. Under the definition of sexual intercourse, touching is not necessary. Rather, penetration of the mouth, however slight, is sufficient to meet the definition. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000).

Identity of Perpetrator — Hearsay Testimony of Child Held Sufficient: Heen became suspicious that his 33-month-old granddaughter, Cassie, had been sexually abused by her stepfather, Osborne, Heen's son-in-law. Heen and his daughter, Jamie, Cassie's mother, talked to Cassie, who said or indicated to either or both Heen and Jamie that she had played with "daddy's rubber duck" and that the rubber duck was Osborne's genitalia. Cassie also gave information tending to implicate Heen, whom she called "Papa", as opposed to Osborne, whom she called "Daddy". Cassie's hearsay testimony was also that "Daddy is yucky" and to the effect that Cassie was afraid of Osborne. A medical examination showed that Cassie had physical injuries consistent with sexual abuse. The District Court interviewed Cassie and found her unable to testify because she was extremely shy and was intimidated by the courtroom. The state relied upon the hearsay testimony by Heen and Jamie, and based upon that hearsay evidence, Osborne was convicted of sexual intercourse without consent. The Supreme Court held that when the evidence is viewed in a light most favorable to the state, there was sufficient evidence from which a rational jury could have found beyond a reasonable doubt that Osborne was the perpetrator of the offense, even though there was no direct physical evidence connecting Osborne with the crime. Concerning Osborne's objection that the evidence did not conclusively show that Osborne had penetrated Cassie with his penis, the Supreme Court held that under the language of the statute, penetration by a different object made no difference. St. v. Osborne, 1999 MT 149, 295 M 54, 982 P2d 1045, 56 St. Rep. 589 (1999).

Circumstantial Evidence Establishing Defendant's Presence at Crime Scene When Victim Only Other Witness Sufficient for Conviction: Southern was charged with two counts of kidnapping, one count of burglary, one count of theft, and five counts of sexual intercourse without consent. Southern contended that the only evidence connecting him to the crimes, which included DNA and other physical evidence, was circumstantial and that even though the evidence placed him at the crime scene, it did not establish that he committed the crimes. The Supreme Court noted that under State ex rel. Murphy v. McKinnon, 171 M 120, 556 P2d 906 (1976), presence at a crime scene is insufficient, in itself, to prove criminal liability. However, this evidence not only placed Southern at the crime scene, but placed him there when the only people present were the victim and her attacker. Although the evidence was circumstantial, it was of sufficient quality and quantity that a reasonable jury could find Southern guilty. Judgment was affirmed. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999). The Southern standard that circumstantial evidence by itself was sufficient to sustain a conviction when the evidence was of sufficient quality and quantity that a reasonable jury could find defendant guilty was applied to a drug possession case in St. v. Hill, 2008 MT 260, 345 M 95, 189 P3d 1201 (2008).

Journal Entries and Statements to County Attorney Detailing Incidents Supported Sex Crimes Charges: An affidavit in support of the information charging sexual intercourse without consent and sexual assault, which contained a long excerpt from the victim's journal detailing the abuse and vividly recounting the progression of the abuse and the particular incidents and which also contained the County Attorney's statements that the victim had told him that sexual contact took place during one incident and penetration took place during another incident, constituted more than sufficient probable cause to support the information. St. v. Mason, 283 M 149, 941 P2d 437, 54 St. Rep. 539 (1997).

Sufficient Evidence of Intercourse With Live Person, Not Dead Body: Defendant testified that he entered a bedroom and asked the victim how it was going, that she replied "all right", that he had intercourse with her, and that he returned to the living room around 2:30 a.m. A pathologist and the coroner estimated that she probably died between 4 and 4:30 a.m. The evidence was sufficient to prove sexual intercourse with a person, not a dead body, for purposes of conviction of sexual intercourse without consent. St. v. Gould, 273 M 207, 902 P2d 532, 52 St. Rep. 930 (1995).

Sufficient Evidence of Mental Incapacitation, Due to Intoxication, of Victim of Sexual Intercourse Without Consent: Mental incapacitation, due to voluntary intoxication, of the victim of sexual assault and therefore her lack of consent were uncontroverted. There was evidence that she had a blood alcohol content of at least 0.45, ran into things and fell, and needed help in getting up. A toxicologist also opined that the victim was in the comatose-to-death phase of intoxication. St. v. Gould, 273 M 207, 902 P2d 532, 52 St. Rep. 930 (1995).

DNA and Other Evidence Held Sufficient to Convict on Sexual Intercourse Without Consent: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based upon DNA evidence and testimony of the stepdaughter. That evidence showed that Weeks had intercourse with the stepdaughter, the stepdaughter did not have intercourse with anyone else, the stepdaughter had a baby, and Weeks was up to 1.9 million times more likely to be the baby's father than any other randomly chosen male. The District Court was therefore correct in refusing to grant a directed verdict of acquittal. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995).

Evidence Sufficient for Conviction Based on Unlawful Entry and Rape: Defendant was charged with aggravated burglary and rape. Although he was not identified by his victim, evidence introduced at trial, including hair from the defendant and victim, serological evidence, and evidence of similar crimes committed by the defendant, indicated his participation. The Supreme Court affirmed the conviction, holding that there was sufficient evidence from which a jury could find beyond a reasonable doubt that the defendant committed the burglary and rape. St. v. Kordonowy, 251 M 44, 823 P2d 854, 48 St. Rep. 1148 (1991).

Insufficient Proof of Penetration: The defendant was convicted of having sexual intercourse without consent with a 3-year-old girl and sexually assaulting her 5-year-old brother. The brother testified that he had seen the defendant touch his sister on numerous occasions. The Supreme Court overturned the conviction for sexual intercourse on the grounds that although there was evidence of penetration, the brother's testimony was not enough to establish that the defendant was the person responsible for the penetration. St. v. Cates, 241 M 282, 787 P2d 319, 47 St. Rep. 271 (1990).

Corroborated Evidence Sufficient to Support Conviction: Evidence was sufficient to support a guilty verdict on counts of robbery, sexual assault, and sexual intercourse without consent by accountability when the victim's testimony was corroborated by: (1) two people who came to an accomplice's apartment during the assault; (2) a police officer who interviewed the victim immediately after the assault; (3) the physician who examined the victim; and (4) two investigating officers who searched the apartments of defendant and accomplice. St. v. Powers, 233 M 54, 758 P2d 761, 45 St. Rep. 1286 (1988). See also In re J.W., 2021 MT 291, 406 Mont. 224, 498 P.3d 211.

Conviction Sustainable on Uncorroborated Testimony of Victim: A conviction of sexual intercourse without consent is sustainable based entirely on the uncorroborated testimony of the victim. St. v. Lamping, 231 M 288, 752 P2d 742, 45 St. Rep. 616 (1988), citing St. v. Maxwell, 198 M 498, 647 P2d 348 (1982), and St. v. Metcalf, 153 M 369, 457 P2d 453 (1969), and followed in St. v. Whitcher, 248 M 183, 810 P2d 751, 48 St. Rep. 383 (1991), and in St. v. Little, 260 M 460, 861 P2d 154, 50 St. Rep. 1124 (1993). See also In re J.W., 2021 MT 291, 406 Mont. 224, 498 P.3d 211.

Penetration Not Proved — Indirect Ambiguous Victim Testimony: Defendant was convicted under 45-5-503 of sexual intercourse without consent. On appeal, he claimed that penetration had not been proved at trial. The Supreme Court agreed and reversed the conviction. The victim had testified indirectly on the issue, but her testimony was ambiguous, and she was not asked to explain her statements. The Supreme Court stated that the fact that this is a delicate subject does not eliminate the requirement that the state prove each element of its case beyond a reasonable doubt. The court further ruled that it would be a violation of the constitutional protection against double jeopardy to remand for a new trial. The state had its opportunity to prove its case and failed to do so. Under its authority set forth in 46-20-703 to reduce the offense of which a defendant has been convicted to a lesser included offense because the record contains evidence establishing all of the elements of sexual assault, the Supreme Court remanded the case to the District Court for entry of judgment finding the defendant guilty of the crime of sexual assault. St. v. Lundblade, 221 M 185, 717 P2d 575, 43 St. Rep. 732 (1986).

Victim's Inconsistent Statements — Alibi — Substantial Evidence: In prosecution for sexual intercourse without consent, inconsistencies in victim's statements were not so great as to render her testimony unworthy of belief as a matter of law. Neither did defendant's alibi witnesses account fully for all his time during the period that the crime was committed. Verdict is supported by sufficient evidence. St. v. Maxwell, 198 M 498, 647 P2d 348, 39 St. Rep. 1149 (1982).

Bodily Injury Evidence Supporting Conviction: Conviction of sexual intercourse without consent was supported by substantial evidence where victim testified that defendant attacked her, hit her, and forced her to have intercourse; person from whom she obtained help afterwards testified that victim's hair and makeup were messed up, she seemed hysterical, and her lips and face were quite puffy and very distorted; police officers who took her to hospital testified as to her condition; and hospital examination disclosed bruises on the inside of her right knee, her arms and upper chest, her lip, and the back of her head, and a cut on the inside of her mouth. St. v. Lamb, 198 M 323, 646 P2d 516, 39 St. Rep. 1021 (1982).

Statutory Rape Not Proven Solely by Unreliable Prior Inconsistent Statement: Charge of sexual intercourse without consent was properly dismissed at the end of the State's presentation of its case where the only evidence upon which conviction could be based was an unreliable prior statement of the alleged victim that was inconsistent with her testimony at trial in which she repudiated the statement. St. v. White Water, 194 M 421, 634 P2d 636, 38 St. Rep. 1664 (1981).

Insufficient Evidence to Support Verdict — Bodily Injury: The verdict of the jury that defendant inflicted bodily injury in the course of committing sexual intercourse without consent was not supported by any evidence, thus his 40-year sentence was erroneous and he should properly have been sentenced under 45-5-503(2). St. v. Coleman, 177 M 1, 579 P2d 732 (1978). For full appellate history of Coleman, see case note at 45-2-101, SERIOUS BODILY INJURY, *Evidence*.

Underage Victim: Prima facie case of statutory rape was established by victim's testimony that defendant had sexual intercourse with her, corroborated by medical finding of sperm in vagina. St. v. Anderson, 156 M 122, 476 P2d 780 (1970).

Corroboration of Confession: Where defendant in a prosecution for statutory rape under 94-4101, R.C.M. 1947 (a forerunner of this section), virtually enticed prosecutrix from her home and placed her in a house of unsavory reputation, kept her there for 3 or 4 days and did not disclose her whereabouts to her father who was searching for her, and in addition made a confession, these circumstances and a statement by a third party that parties had intercourse were sufficient to prove the corpus delicti and sustain conviction, despite the fact that prosecutrix, third party, and defendant all repudiated prior statements to officers that the parties had intercourse. St. v. Traufer, 109 M 275, 97 P2d 336 (1939).

INSTRUCTIONS

Statutory Requirements Followed in Instructing Jury — Plain Error Review Inappropriate. St. v. Ragner, 2022 MT 211, 410 Mont. 361, 521 P.3d 29.

Denial of Motion to Remove Prospective Juror — Structural Error Standard Not Met — Conduct-Based Jury Instruction Defining Mental State for Sexual Intercourse Without Consent — Incorrect Jury Instruction on Definition of Consent Not Plain Error. St. v. Deveraux, 2022 MT 130, 409 Mont. 177, 512 P.3d 1198.

Refusal to Issue Jury Instruction Concerning Age of Consent — Victim Older Than Age of Consent — Perpetrator Younger Than Age of Consent — No Abuse of Discretion: In a case concerning a 14-year-old defendant accused of committing sexual intercourse without consent against a 16-year-old, the Youth Court did not abuse its discretion in refusing the defendant's proposed jury instruction on the legal age of consent because only victims — not perpetrators — can be incapable of consenting, and the instruction did not accurately reflect this distinction, nor was the defendant's age an element of the crime charged. In re J.W., 2021 MT 291, 406 Mont. 224, 498 P.3d 211.

Decision to Withdraw Jury Instruction Based on Lesser Included Offense — Sound Legal Reasoning for Withdrawal Given Claim of Innocence — No Ineffective Assistance of Counsel: Following a police report that the defendant, a massage therapist, had penetrated a client with his finger during a massage, he was charged with sexual intercourse without consent. During trial, his defense counsel requested a jury instruction on the lesser included offense of sexual assault but later withdrew his request for the instruction because it ran counter to the defendant's claim of innocence. After his conviction, the defendant filed a petition for postconviction relief in which he claimed that his attorney had erred in withdrawing the instruction. The Supreme Court, however, concluded that the attorney's decision to withdraw the instruction was legally sound given the defendant's claim of innocence and did not constitute ineffective assistance. Taylor v. St., 2014 MT 142, 375 Mont. 234, 335 P.3d 1218.

Defendant's Offensive Sexual Photos Prejudicial Despite Cautionary Jury Instruction: The admission of inadmissible sexually explicit photos was not harmless error since the state could not establish that there was no reasonable possibility their admission might have contributed to the defendant's conviction and it was not possible to conclude that cautionary jury instructions mitigated the prejudicial impact. St. v. Sage, 2010 MT 156, 357 Mont. 99, 235 P.3d 1284.

Endangering Welfare of Children Not Lesser Included Offense of Sexual Intercourse Without Consent: At a felony sexual intercourse without consent trial, Grindheim requested a jury instruction on a lesser included offense of endangering the welfare of a child. The motion was denied, and on appeal, the Supreme Court affirmed. Because the elements of the crimes are different and require different elements of proof, endangering the welfare of a child cannot be considered a lesser included offense of sexual intercourse without consent. St. v. Grindheim, 2004 MT 311, 323 M 519, 101 P3d 267 (2004). See also St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371 (1999), and St. v. Jay, 2013 MT 79, 369 Mont. 332, 298 P.3d 396.

Failure to Request Not Ineffective Assistance of Counsel — Tactical Decision Supported by Defendant: The District Court properly denied a petition for postconviction relief based on claimed ineffective assistance of counsel in that counsel did not request an instruction that misdemeanor sexual assault was a lesser included offense of the charged offense of sexual intercourse without consent. Counsel's decision to not offer the instruction was a tactical one based on all the facts and on defendant's strident proclamations of innocence. Counsel stated that he believed that he had put on a strong defense and that he and defendant decided to force the jury to either convict or acquit on the charged offense. The courts will not second guess the tactical and strategic decisions of counsel. St. v. Sheppard, 270 M 122, 890 P2d 754, 52 St. Rep. 106 (1995).

Defendant Prejudiced by Jury Instruction Giving Incomplete Version of Spousal Exemption: Bradley appealed his conviction for sexual intercourse without consent on the basis that the jury instruction did not require the jury to find that the victim was not his spouse. The state argued that Bradley's divorce from his former wife was not final before he married the victim and that therefore the instruction did not have to address the issue of whether or not the victim was his spouse. The Supreme Court held that the law in effect in 1989 when the crime was alleged to have occurred included an exemption for persons living together as husband and wife regardless of the legal status of their relationship. Therefore, the jury instruction was not an accurate version of the law. St. v. Bradley, 269 M 392, 889 P2d 1167, 52 St. Rep. 43 (1995).

Instructions and Special Interrogatories Relating to Consent Properly Excluded: Defendant contended that the trial court improperly excluded several proposed instructions and special interrogatories relating to consent by the complainant to acts of sexual intercourse. Defendant's proposed instructions addressed the necessity that the force or lack of consent precede the acts of sexual intercourse for rape to occur, that consent may not be withdrawn during the acts, and that consent is a defense. The Supreme Court held that the trial court properly excluded the instructions as being adequately covered in other instructions or as misstatements of the law. St. v. Brodniak, 221 M 212, 718 P2d 322, 43 St. Rep. 755 (1986).

Denial of Instructions on Victim's Medical and Court Records and Ease of Alleging Rape: The defendant was convicted of sexual intercourse without consent and on appeal contended that denial of two of his proposed jury instructions constituted error. At trial, he had sought to introduce the victim's medical and Youth Court records in an attempt to impeach her credibility as a witness. The District Court refused to allow inspection of the records, and the Supreme Court ruled that because of the refusal, a jury instruction relating to credibility based on such records could not be given. His second proposed instruction stated the precaution that rape is easy to allege and difficult to defend against and called for instructing the jury to view the victim's testimony with caution. The Supreme Court, quoting St. v. Liddell, 211 M 180, 685 P2d 918, 41 St. Rep. 1293 (1984), ruled that such a cautionary instruction "is an improper and unwarranted comment on the evidence and is not required under the law or by reason of public policy. Therefore, such an instruction should not be given." The propriety of denying the defendant's proposed jury instructions was adequately supported, and conviction was affirmed. St. v. Mendenhall, 219 M 328, 721 P2d 1255, 42 St. Rep. 2060 (1985).

Cautionary Instruction — Use of Evidence of Other Crimes: Before allowing testimony of a prosecution witness who claimed she had been sexually assaulted by defendant, the District Court instructed the jury they could not consider evidence of defendant's other crimes as proof he is a person of bad character or has a disposition to commit crimes, but could consider evidence to prove characteristic method, plan, or scheme or to show existence of purpose or knowledge, an element of the crime charged. The instruction was based on St. v. Van Natta, 200 M 312, 651 P2d 57, 39 St. Rep. 1771 (1982), except the District Court substituted words "purpose or knowledge" for word "intent" found in Van Natta. The cautionary instruction was proper concerning the admission of evidence of other crimes. St. v. Norris, 212 M 427, 689 P2d 243, 41 St. Rep. 1841 (1984).

"Easy to Charge but Difficult to Defend" Instruction Improper: The cautionary jury instruction providing that sexual intercourse without consent is an easy charge to make but is difficult to defend is an improper instruction. The Supreme Court, in holding that the instruction is an unwarranted and improper comment on the evidence which is not required by law or public policy, specifically overruled St. v. Smith, 187 M 245, 609 P2d 696, 37 St. Rep. 583 (1980). St. v. Liddell, 211 M 180, 685 P2d 918, 41 St. Rep. 1293 (1984).

Acceptable Jury Instructions — Duty of Counsel to Present When Alleging Improper Instruction: Defendant, in a sexual intercourse without consent trial, relied on the theory that the victim consented. Since evidence supporting the theory was admitted, defendant argued that the jury should have been instructed regarding that theory. Each of defendant's offered consent instructions was replete with misleading statements and misstatements of Montana law. Failure to present a specific acceptable instruction regarding its own theory precludes the defense from alleging reversible error for lack of proper instruction. St. v. Pecora, 190 M 115, 619 P2d 173, 37 St. Rep. 1742 (1980).

Jury Instruction on Uncorroborated Testimony Properly Refused: In a trial of the defendant for sexual intercourse without consent, it was not error for the court to refuse cautionary instruction on the uncorroborated nature of the prosecutrix's testimony as the law does not require corroboration, some corroborating evidence was presented, and there was nothing in the record to suggest malice by the prosecutrix. St. v. Just, 184 M 263, 602 P2d 957 (1979).

Burden of Proving Defense: The court did not err in instructing the jury that defendant had the burden of proving the defense of reasonable belief of age by a preponderance of the evidence. St. v. Smith, 176 M 159, 576 P2d 1110 (1978).

Instructions to Jury: Instruction in rape case prosecuted under 94-4101, R.C.M. 1947 (a forerunner of this section), which intimated to jury that impact of guilty verdict could be lessened by court's imposition of light sentence, was prejudicial to defendant, since punishment should not be a concern to jury in determining defendant's guilt or innocence. St. v. Zuidema, 157 M 367, 485 P2d 952 (1971), overruling St. v. Metcalf, 153 M 369, 457 P2d 453 (1969).

Penetration: It was not error to instruct the jury in the language of 94-4103, R.C.M. 1947 (now 45-2-101), that any penetration, however slight, was sufficient or to add that "proof of emission is not necessary". St. v. Bouldin, 153 M 276, 456 P2d 830 (1969).

SENTENCING

Blanket Prohibition Against Access to Internet Devices Without Prior Permission Too Prohibitive — Remanded to District Court for Amending to Allow Access Subject to Certain Restrictions, Monitoring, and Supervision. St. v. Johnson, 2023 MT 143, 413 Mont. 114, 533 P.3d 335.

Terms of Sentencing Restricting Defendant's Contact With Minors — Defendant's Viewing of Pornography Insufficient Nexus to Underlying Offense: The defendant pleaded guilty to sexual intercourse without consent. Part of the presentence investigation recommended restricting the defendant's contact with minors. The defendant objected, arguing that the victim was not a minor and there was an insufficient nexus between the defendant, his offense, and the conditions protecting minors. The District Court disagreed, reasoning that the charging affidavit and the reports from two experts indicated that the defendant's viewing of pornography distorted his view of what a reasonable woman would consent to. On appeal, the Supreme Court overruled the District Court. The court held that a condition of sentence that generally relates to rehabilitation is insufficient; rather, there must be a correlation between the crime for which the defendant was convicted and the conditions imposed. Since nothing in the record related to minors, the District Court's restriction on the defendant's contact with minors did not correlate. St. v. Mehan, 2019 MT 100, 395 Mont. 383, 440 P.3d 25.

Four-Year Mandatory Minimum Required When No Exceptions Apply: The District Court sentenced the defendant to 15 years with all but 31 days suspended for sexual intercourse without consent with a minor. The Supreme Court reversed the sentence, finding that none of the applicable exceptions to the 4-year mandatory minimum applied and that the District Court lacked statutory authority to suspend all but 31 days of the defendant's sentence. St. v. Rambold, 2014 MT 116, 375 Mont. 30, 325 P.3d 686.

Sentencing Condition Lacked Nexus — No History of Substance Use or Abuse: A 17-year-old defendant was charged as an adult with one count of sexual intercourse without consent and one count of sexual assault. Subsequently, the defendant was sentenced and one of the conditions required him to report the conviction to all medical providers, as well as reporting addiction history and prescriptions for narcotics or medical marijuana. On appeal, the Supreme Court relied on St. v. Ashby, 2008 MT 83, 342 Mont. 187, 179 P.3d 1164, and reversed the reporting requirement on the grounds that the sentencing conditions lacked a nexus to either the offense or the offender. St. v. Dietsch, 2013 MT 245, 371 Mont. 460, 308 P.3d 111. See also St. v. Mehan, 2019 MT 100, 395 Mont. 383, 440 P.3d 25.

Life Sentence for Sexual Intercourse Without Consent Affirmed: Thorp was convicted of sexual intercourse without consent after having been previously convicted of the same offense in another state and was sentenced to life imprisonment without parole. Thorp contended that the sentence amounted to cruel and unusual punishment, but the Supreme Court disagreed. The sentence was within the statutory guidelines and could not be seen as so disproportionate to the crime as to shock the conscience or to outrage the moral sense of the community or of justice and thus was not considered cruel and unusual punishment. St. v. Thorp, 2010 MT 92, 356 Mont. 150, 231 P.3d 1096, following St. v. Shults, 2006 MT 100, 332 Mont. 130, 136 P.3d 507.

Voluntary Guilty Plea — Withdrawal of Plea Properly Denied: Usrey pleaded guilty through a plea agreement to sexual intercourse without consent with a 6-year-old girl but later sought to withdraw the plea on grounds that it was involuntary because Usrey did not understand the plea agreement and because the District Court did not explain the rights Usrey was waiving. The Supreme Court examined the plea bargain language and affirmed. Although the written plea agreement did not state the specific maximum penalty upon conviction of sexual intercourse without consent and the District Court did not state the penalty when Usrey pleaded guilty, the court did ask Usrey if he was mindful of the maximum penalty, which was clearly stated in the information, and Usrey replied affirmatively. Also, the plea bargain called for a sentence far less than the maximum penalty, and the sentence that Usrey bargained for and that was imposed was far less than the maximum. Additionally, Usrey was not misled to his detriment simply because the District Court did not use the exact words of 46-12-210(1)(d) in telling Usrey that he might not be allowed to withdraw the guilty plea if the plea bargain was rejected. The record contained substantial evidence supporting the District Court's conclusions that Usrey understood the proceedings and was mentally competent to enter a voluntary guilty plea, and the District Court did not err in denying the motion to withdraw the plea on grounds of involuntariness. St. v. Usrey, 2009 MT 227, 351 M 341, 212 P3d 279 (2009).

Plea Not Considered Involuntary Based on Defendant's Belief in Designation as Low-Level Sexual Offender: Brinson entered a plea agreement stating that he would be sentenced to 20 years suspended if he completed a sexual offender evaluation with an evaluator certified by the Montana Sex Offender Treatment Association (MSOTA) and if the evaluator concluded that Brinson was a low risk to reoffend. However, if Brinson was not found to be a low risk, the parties would be free to argue for an appropriate sentence. Brinson received two evaluations. A non-MSOTA evaluator found Brinson to be a level 1 low-risk offender, but an MSOTA evaluator concluded that Brinson was a level 2 moderate-risk offender. The sentencing court held that because Brinson was not found to be a low risk by an MSOTA evaluator, the suspended sentence provisions of the plea agreement did not apply. The court subsequently adopted the recommendation in the presentence investigation report and sentenced Brinson to 20 years in prison with 10 years suspended. Brinson appealed on grounds that he was misled by the plea bargain, however slightly, so withdrawal of the guilty plea was warranted. The Supreme Court disagreed. The court disapproved the "however slightly" language in the analysis of the voluntariness of a plea. Even though Brinson's expectations were bolstered by the low-level evaluation 3 months after his plea, those subsequent expectations were irrelevant to whether the plea was voluntary when entered. Even though Brinson may have had a good faith belief that he would ultimately be designated a low-risk offender, he presented no objective proof that he was assured of receiving that designation. In fact, the plea agreement was clear that a low-risk designation might not be forthcoming, so Brinson's argument that the plea was involuntary because it was induced by a misrepresentation or an unfulfillable promise was unpersuasive. The sentencing court did not err in denying Brinson's motion to withdraw the plea. St. v. Brinson, 2009 MT 200, 351 M 136, 210 P3d 164 (2009), overruling St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005), and St. v. Deserly, 2008 MT 242, 344 M 468, 188 P3d 1057 (2008), regarding applicability of the "however slightly" language in the analysis of the voluntariness of a plea.

Sufficient Nexus of Sentencing Condition to Offense of Sexual Intercourse Without Consent: Brinson was sentenced to 20 years with 10 years suspended for sexual intercourse without consent, and the sentencing court also attached 56 terms and conditions to the sentence. Brinson challenged three conditions. The Supreme Court applied the nexus test in St. v. Ashby, 2008 MT 83, 342 M 187, 179 P3d 1164 (2008), to determine whether the conditions lacked a nexus either to the offense or to Brinson. In this case a sufficient nexus was established to affirm imposition of conditions: (1) that Brinson's contact with his daughter be supervised; (2) prohibiting Brinson from having a cell phone, with exceptions, or other technology or device with photo, video, or internet capabilities; and (3) prohibiting Brinson from viewing television or motion pictures that were geared toward Brinson's offending cycle or as a stimulus to arouse deviant thoughts or fantasies. St. v. Brinson, 2009 MT 200, 351 M 136, 210 P3d 164 (2009).

Failure to Object to Constitutionality of Probation Condition Constituting Waiver of Issue on Appeal: When LaFreniere was sentenced for sexual intercourse without consent, the sentencing court did not attach any probation conditions. The County Attorney subsequently petitioned the court to add probation conditions pursuant to 46-23-1011, one of which was that LaFreniere complete sex offender treatment. LaFreniere objected to that condition on grounds that he couldn't afford it, but the District Court nevertheless imposed the treatment requirement along with 14 other probation conditions. LaFreniere later appealed on grounds that imposition of the treatment condition violated the constitutional prohibition against ex post facto laws. Without addressing the constitutional argument, the Supreme Court affirmed. By failing to raise the constitutional argument in District Court, LaFreniere waived the issue for purposes of appeal. St. v. LaFreniere, 2008 MT 99, 342 M 309, 180 P3d 1161 (2008).

Illegal Portion of Sentence Affecting Entirety of Sentence — Remand for Resentencing: For sexual intercourse without consent, Hicks was sentenced to 14 years with the Department of Corrections with no time suspended, and because of the seriousness of the offense, Hicks was also ordered to complete sexual offender treatment, undergo psychiatric evaluation to determine possible mental or personality disorders, and complete a chemical dependency evaluation, a cognitive and behavioral modification program, and an anger management course. Hicks appealed the legality of the sentence because it violated sentencing statutes. The Supreme Court noted that 46-18-201(3)(d)(i) provides that when a defendant is sentenced to the Department, all but the first 5 years of the sentence must be suspended, so the unsuspended sentence was illegal. However, the court could not determine whether the sentencing court would consider a 14-year sentence with 9 years suspended adequate to complete the recommended sentence conditions. Because the illegal portion of the sentence affected the entirety of the sentence, the Supreme Court remanded for resentencing under a correct application of the sentencing statutes. St. v. Hicks, 2006 MT 71, 331 M 471, 133 P3d 206 (2006).

Adoption of Federal Test for Voluntariness of Guilty Pleas — Huttinger Overruled — Standard of Review: Since St. v. Huttinger, 182 M 50, 595 P2d 363 (1979), the Supreme Court has applied a good cause test in determining whether to permit a plea of guilty or nolo contendere to be withdrawn and a plea of not guilty substituted. The good cause test involved a balancing of three conflicting factors: (1) the adequacy of the interrogation by the District Court of the defendant at the entry of the guilty plea as to the defendant's understanding of the consequences of the plea; (2) the promptness with which the defendant attempted to withdraw the prior plea; and (3) the fact that the defendant's plea was apparently the result of a plea bargain in which the guilty plea was given in exchange for dismissal of another charge. None of the factors required a court to consider the voluntariness, knowledge, or intelligence of a defendant's plea, although a defendant has been allowed to withdraw a guilty plea upon a showing that the plea was made unknowingly or involuntarily. Citing Bousley v. U.S., 523 US 614 (1998), the Supreme Court concluded that the ultimate test for withdrawal of a plea is voluntariness, which subsumes the relevant elements of the Huttinger test, so Huttinger was overruled. Therefore, a guilty plea may be withdrawn only upon a showing that the plea was made involuntarily, and the Supreme

Court will review questions of voluntariness in pleas and plea agreements de novo. St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005), overruling St. v. Miller, 248 M 194, 810 P2d 308 (1991), overruling St. v. Martin, 2004 MT 288, 323 M 320, 100 P3d 146 (2004), and other cases that have applied the abuse of discretion standard, and followed in Duffy v. St., 2005 MT 228, 328 M 369, 120 P3d 398 (2005). See also St. v. Warclub, 2005 MT 149, 327 M 352, 114 P3d 254 (2005), in which the Supreme Court clarified Lone Elk and held that, with respect to appeals of denials of motions to withdraw guilty pleas, the court will review the findings of fact to determine if they are clearly erroneous and the conclusions of law to determine if they are correct. When voluntariness of the plea is at issue, the court will review that ultimate mixed question of law and fact de novo to determine if the trial court was correct in holding that the plea was voluntary. Warclub was followed in St. v. Muhammad, 2005 MT 234, 328 M 397, 121 P3d 521 (2005), and Maldonado v. St., 2008 MT 253, 345 M 69, 190 P3d 1043 (2008). Warclub and Lone Elk were followed in St. v. Leitheiser, 2006 MT 70, 331 M 464, 133 P3d 185 (2006). In St. v. Deserly, 2008 MT 242, 344 M 468, 188 P3d 1057 (2008), the Supreme Court noted that the standard for reviewing the voluntariness of a guilty plea adopted in St. v. Miller, 248 M 194, 810 P2d 308 (1991) (overruled Lone Elk), under which a plea would be considered involuntary when it appeared that defendant was laboring under such a strong inducement, fundamental mistake, or serious mental condition that the possibility existed that defendant may have pleaded guilty to a crime for which he was innocent, had been followed in other cases. To avoid confusion, the court overruled the following cases to the extent that they may be read as supporting the Miller standard: St. v. Pelke, 143 M 262, 389 P2d 154 (1964), St. v. LeMay, 144 M 315, 396 P2d 83 (1964), St. v. Griffin, 167 M 11, 535 P2d 498 (1975), State ex rel. Gladue v. District Court, 175 M 509, 575 P2d 65 (1978), St. v. Huttinger, 182 M 50, 595 P2d 363 (1979), St. v. Campbell, 182 M 521, 597 P2d 1146 (1979), St. v. Hilton, 183 M 13, 597 P2d 1171 (1979), St. v. Nelson, 184 M 491, 603 P2d 1050 (1979), Benjamin v. McCormick, 243 M 252, 792 P2d 7 (1990), St. v. Milinovich, 248 M 373, 812 P2d 338 (1991), St. v. Cameron, 253 M 95, 830 P2d 1284 (1992), St. v. Barker, 257 M 31, 847 P2d 300 (1993), St. v. Skroch, 267 M 349, 883 P2d 1256 (1994), St. v. Schaff, 1998 MT 104, 288 M 421, 958 P2d 682 (1998), St. v. Ereth, 1998 MT 197, 290 M 294, 964 P2d 26 (1998), St. v. Sanders, 1999 MT 136, 294 M 539, 982 P2d 1015 (1999), St. v. Kellames, 2002 MT 41, 308 M 347, 43 P3d 293 (2002), St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002), St. v. Chase, 2006 MT 13, 331 M 1, 127 P3d 1038 (2006), and St. v. Milligan, 2008 MT 36, 341 M 316, 177 P3d 500 (2008). The "however slightly" language in the analysis of the voluntariness of a plea as set out in Lone Elk and Deserly was overruled in St. v. Brinson, 2009 MT 200, 351 M 136, 210 P3d 164 (2009).

Mandatory Life Sentence Not Violative of Due Process, Cruel and Unusual Punishment, or Separation of Powers — Exception Properly Considered: Webb pleaded guilty to second offense sexual intercourse without consent and was sentenced to life in prison without parole pursuant to 46-18-219. Webb appealed the sentence on grounds that the mandatory life sentence violated procedural and substantive due process, the prohibition against cruel and unusual punishment, and the separation of powers doctrine. Webb also asserted that the sentencing court failed to properly consider the exception to mandatory sentencing set out in 46-18-222(3). The Supreme Court affirmed. The sentencing court properly considered the exception and did not abuse its broad discretion in finding no unusual and substantial distress. The sentencing court offered Webb all the procedural due process necessary and did not violate substantive due process because the sentence fit within the statutory sentencing limits. Webb's contention that life without parole was cruel and unusual punishment failed because the sentence was commensurate with the gravity of the crime and consistent with state sentencing and correctional policy. The argument that mandatory sentences violate the separation of powers doctrine also failed because it is in the Legislature's province to distinguish between criminal offenses and to establish punishments, and enactment of 46-18-219 was based on constitutional principles and Montana public policy. St. v. Webb, 2005 MT 5, 325 M 317, 106 P3d 521 (2005). See also St. v. Bruns, 213 M 372, 691 P2d 817 (1984), and St. v. Dahms, 252 M 1, 825 P2d 1214 (1992).

Deferred Sentence, Community Service, and Restitution Properly Imposed for Sexual Intercourse Without Consent: Following Grindheim's conviction for sexual intercourse without consent, the District Court deferred Grindheim's sentence for 6 years, subject to 6 months in the county jail, 2,000 hours of community service, and fines and restitution totaling about $6,496.60. Grindheim appealed on grounds that the combination of the conditions rendered the sentence unreasonable and impossible to perform and constituted punishment instead of rehabilitation. The Supreme Court held that the conditions and community service were within the parameters of the sentencing statute and were reasonably related to the circumstances of the offense and that the restitution calculations were reasonable considering the victim's long-term counseling needs. Therefore, the District Court did not err in imposing the sentence, and the sentence was affirmed. St. v. Grindheim, 2004 MT 311, 323 M 519, 101 P3d 267 (2004).

Error in Sentencing to Department of Corrections — Remand Based on Partially Illegal Sentence: Upon conviction for sexual intercourse without consent, the District Court sentenced Heath to the Department of Corrections for 25 years with 5 years suspended and required Heath to complete a sex offender program and a criminal thinking course at the state prison. However, the court erred because under 46-18-201(3)(d), commitment to the Department requires that all but the first 5 years of the sentence be suspended. The Supreme Court generally remands for resentencing if the illegal portion of a sentence affects the entire sentence or if the court is unable to discern what sentence the trial court would have imposed if it had correctly applied the law. Heath asserted that resentencing could impermissibly expose him to an increased sentence if the trial court was vindictive because Heath successfully attacked the conviction. Nevertheless, the illegal unsuspended portion of Heath's sentence affected the entire sentence, so the case was remanded with instructions that the sentencing court avoid vindictiveness in imposing a new sentence. St. v. Heath, 2004 MT 58, 320 M 211, 89 P3d 947 (2004). On remand, the District Court sentenced Heath to prison for 25 years with 15 years suspended. Citing St. v. Tracy, 2005 MT 128, 327 M 220, 113 P3d 297 (2005), Heath appealed on grounds that commitment to prison instead of to the Department of Corrections was harsher than the original sentence, but the Supreme Court affirmed. Despite the more flexible nature of a commitment to the Department of Corrections, Heath could not seriously argue that he received a harsher sentence on remand because the sentence was changed to run concurrently rather than consecutively, actually reducing the sentence by 12 years. St. v. Heath, 2005 MT 280, 329 M 226, 123 P3d 228 (2005).

No Claim to Unconstitutional Effect of Mandatory Minimum Sentence When Defendant Not Subject to Mandatory Minimum: Duffy was sentenced to 20 years for each offense of sexual abuse of his daughters, who were less than 16 years old at the time of the offense. On appeal, Duffy claimed that because of their ages, 45-5-507 and this section required a minimum 4-year prison term, which deprived him of equal protection and due process because he did not qualify for the exception to the minimum term in 46-18-222(5) regarding instances involving a lack of serious bodily injury, asserting that he was similarly situated to persons convicted of sexual assault but treated differently because those offenders could qualify for the exception. However, before Duffy could claim standing to complain that he was unconstitutionally affected by the mandatory minimum sentences, he must have been subjected to those sentences, which was not the case here. Thus, Duffy was not affected by the disparate treatment of sex offenders based on the nature of the offenses and lacked standing to challenge the sentencing scheme on equal protection or due process grounds. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000).

Four-Year Mandatory Minimum Sentence for Sexual Intercourse With Minor Properly Applied: By plea agreement, Fauque pleaded guilty to one count of sexual intercourse without consent and one count of sexual assault against his 14-year-old daughter. The District Court concluded that the 4-year minimum sentence provided in this section applied and that Fauque had failed to establish entitlement to any exceptions to the mandatory minimum sentence provided in 46-18-222. The court sentenced Fauque to 25 years on each count, with all but 4 years suspended and the sentences to run concurrently. Fauque appealed on grounds that a direct conflict existed between the mandatory minimum sentence for sexual intercourse without consent when the victim is less than 16 and the defendant is 3 or more years older contained in this section and the 30-day mandatory minimum sentence for sexual intercourse without consent when the victim is less than 16 contained in 46-18-201 (see 1999 amendment and enactment of 46-18-205). The Supreme Court examined the legislative intent of both sentencing provisions and found no conflict in this case. The 4-year mandatory minimum provided in this section clearly applied to Fauque, who was 53 years old at the time that he assaulted his 14-year-old daughter and who did not argue any sentencing exception under 46-18-222. The mandatory minimum (now contained in 46-18-205) in 46-18-201 simply disallowed suspension of the first 30 days of a sentence under this section under any circumstances, even if an exception existed under 46-18-222. Because no exception existed here, 46-18-201 did not come into play, so the Supreme Court affirmed Fauque's 4-year mandatory minimum sentence pursuant to this section. St. v. Fauque, 2000 MT 168, 300 M 307, 4 P3d 651, 57 St. Rep. 693 (2000).

Exception Properly Applied to Mandatory Sentence for Sexual Intercourse Without Consent: The state contended that the District Court erred in applying the exception contained in 46-18-222(5) when suspending all but 30 days of a sentence for sexual intercourse without consent because no serious bodily injury was inflicted on the victim. The Supreme Court cited numerous federal cases in resolving the ambiguity between 46-18-222(5) and subsection (2) of this section, concluding that because the threat or infliction of bodily harm may, depending on the circumstances, be an element of the offense of sexual intercourse without consent, the exception to the minimum sentence when no serious bodily harm was inflicted is applicable to that offense. Ambiguity regarding the applicability of the exception must be resolved in favor of leniency. St. v. Goodwin, 249 M 1, 813 P2d 953, 48 St. Rep. 539 (1991), followed in St. v. Van Robinson, 248 M 528, 813 P2d 967, 48 St. Rep. 558 (1991).

Assault and Sexual Intercourse Without Consent — Grandparent-Grandchild Relationship — Sentencing Under Incest Statute Not Required: When defendant was charged and convicted of sexual assault and sexual intercourse without consent, the District Court properly sentenced defendant under the sexual assault and sexual intercourse without consent statutes. Defendant's argument that he should have been sentenced under the incest statute because he and the victim had a grandparent-grandchild relationship has no merit. Such a relationship would not serve to alter the charges, convictions, or sentences against the defendant. St. v. Walters, 247 M 84, 806 P2d 497, 48 St. Rep. 102 (1991).

Law Review Articles

The Death Penalty in Montana: A Violation of the Constitutional Right to Individual Dignity, Eklund, 65 Mont. L. Rev. 135 (2004).

45-5-504. Indecent exposure.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 213.5.

The special case of genital exposure for sexual gratification has been placed in this article along with other types of sexual aggression. It is not meant to include "indecent" brevity of attire, but rather "lewdness" which requires an awareness of the likelihood of affronting observers and is often a threat or prelude to overt sexual aggression.

Compiler's Comments

2015 Amendment: Chapter 144 in (1) inserted "or intimate parts by any means, including electronic communication as defined in 45-5-625(5)(a)"; in (2)(c) substituted "the person shall be fined an amount not to exceed $10,000 or be imprisoned in a state prison for a term of not more than 10 years, or both" for "the person shall be punished by life imprisonment or by imprisonment in a state prison for a term of not less than 5 years or more than 100 years and may be fined not more than $10,000"; and inserted (3) establishing the offense of indecent exposure to a minor. Amendment effective October 1, 2015.

1999 Amendment: Chapter 288 in (1) near beginning substituted "A person commits the offense of indecent exposure if the person knowingly or purposely" for "A person who, for the purpose of arousing or gratifying the person's own sexual desire or the sexual desire of any person" and at end after "alarm" substituted "in order to:

(a) abuse, humiliate, harass, or degrade another; or

(b) arouse or gratify the person's own sexual response or desire or the sexual response or desire of any person" for "commits the offense of indecent exposure"; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 550 in (2)(c), after "shall be", substituted "punished by life imprisonment or by imprisonment" for "fined an amount not to exceed $10,000 or be imprisoned" and after "term of not" substituted "less than 5 years or more than 100 years and may be fined not more than $10,000" for "more than 5 years, or both"; and made minor changes in style.

1991 Amendments: Chapter 176 inserted (2)(b) and (2)(c) relating to second and third or subsequent convictions; and made minor changes in style.

Chapter 687 in (1), near middle after "any person", deleted "other than his spouse". Amendment effective April 27, 1991.

Annotator's Note: Display of one's genitals to anyone under the age of eighteen is also prohibited by the Obscenity statute, MCA, 45-8-201(d). That offense does not require a purpose of sexual gratification, nor does it require knowledge in the actor of possible affront or alarm, as does this section.

Case Notes

Failure to Challenge Statutory Basis for Charge — Ineffective Assistance of Counsel: The defendant was charged with several counts of sexual misconduct with young family members. One of the alleged events occurred prior to the statute outlawing the conduct went into effect. Following his conviction on all counts, the defendant appealed to the Supreme Court and alleged that he had received ineffective assistance of counsel because his counsel had not objected to the inclusion of conduct that was not outlawed. The Supreme Court reversed and remanded for a new trial, agreeing that the record demonstrated that the defendant had received ineffective assistance of counsel. St. v. Tipton, 2021 MT 281, 406 Mont. 186, 497 P.3d 610.

No Error in Denying Motion to Dismiss Felony Indecent Exposure Charge for Insufficient Evidence: Defendant's actions coupled with facts and circumstances constituted sufficient evidence for the jury to find the essential elements of the crime beyond a reasonable doubt. St. v. Ommundson, 2008 MT 340, 346 M 263, 194 P3d 672, (2008).

Out-of-State Conviction of Indecency With Child Considered Aggravating Circumstance for Purposes of Terminating Parental Rights: A father was convicted in Texas of indecency with a child. A Montana District Court considered the Texas conviction as an aggravating circumstance in terminating the father's parental rights. On appeal, the father contended that in Texas, the crime of indecency with a child was analogous to indecent exposure and asserted that the state did not introduce clear and convincing evidence that the Texas crime would constitute sexual abuse under Montana law to qualify as an aggravating circumstance. The Supreme Court disagreed. In Montana, the definition of child abuse includes indecent exposure, and the District Court properly concluded that the Texas conviction constituted an aggravating circumstance under Montana law. In re. M.A.L., D.L., & T.L., 2006 MT 299, 334 M 436, 148 P3d 606 (2006). See also In re L.M.A.T. & B.L.F.T., 2002 MT 163, 310 M 422, 51 P3d 504 (2002).

Indecent Exposure to Different Victims on Different Dates Not Considered Same Transaction — Prosecution Not Barred: After charging Waldrup with three counts of indecent exposure, to which he pleaded guilty on two counts, police continued to investigate previous reports of a man exposing himself. Waldrup was a suspect. After Waldrup was identified from a photographic lineup, he was charged with four additional counts of indecent exposure in incidents involving four different victims. Under this section, a third or subsequent conviction of indecent exposure allows for enhancement of punishment to a felony. Waldrup moved to dismiss the charges on the grounds that prosecution was barred for reasons of fundamental fairness and violation of constitutional provisions. The District Court granted the dismissal motion on the basis of double jeopardy. About 1 week after dismissal, the Supreme Court decided St. v. Berger, 259 M 364, 856 P2d 552 (1993), holding that the 1991 amendments to 46-11-503 did not eliminate the "same transaction" requirement or expand statutory protection to unrelated offenses. Because the charges against Waldrup were based on incidents that were not part of the same transaction, within the meaning of 46-1-202, the incidents could not be considered part of a plan resulting in the repeated commission of the same offense against the same person. Thus, prosecution of the four later counts was not precluded. St. v. Waldrup, 264 M 456, 872 P2d 772, 51 St. Rep. 344 (1994).

Obscenity or Indecent Exposure: The obscenity statute (45-8-201) is imprecise when applied to an exposure crime. Though the portion of the obscenity statute that requires proof of contemporary community standards refers to "material" and could be stretched to mean that community standards do not apply to exposure crimes, since "material" is not involved, the court reversed the obscenity conviction saying: "charge a flasher as a flasher and not as a strip-tease artist". St. v. Price, 191 M 1, 622 P2d 160, 37 St. Rep. 1926 (1980).

Attorney General's Opinions

Regulation of Live Dance Performance in Licensed Liquor Establishment — Abridgment of Free Expression: The validity of a city ordinance regulating live dance performances in establishments licensed to serve liquor must be measured against free expression standards imposed by Art. II, sec. 7, Mont. Const., and the first amendment to the U.S. Constitution. Therefore, a proposed city ordinance prohibiting any live performance involving dance or the removal of clothing in licensed liquor establishments is an unconstitutional abridgment of the constitutional standards because: (1) it fails to distinguish carefully between protected and unprotected conduct; and (2) the requisite governmental interest in regulating such conduct has not been sufficiently established. 41 A.G. Op. 75 (1986).

45-5-507. Incest.

Criminal Law Commission Comments

Source: New and M.P.C. 1962, § 230.2.

This section is patterned after the Model Penal Code. The uncle-aunt-nephew-niece cases are excluded from the category of "felonious incest," in view of the severity of the penalty.

The marriage regulations of R.C.M. 1947, section 48-105 circumscribe marriage more strictly than the criminal incest law, but different considerations justify a more limited scope in criminal incest vis-a-vis a marriage contract. Relations between uncles and under-age nieces would be "sexual intercourse without consent." "Ancestor" and "descendant" include all persons in lineal ascent and descent from one body.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 536, L. 2023. Amendment effective May 18, 2023.

2019 Amendment: Chapter 228 in (5)(a)(i) in two places substituted "25 years" for "10 years". Amendment effective October 1, 2019.

Applicability: Section 4, Ch. 228, L. 2019, provided: "[This act] applies to offenses committed on or after October 1, 2019."

2017 Amendments — Composite Section: Chapter 226 in (2)(a) after "defense" deleted "under this section" and substituted "stepson or stepdaughter is less than 18 years of age and the stepparent is 4 or more years older than the stepson or stepdaughter" for "victim is less than 18 years old"; inserted (2)(b) regarding person less than 18 years of age being considered a victim if other person is 4 or more years older; and made minor changes in style. Amendment effective October 1, 2017.

Chapter 321 in (5)(a)(i) in two places substituted "10 years" for "25 years", substituted "46-18-222(1) through (5)" for "46-18-222", and inserted last sentence concerning exception. Amendment effective July 1, 2017.

Applicability: Section 2, Ch. 226, L. 2017, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective October 1, 2017.

Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

2007 Amendment: Chapter 483 in (3) at beginning inserted exception clause; inserted (5) providing punishment if the victim was 12 years of age or younger and the offender was 18 years of age or older at the time of the offense; in (6) near beginning of first sentence after "(4)" inserted "or (5)"; and made minor changes in style. Amendment effective May 11, 2007.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

1995 Amendment: Chapter 550 in (3), after "shall be", substituted "punished by life imprisonment or by imprisonment" for "imprisoned", after "exceed" substituted "100" for "20", and at end deleted "or both"; in (4), after "shall be", substituted "punished by life imprisonment or by imprisonment" for "imprisoned" and after "prison for" substituted "a term of not less than 4 years or more than 100" for "any term not to exceed 20"; and made minor changes in style.

1991 Amendment: In (3) increased maximum term of imprisonment from 10 years to 20 years. Amendment effective April 27, 1991.

1989 Amendment: Inserted (4) requiring that a person committing incest may be imprisoned up to 20 years and fined up to $50,000 if the victim is under age 16, the offender is 3 or more years older than the victim, or the offender inflicts bodily injury during incest; and in (5) inserted "or (4)".

1985 Amendment: Inserted (4) requiring offender, if able, to pay incest victim's counseling costs.

1983 Amendment: Near beginning of (1), after "cohabits" inserted "with"; after "intercourse with" inserted "or has sexual contact as defined in 45-2-101 with"; near middle of (1) after "half blood" inserted "or any stepson or stepdaughter"; at end of (1) after "adoption" inserted "and relationships involving a stepson or stepdaughter"; inserted (2) providing that consent is incest defense if victim is age 18 or older; and made minor changes in phraseology.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: While this section retains the basic purpose of prior law, it has restricted criminal incest to narrower limits than did the preceding incest statute. The old incest law could be interpreted only by reference to R.C.M. 1947, § 48-105 which indicated within which degrees of consanguinity marriages were incestuous and void. The use of § 48-105 resulted in the inclusion in the old law of marriage, cohabitation and fornication with "parents and children, ancestors and descendants of every degree, and between brothers and sisters of half as well as the whole blood, and between nieces and uncles, and between aunts and nephews, and between first cousins". The [prison term] for incest has been retained at the same level [and the provision for a fine was inserted in 1981].

The statute, as originally enacted, included the definition of "cohabit", which was apparently deleted by the [Code Commissioner], because the word is defined by § 45-2-101(6).

Case Notes

One-Hundred-Year Sentence When Victim Was Younger Than 12 — Mandatory Unless Exception Applies: The District Court was correct to apply the mandatory 100-year sentence upon finding that none of the exceptions in 46-18-222(1) through (5) applied, because the statute specifies the exact penalty instead of providing a range. St. v. Hamilton, 2018 MT 253, 393 Mont. 102, 428 P.3d 849.

Defendant Prohibited From Questioning Incest Victim at Trial About Prior Rape Allegations Without Evidence: During discovery, the defendant obtained a single-page report written by a social worker that contained a reference to the incest victim's allegation of a prior rape. At trial, the District Court determined that the report was not admissible under St. v. Anderson, 211 Mont. 272, 686 P.2d 193 (1984), because the reported allegation had not been proven false or admitted to be false and prohibited the defendant from questioning the victim about the existence and veracity of prior allegations. The defendant appealed, arguing that the District Court had applied Anderson incorrectly. The Supreme Court affirmed, holding that a defendant is not entitled to question the victim on the stand about prior false allegations if there is no evidence that the victim had made a prior false accusation. St. v. Ring, 2014 MT 49, 374 Mont. 109, 321 P.3d 800, following St. v. Anderson, 211 Mont. 272, 686 P.2d 193 (1984), and State ex rel. Mazurek v. 14th Judicial District Court, 277 Mont. 349, 922 P.2d 474 (1996).

Admission of Sexually Explicit Photographs Taken When Victim Was Between 15 and 18 Years Of Age — Relevant and Admissible: There is no age element required for a conviction of incest; thus sexually explicit photographs taken when the victim was 18 were relevant and admissible because they tended to prove the defendant had a sexual relationship with the victim, who was his daughter. Additionally, because the photographs were admissible to prove a necessary element in the crime of incest, the defendant's argument that the photographs were inadmissible because they did not provide evidence for a sentence enhancement lacked merit. St. v. Stewart, 2012 MT 317, 367 Mont. 503, 291 P.3d 1187.

Conviction of Incest and Attempted Incest Upheld — Crimes Arising From Separate and Distinct Transactions: After a jury found him guilty of both incest and attempted incest, the defendant moved for a new trial on multiple grounds, including an allegation that he was subjected to double jeopardy. The defendant argued that both offenses occurred on the same day during a hunting trip, but the Supreme Court determined the convictions were based on two separate and distinct transactions. St. v. Geren, 2012 MT 307, 367 Mont. 437, 291 P.3d 1144, citing St. v. Williams, 2010 MT 58, 355 Mont. 354, 228 P.3d 1127.

Failure to Question Witnesses at Sentencing or Present Alternative Sentencing Recommendation — No Ineffective Assistance: After being convicted of incest, the defendant refused to cooperate in the presentencing investigation process. At the sentencing hearing, the defendant's counsel did not cross-examine the state's witnesses, offer any witnesses on the defendant's behalf, or offer an alternative sentencing recommendation. The District Court imposed a harsher sentence than recommended by the state and did not suspend any of the defendant's sentence. The defendant asserted that he had been denied effective assistance of counsel because his attorney did not subject the state's case at sentencing to meaningful adversarial testing and did not make an alternative sentencing recommendation. Analyzing the defendant's claim under the second prong of the Strickland test, the Supreme Court held that the defendant was not prejudiced by his attorney's performance. The defendant suggested no possible questions that his trial counsel should have asked the witnesses at the sentencing hearing, did not offer any witnesses who should have been called on his behalf, and refused to participate in the presentencing investigation, forgoing the opportunity to explain the information provided in the presentence report. Finally, the District Court detailed a number of bases to support a sentence in excess of the mandatory minimum, and the Supreme Court held that because there was not a reasonable probability that the District Court would have imposed a less severe sentence had the defendant's counsel offered an alternative recommendation, the defendant received effective assistance of counsel. St. v. Peart, 2012 MT 274, 367 Mont. 153, 290 P.3d 706.

Expert Testimony Regarding Grooming of Victims for Sexual Abuse Properly Allowed: The court in Berosik's incest trial allowed the state's witness to describe the characteristics of the grooming of potential child victims of sexual abuse and then allowed the complaining witnesses and others to testify about Berosik's prior acts that occurred with the victims over several years. The court ruled that the prior acts were evidence that Berosik was grooming his victims and thus were part of the transactions the state sought to prove. On appeal, Berosik asserted that the expert testimony on grooming was irrelevant and highly prejudicial. The Supreme Court disagreed. Expert testimony explaining the complexities of child sexual abuse is admissible, and the evidence of prior sexual activity occurring before the charged offenses was admissible under the transaction rule because the activity formed part of the transaction that was the fact in dispute and was explanatory of the charged offense. St. v. Berosik, 2009 MT 260, 352 M 16, 214 P3d 776 (2009). See also St. v. Derbyshire, 2009 MT 27, 349 M 114, 201 P3d 811 (2009), and St. v. Crosley, 2009 MT 126, 350 M 223, 206 P3d 932 (2009).

Evidence of Escalating Sexual Abuse, Including Uncharged Incidents Occurring in Another State, Properly Admitted Under Transaction Rule — No Ineffective Assistance of Counsel for Failure to Object to Admissible Evidence: At Crosley's incest trial, the state sought to introduce evidence of several incidents of abuse that occurred in California and in a county outside Ravalli County, where the crimes were charged. Defense counsel did not object to admission of the evidence, and the trial court allowed it. On appeal, Crosley asserted error in admitting the evidence and claimed ineffective assistance of counsel based on defense counsel's failure to object to the testimony or to request that the trial court provide a contemporaneous admonition at the time the evidence was admitted. The Supreme Court affirmed on both issues. Evidence of Crosley's other acts of incest that occurred in places other than Ravalli County was not wholly independent of or unrelated to the charged offenses in Ravalli County, and all the acts of incest, regardless of where they occurred, were inextricably linked to and explanatory of the Ravalli County offenses, so evidence thereof was admissible under the transaction rule exception to other crimes evidence in Rule 404(b), M.R.Ev. (Title 26, ch. 10). The fact in dispute was whether various acts of incest occurred, including evidence of uncharged acts that occurred outside Ravalli County, because those acts were clearly related to and not independent of the continuous and escalating nature of Crosley's sexual abuse. The other crimes evidence was thus proper under the transaction rule, and there was no error in the trial court's other acts jury instruction or in the court's assessment of the state's notice of intent to introduce evidence of other acts. Additionally, Crosley's counsel could not have provided ineffective assistance based on failure to object to admissible evidence. St. v. Crosley, 2009 MT 126, 350 M 223, 206 P3d 932 (2009). See also St. v. Lozon, 2004 MT 34, 320 M 26, 85 P3d 753 (2004).

Failure of Defendant to Admit Incest — Sentence Not Considered More Harsh Given Relevant Sentencing Factors: Bullman consistently maintained that he was not guilty of incest with his stepdaughter because he was never married to her mother. Because Bullman refused to admit guilt and was thus ineligible for community-based treatment, he asserted that he was sentenced more harshly by being sentenced to prison. The Supreme Court examined the record and disagreed. The sentencing court was aware of the prohibition against sentencing a defendant to prison because the defendant does not admit guilt, but the court also considered numerous other relevant factors in sentencing Bullman to prison in addition to the expert opinion that Bullman was not a candidate for community-based treatment, including: (1) the significant impact of the crime on the victim; (2) the need to protect society; (3) Bullman's need for appropriate treatment; (4) Bullman's criminal history; and (5) Bullman's long history of substance abuse. Given these sentencing factors, the Supreme Court could not conclude that Bullman was sentenced to prison for failure to admit guilt, and the conviction was affirmed. St. v. Bullman, 2009 MT 37, 349 M 228, 203 P3d 768 (2009).

Sufficient Evidence of Common-Law Marriage to Allow Conviction for Incest With Stepchild: Following conviction for incest with his stepdaughter, Bullman asserted that the state failed to prove sufficient evidence that Bullman was married to the victim's mother, so the victim was not Bullman's stepdaughter and Bullman could not be convicted of incest. However, the jury concluded that a common-law marriage existed based on facts that: (1) Bullman and the victim's mother lived together as husband and wife for many years and had children together; (2) Bullman supported the mother and her children, including the victim; (3) Bullman purchased a house and the mother was "on the deed"; (4) the mother filed joint tax returns while Bullman was incarcerated; (5) the mother testified that Bullman sometimes referred to her as his wife in front of others; (6) the victim testified that Bullman assumed a father-daughter relationship and asked her to call him "Dad"; and (7) the mother had obtained a divorce decree that was filed over Bullman's objection. The evidence of a common-law marriage, although circumstantial, was sufficient for the jury to conclude that Bullman and the victim's mother were married at the time the sexual contact occurred. St. v. Bullman, 2009 MT 37, 349 M 228, 203 P3d 768 (2009).

Alcohol-Related Sentencing Condition for Incest Conviction Affirmed: As sentencing conditions following conviction for felony incest, the sentencing court required Heddings to abstain from and be tested for alcohol and drugs. Heddings argued that the alcohol-related conditions should be stricken because they were unrelated to the crime or to Heddings himself. Citing St. v. Stephenson, 2008 MT 64, 342 M 60, 179 P3d 502 (2008), the Supreme Court noted that a sentencing condition is illegal if: (1) the sentencing court lacked statutory authority to impose it; (2) the condition falls outside the parameters of the applicable sentencing statutes; or (3) the sentencing court did not adhere to affirmative mandates of the applicable sentencing statutes. Here, the presentence investigation revealed that Heddings was a situational, opportunistic child molester and that allowing him to drink would give him more opportunities to fail and increase the likelihood of reoffending. Heddings maintained that the incest did not involve the use of alcohol, but he did not challenge the accuracy of the findings. Thus, there was a nexus between the alcohol-related conditions and Heddings as an offender. It was within the sentencing court's discretion to impose conditions that were reasonable and necessary for rehabilitation or for the protection of the victim or society, and the Supreme Court affirmed. St. v. Heddings, 2008 MT 402, 347 M 169, 198 P3d 242 (2008).

No Error in Ordering Second Psychosexual Evaluation in Incest Case to Provide Updated Information for Risk Assessment: Having been convicted of eight counts of incest, the state requested that an independent second psychosexual evaluation be performed on Hamilton based on changed circumstances and because Hamilton's chosen evaluator opined that Hamilton could be designated a tier 1 low risk to reoffend. The District Court agreed and ordered a second evaluation with an independent evaluator, but Hamilton declined to participate. Without interviewing Hamilton personally, the second evaluator recommended a tier 2 risk designation, which the sentencing court applied. Hamilton appealed on grounds that there were no legal grounds for the state to seek a second evaluation because the first evaluation met the statutory requirements. The Supreme Court held that 46-18-111 does not, by its plain language, provide that only one evaluator may be involved or that only one psychosexual evaluation report may be issued. Because of concerns that Hamilton's first evaluation was not independently conducted and that some of the factors in the first risk assessment had changed, the District Court did not abuse its discretion by ordering a second updated evaluation based on accurate information. St. v. Hamilton, 2007 MT 223, 339 M 92, 167 P3d 906 (2007).

Incest Found Despite Contradictory Testimony of Consent and Age of Victim — Weight of Evidence to Be Determined by Jury: Rennaker was convicted on two counts of incest with his stepdaughter. Although there was some testimony that might have indicated consent and some testimony that Rennaker's stepdaughter might have been confused about how old she was at the time of the first incestuous acts, the Supreme Court found that there was sufficient evidence in the record upon which the jury could have relied to determine that incest had occurred. The credibility of the testimony favoring Rennaker and the weight to be accorded that testimony were therefore for the jury to determine. St. v. Rennaker, 2007 MT 10, 335 M 274, 150 P3d 960 (2007).

Test Whether Witness May Testify as Expert on Child Abuse: Factors in the three-part test set out in St. v. Scheffelman, 250 M 334, 820 P2d 1293 (1991), for whether a witness may testify as an expert on child abuse are: (1) the expert must have extensive first-hand experience with children who both have and have not been sexually abused; (2) the expert must have a thorough and current knowledge of the professional literature on child abuse; and (3) the expert must have objectivity and neutrality regarding individual cases. In Riggs's case, the state called a child abuse expert who met the qualifications but who had a therapeutic relationship with one of the victims to testify concerning interviewing techniques applied in a sexual abuse investigation. Riggs contended that the trial court erred by allowing the expert to testify and by limiting the defense's ability to cross-examine the expert. The Supreme Court disagreed on both issues. Given the limited scope of the expert's testimony, the objectivity with which the expert could testify regarding interviewing techniques was not susceptible to being compromised by the therapeutic relationship with one of the victims, so the trial court did not err in qualifying the witness as an expert. Additionally, Riggs was afforded a fair and full opportunity to expose any potential bias of the expert, so Riggs's right to confront witnesses was not infringed. St. v. Riggs, 2005 MT 124, 327 M 196, 113 P3d 281 (2005). See also St. v. Whitlow, 285 M 430, 949 P2d 239 (1997).

Expert Testimony Not Targeting Defendant's State of Mind During Crimes Properly Admitted: In Sandrock's trial for sexual intercourse without consent, incest, and witness tampering, Sandrock maintained that he was suffering from a mental disease or defect and could not have committed the crimes because he could not have formed the requisite mental state. A medical expert testified that although Sandrock was an oddball, he knew right from wrong when he wrote several letters to his wife outlining his intended actions. Sandrock moved for a mistrial because the expert's testimony violated the prohibition on ultimate issue testimony. The motion was denied, and on appeal, the Supreme Court affirmed. Although a medical expert may not offer an opinion on the ultimate issue of whether a defendant had a particular state of mind that is an element of an offense, the expert may state the nature of a medical examination and the medical or psychological diagnosis of the defendant's mental condition, and testimony in the form of an opinion or inference that would otherwise be admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact. Here, the expert's testimony did not target the ultimate issue of whether Sandrock actually possessed the requisite mental states at the time that the crimes were committed, so the mistrial motion was properly denied. St. v. Sandrock, 2004 MT 195, 322 M 231, 95 P3d 153 (2004). See also St. v. Santos, 273 M 125, 902 P2d 510 (1995).

Generalized Expert Testimony Regarding Sexual Abuse and Religious Manipulation and Control Properly Admitted in Sexual Intercourse Without Consent, Incest, and Witness Tampering Case: In Sandrock's trial for sexual intercourse without consent, incest, and witness tampering, an expert testified regarding sexual abuse and religious manipulation and control based on experiences in a Christian sect. Sandrock moved for mistrial on grounds that the testimony was irrelevant and tended to supplant the state's need to prove Sandrock's mental state. The motion was denied, and on appeal, the Supreme Court affirmed. The expert did not provide any testimony specific to Sandrock, but rather provided the jury a context within which to understand the intricacies of religious groups in general, so the court concluded that the testimony was relevant. Further, the testimony did not prejudice Sandrock because Sandrock himself admitted to controlling his wife and daughters, and the expert never stated that Sandrock exhibited or performed the beliefs that were typical of the religious groups about which the expert testified in general. The mistrial motion was properly denied. St. v. Sandrock, 2004 MT 195, 322 M 231, 95 P3d 153 (2004).

Mandatory Minimum Sentence for Incest Properly Applied — Victims Under Age Sixteen: Bailey was convicted of incest with two victims under 16 years old, and Bailey was more than 3 years older than both victims. The District Court determined that subsection (4) of this section required the imposition of a mandatory minimum sentence of 4 years and sentenced Bailey to 10 years with the Department of Corrections, with 6 years suspended, on each count. Bailey asserted error, but the Supreme Court examined the sentence for legality and affirmed. The 4-year mandatory minimum sentence in subsection (4) of this section clearly applied, and 46-18-205 did not come into play because none of the exceptions in 46-18-222 to the mandatory minimum sentence for incest existed, so the District Court did not err in sentencing Bailey. St. v. Bailey, 2004 MT 87, 320 M 501, 87 P3d 1032 (2004), following St. v. Fauque, 2000 MT 168, 300 M 307, 4 P3d 651 (2000).

Sufficient Evidence of Sexual Contact to Preclude New Trial on Incest Charge: After the jury convicted Bailey of two counts of incest, Bailey moved for a new trial on grounds that there was insufficient evidence to support the verdict on one count, but the motion was denied. The child victim had been ruled incompetent to testify, and none of the expert witnesses testified regarding any specific incident of sexual contact between Bailey and the child. However, the child's mother did testify regarding an incident when she found Bailey and the victim in bed, which provided sufficient evidence for the jury to conclude that sexual contact occurred during the time in question, so denial of Bailey's motion for a new trial was not an abuse of discretion. St. v. Bailey, 2004 MT 87, 320 M 501, 87 P3d 1032 (2004).

Lack of Remorse Not Sole Sentence Enhancement Factor — Incest Sentence Affirmed: Defendant contended that the sentencing court erred in augmenting a sentence for incest simply because defendant did not show remorse or admit guilt. The Supreme Court noted that St. v. Shreves, 2002 MT 333, 313 M 252, 60 P3d 991 (2002), prohibits enhancement of a sentence solely because a defendant is not remorseful or refuses to be accountable for the defendant's conduct. However, in this case, the sentencing court did not rely solely on defendant's attitude in enhancing the incest sentence but also considered defendant's risk of reoffending, risk to society, prospects for rehabilitation, character, background, history, and mental and physical functioning. Thus, Shreves was distinguishable, and the sentence was affirmed. St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004).

Child Incest Victim's Testimony Not Tainted by Interview Technique — Directed Verdict Denied: Following Gardner's incest conviction, he moved for a directed verdict, attacking the victim's credibility, criticizing the police investigation, and asserting that no medical evidence existed to support sexual abuse. The motion was denied, and Gardner appealed. A directed verdict of acquittal is appropriate only when there is no evidence to support a guilty verdict. Although not required, the District Court conducted a taint hearing to determine whether the child's testimony was rendered irremediably unreliable by the investigative process and determined that it was not. The court also heard testimony that no custody issues existed that may have motivated the mother to coax an adverse statement from the child about her father. The motion for a directed verdict was properly denied. On the issue of medical evidence, the Supreme Court noted that a conviction for a sex offense may be based entirely on uncorroborated evidence of the victim, even if the victim is a child, and that the credibility and weight of witness testimony are determined by the trier of fact. In this case, Gardner's allegations in conflict with his daughter's testimony constituted questions for the trier of fact, which the jury resolved against Gardner. Viewed in a light most favorable to the prosecution, a rational jury could have found the essential elements of incest beyond a reasonable doubt. The Supreme Court affirmed. St. v. Gardner, 2003 MT 338, 318 M 436, 80 P3d 1262 (2003), followed, with regard to allowing a conviction for a sex offense based entirely on the testimony of the child victim, in St. v. Skinner, 2007 MT 175, 338 M 197, 163 P3d 399 (2007).

Rebuttal Testimony Offered to Refute Defendant's Theory of Child Incest Victim's Conduct Properly Allowed: During the state's case in chief, a child incest victim's mother testified that on one occasion when the child was visiting her father, the child had called and requested to be picked up early because her father had scared her and that the touching of the child by the father had begun when the child called to be picked up. During the defendant's case in chief, Gardner offered a different explanation as to why the child was frightened that day. The District Court then allowed rebuttal testimony from the mother and a friend regarding the child's demeanor after being picked up. Gardner asserted that it was error to allow the rebuttal testimony because it did not contain any facts to rebut Gardner's explanation. The Supreme Court held that the District Court did not err in allowing the rebuttal testimony because it could be viewed as tending to contradict or disprove the alternate theory and evidence offered by Gardner, so allowing the testimony was within the trial court's discretion. St. v. Gardner, 2003 MT 338, 318 M 436, 80 P3d 1262 (2003).

Improper Consideration of Hearsay Evidence Corroborating Testimony of Child Sexual Abuse Victim — Trustworthiness of Child's Statement Considering Totality of Circumstances: Defendant convicted of incest contended on appeal that the District Court erred in determining that the child victim's hearsay statements were admissible under the residual exception of Rule 804(b)(5), M.R.Ev. (Title 26, ch. 10), because the statements had comparable circumstantial guarantees of trustworthiness, in violation of defendant's constitutional right to confront witnesses. Citing Idaho v. Wright, 497 US 805 (1990), the Supreme Court noted that reliance upon exceptions to the hearsay rule is permissible if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility. Factors often identified by courts as indicia of the reliability of statements made by child witnesses in sexual abuse cases, such as spontaneity, use of language unexpected of a child of similar age, and lack of motive to fabricate, all relate to whether the child was likely to be telling the truth when the statement was made, but do not include factors that may be added using hindsight. Thus, in child sexual abuse cases, a court may not consider corroborating evidence when making a determination about the admissibility of hearsay statements under the confrontation clause, and the District Court in this case erred as a matter of law in doing so. However, after considering the totality of circumstances exclusive of the corroborating evidence, the Supreme Court found that the child's statements were supported by the particularized guarantees of trustworthiness necessary to withstand a confrontation clause challenge, so the District Court's admission of the child's hearsay statements was affirmed. St. v. S.T.M., 2003 MT 221, 317 M 159, 75 P3d 1257 (2003). See also St. v. Osborne, 1999 MT 149, 295 M 54, 982 P2d 1045 (1999).

Closing Arguments Regarding Defendant's Failure to Present Evidence Contradicting Testimony of Prosecution Witnesses Not Warranting Mistrial: During closing arguments in Rodarte's incest trial, the prosecution referenced Rodarte's failure to present evidence that contradicted the testimony of prosecution witnesses. Citing U.S. v. Williams, 739 F2d 297 (7th Cir. 1984), and U.S. v. Viera, 819 F2d 498 (5th Cir. 1987), Rodarte contended that a mistrial should have been granted because it was error for the prosecution to draw inferences from defendant's failure to call a particular witness. The Supreme Court distinguished Rodarte's cited cases, noting that although it is improper for the prosecution to comment on the failure of a defendant to testify on the defendant's own behalf, the prosecution is permitted to point out facts at issue that could have been controverted by persons other than the defendant, but were not. St. v. Rodarte, 2002 MT 317, 313 M 131, 60 P3d 983 (2002). See also Lockett v. Ohio, 438 US 586 (1978).

Statement and Letter Related to Incest Charge Properly Admitted as Evidence: In Rodarte's incest trial, he sought to exclude statements that he made to his wife's brother that he thought that his own daughter was "hot" and that he didn't worry about sex because he could just go to another bedroom, as well as letters that he sent to his wife stating that if she and his daughter did not show up in court, he could "get off and get out". The District Court allowed the evidence, and

Rodarte appealed, contending that the evidence was neither a part of the case nor an admission or confession, and thus was inadmissible. The Supreme Court disagreed. The prosecution is permitted to introduce evidence that tends to explain the circumstances surrounding the alleged offense if the evidence is relevant, probative, and competent. The evidence in this case was not wholly independent of the crime charged and tended to show guilt, so it was admissible, and Rodarte's motion for a mistrial on those grounds was properly denied. St. v. Rodarte, 2002 MT 317, 313 M 131, 60 P3d 983 (2002).

Facts Regarding Defendant's Prison Incarceration and Probationary Status Properly Admitted as Inextricably Linked to Circumstances Surrounding Incest Charge: At Bauer's incest trial, the District Court barred mention by the prosecution of Bauer's two prior felony convictions, but did rule that the fact of Bauer's lengthy prior prison incarceration and status as a probationer at the time of the incest were admissible as part of the transaction. Bauer contended on appeal that the incarceration and probation information were highly prejudicial and constituted evidence of other crimes that should have been admitted only after the appropriate notice under the Just rules. The state cited the transaction rule in 26-1-103, which provides that when a declaration, act, or omission forms part of a transaction that is itself the fact in dispute or evidence of that fact, then the declaration, act, or omission is admissible as part of the transaction. The Supreme Court agreed with the state. In order for the jury to understand the context of the alleged incest, the victim needed to explain that she had not known or seen her father because he had been incarcerated since she was a small child. Thus, the District Court acted conscientiously and within the bounds of reason in allowing the facts of Bauer's prison incarceration and probationary status into evidence. St. v. Bauer, 2002 MT 7, 308 M 99, 39 P3d 689 (2002).

Sufficient Evidence of Incest Based on Uncorroborated Testimony of Victim: Bauer appealed an incest conviction on grounds that the evidence produced at trial was insufficient to support the jury's verdict. The victim's testimony served as the basis for the conviction, and Bauer maintained that the victim's story was inherently incredible because of internal contradictions. In particular, there was some discrepancy in the victim's testimony regarding the number of times that sexual intercourse occurred and concerning certain details involved in the incidents. However, the victim clearly testified that her father engaged in sexual intercourse with her on one of the dates in question. Even though the testimony was uncorroborated, the evidence was sufficient to establish the essential elements of incest, and Bauer's conviction was affirmed. St. v. Bauer, 2002 MT 7, 308 M 99, 39 P3d 689 (2002). See also St. v. Rennaker, 2007 MT 10, 335 M 274, 150 P3d 960 (2007).

Unredacted Reference to Expiration Date of Felony Sentences — Harmless Error: At Bauer's incest trial, the District Court barred mention by the prosecution of Bauer's two prior felony convictions, but did rule that the fact of Bauer's lengthy prior prison incarceration and status as a probationer at the time of the incest were admissible as part of the transaction. To comply with the ruling, the state redacted the portions of two travel permits that listed Bauer's actual felony offenses; however, the state failed to black out the dates that the felony sentences would expire. The trial court ordered the state to redact the sentence expiration dates as well, and offered to instruct the jury to disregard any reference to Bauer's prior felony convictions on the travel permits. Defense counsel contended that a corrective instruction would only draw more attention to the prior felonies, and moved for a mistrial instead. The motion was denied and Bauer appealed. The Supreme Court applied the two-part analysis in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001) to determine if the error prejudiced Bauer's right to a fair trial. The erroneous presentation to the jury of the unredacted dates did constitute trial error, however, it was harmless beyond a reasonable doubt and did not contribute to Bauer's conviction or prejudice his right to a fair trial. The District Court did not abuse its discretion in denying Bauer's motion for a mistrial. St. v. Bauer, 2002 MT 7, 308 M 99, 39 P3d 689 (2002).

Evidence of Slight Oral Penetration Sufficient to Prove Sexual Intercourse: In Duffy's trial for sexual intercourse without consent and incest with his daughter, she testified that she did not touch Duffy's penis, even though she had it in her mouth. Duffy contended that there was insufficient evidence for conviction. Under the definition of sexual intercourse, touching is not necessary. Rather, penetration of the mouth, however slight, is sufficient to meet the definition. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000).

No Claim to Unconstitutional Effect of Mandatory Minimum Sentence When Defendant Not Subject to Mandatory Minimum: Duffy was sentenced to 20 years for each offense of sexual abuse of his daughters, who were less than 16 years old at the time of the offense. On appeal, Duffy claimed that because of their ages, 45-5-503 and this section required a minimum 4-year prison term, which deprived him of equal protection and due process because he did not qualify for the exception to the minimum term in 46-18-222(5) regarding instances involving a lack of serious bodily injury, asserting that he was similarly situated to persons convicted of sexual assault but treated differently because those offenders could qualify for the exception. However, before Duffy could claim standing to complain that he was unconstitutionally affected by the mandatory minimum sentences, he must have been subjected to those sentences, which was not the case here. Thus, Duffy was not affected by the disparate treatment of sex offenders based on the nature of the offenses and lacked standing to challenge the sentencing scheme on equal protection or due process grounds. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000).

No Prosecutorial Misconduct in Eliciting Facts to Aid Witness Recollection, Disclosing Prior Witness Conversations, or Offering Statements in Rebuttal Based on Testimony: Defendant alleged several instances of prosecutorial misconduct in his trial for sexual intercourse without consent and incest with his daughter. The prosecutor had instructed the daughter that the assault occurred in Montana rather than Idaho, thereby avoiding Duffy's challenge to Montana's jurisdiction. However, the prosecutor was not prohibited from discovering facts to aid the daughter's recollection of where the incident occurred and doing so was not misconduct. Duffy also contended that the prosecutor's questioning of a detective about a telephone call to Duffy was misconduct because the prosecutor did not disclose the conversation, but the trial court cured any potential for violating Duffy's substantial rights by instructing the jury to disregard the testimony and by refusing to give the prosecution's flight instruction that was the basis for that line of inquiry. Lastly, Duffy claimed misconduct when the prosecutor elicited testimony from the daughter regarding her desire to see Duffy convicted and then later reiterated that testimony during rebuttal. However, Duffy's own counsel opened the door for the testimony, and the prosecutor was then free to reexamine the daughter for the purpose of discovering the daughter's motive; therefore, the prosecutor's subsequent comments were not construed as misconduct warranting a mistrial. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000), followed in St. v. Hayden, 2008 MT 274, 345 M 252, 190 P3d 1091 (2008). See also St. v. Berger, 1998 MT 170, 290 M 78, 964 P2d 725 (1998), and St. v. Soraich, 1999 MT 87, 294 M 175, 979 P2d 206 (1999).

Procedural Change in Statute of Limitations Not Violative of Ex Post Facto Protection: At the time that Duffy was alleged to have committed sexual intercourse without consent and incest with his daughter in 1986, the applicable statute of limitations provided that a prosecution be commenced within 5 years after the offense if the victim was less than 16 years old at the time that the offense occurred. In 1989, the statute was amended to provide that a prosecution be commenced within 5 years after the victim reached 18 years of age if the victim was less than 18 at the time of the offense. In Duffy's case, if the statute of limitations had not been amended, prosecution would have been barred, so Duffy maintained that applying the 1989 statute of limitations was an unlawful application of the constitutional ex post facto provisions. The Supreme Court applied the ex post facto test in St. v. Leistiko, 256 M 32, 844 P2d 97 (1992), which established that an ex post facto violation occurs when: (1) the law is retrospective; and (2) the law disadvantages the offender. Duffy failed to satisfy the second part of the Leistiko test because the 1989 change in the statute of limitations did not alter the definition of or punishment for the crimes, but merely expanded the time in which the punishment might be imposed and thus did not violate constitutional ex post facto provisions. The conduct of which Duffy was accused was illegal and punishable both before and after the statute of limitations was extended. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000). See also U.S. v. Marrow, 177 F3d 272 (5th Cir. 1999).

Reasonableness of In Camera Review of Exculpatory Evidence in Balancing Defendant's Right to Review With Victim's Right to Confidentiality: Duffy sought access to confidential reports, many of which were handwritten notes from mental health professionals who were involved in the treatment of Duffy's daughters whom Duffy was alleged to have assaulted. The District Court examined the documents in camera and ordered a redacted one-page copy to be disclosed to defense counsel. Duffy asserted that the in camera procedure was unfair because review by a judge is no substitute for review by the defendant's advocate. However, equally important to the defendant's right to discover exculpatory evidence is the victim's right to protect confidential relations. When these competing interests conflict, they must be balanced by the District Court through in camera review, and the court did not err in doing so. To allow defense counsel general access to a victim's confidential records could adversely affect the state's interest in uncovering and treating abuse. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000), following St. v. Donnelly, 244 M 371, 798 P2d 89 (1990). See also Pa. v. Ritchie, 480 US 39 (1986).

Failure to Prosecute Both Parties in Incest Case Not Violative of Equal Protection — Prosecutorial Discretion: Harris was convicted of incest with his adopted daughter. On appeal, he argued that if he were guilty of incest, his adopted daughter was also guilty of incest and that the state's failure to also prosecute her for the crime amounted to a violation of Harris's constitutional right to equal protection against selective prosecution. The Supreme Court disagreed. The state's decision not to prosecute Harris's daughter was a matter of prosecutorial discretion. Because Harris did not show that the state's decision was based on any arbitrary, unjustifiable standard, such as race, religion, or other arbitrary classification, he did not establish that his equal protection right was violated by selective prosecution. St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881, 56 St. Rep. 481 (1999), following St. v. Lemmon, 214 M 121, 692 P2d 455 (1984), and St. v. Stanko, 1998 MT 323, 292 M 214, 974 P2d 1139, 55 St. Rep. 1313 (1998), and distinguishing St. v. Fuhrmann, 278 M 396, 925 P2d 1162, 53 St. Rep. 966 (1996), and St. v. Ingraham, 284 M 77, 945 P2d 16, 54 St. Rep. 614 (1997).

Guilty Verdict on Incest Charge Not Inconsistent With Acquittal of Sexual Intercourse Without Consent: Harris contended that because the jury acquitted him of a charge of sexual intercourse without consent with his adopted daughter, it could not then find him guilty of incest during the same period. However, the period of time covered under the incest charge included an additional 5-year period that was not included in the sexual intercourse without consent charge, so it was not legally inconsistent to acquit Harris of sexual intercourse without consent and find him guilty of incest. St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881, 56 St. Rep. 481 (1999).

Error in Denial of Continuance so That New Psychosexual Evaluation Might Be Performed Without Polygraph Test: As part of a plea agreement in an incest case, Anderson was required to voluntarily submit to a psychosexual evaluation, which included a polygraph test. Results of the test were considered in the preparation of the presentence sexual offender evaluation. Anderson moved for a continuance of the sentencing hearing so that a new psychosexual evaluation could be performed without the use of a polygraph, but the continuance motion was denied. Noting that pursuant to St. v. Staat, 248 M 291, 811 P2d 1261 (1991), polygraph evidence may not be used in any proceeding in a Montana court, the Supreme Court reversed and ordered a new psychosexual evaluation performed without the use of a polygraph and the preparation of a new presentence sexual offender evaluation in light of the new psychosexual evaluation. St. v. Anderson, 1999 MT 58, 293 M 472, 977 P2d 315, 56 St. Rep. 243 (1999), followed in In re N.V., 2004 MT 80, 320 M 442, 87 P3d 510 (2004).

Incest Not Included Offense of Sexual Intercourse Without Consent: McQuiston contended that his conviction for both incest and sexual intercourse without consent violated double jeopardy protections because under 46-11-410, a defendant may not be convicted of more than one offense if one offense is an included offense in another, as defined in 46-1-202. The Supreme Court held that incest is not an included offense of sexual intercourse without consent but rather is a distinct and wholly separate offense, each crime requiring proof of distinct elements that the other does not have. McQuiston's conviction for both crimes was not a double jeopardy violation. St. v. McQuiston, 277 M 397, 922 P2d 519, 53 St. Rep. 729 (1996), following St. v. Sor-Lokken, 247 M 343, 805 P2d 1367 (1991).

Sufficient Evidence of Intent to Arouse Defendant's Sexual Desires to Prove Incest: Testimony of an incest victim that Riley touched intimate parts of her body, including her breasts and pubic area, and that Riley appeared to be aroused during these incidents was sufficient to infer that Riley touched the victim with the intent to arouse or gratify his sexual desires. Testimony of a more explicit or graphic nature was unnecessary to support a conviction for incest. St. v. Riley, 270 M 436, 893 P2d 310, 52 St. Rep. 258 (1995), followed in St. v. Olson, 286 M 364, 951 P2d 571, 54 St. Rep. 1449 (1997).

Simulated Intercourse Not Constituting Incest — Finding of Accountability Improper: Under 45-2-302, a person is legally accountable for the conduct of another arising from the commission of an underlying offense. Henderson was charged with accountability for incest involving his stepchildren, but the state failed to produce evidence on which the jury could find that the children committed incest because none of the children engaged in intimate touching for the purpose of sexual arousal or gratification, an essential element of the offense. Henderson could not be legally accountable for an offense that was not proved. Henderson's motion for a directed verdict should have been granted, and the case was remanded for entry of a directed verdict of acquittal on the accountability charge. St. v. Henderson, 265 M 454, 877 P2d 1013, 51 St. Rep. 606 (1994).

Solicitation of Incest: Having been charged with solicitation of incest, Sage contended that the crime of solicitation applies only when a person requests another to commit a crime and not when the person solicits a victim. However, under 45-4-101, the status of the person solicited is neither an element of nor a defense to the crime of solicitation. Sage completed the crime when he asked his daughter to aid him in performing incest. Sage's intent as solicitor was the basis of the crime. St. v. Sage, 255 M 227, 841 P2d 1142, 49 St. Rep. 978 (1992).

No Prejudice in Prosecutor's Voir Dire Questioning — Failure to Request Cautionary Instruction or Mistrial: Defendant claimed that the prosecutor's questions to prospective jurors during voir dire in regard to the juror's potential discomfort in telling a group of people the details of a first sexual experience denied him a fair trial because he was not allowed to present any possible explanation for an incest victim's motives, biases, and prejudices other than defendant's guilt to the offense charged. The Supreme Court found no prejudice in the questions because the thrust of the comment was not to suggest that the alleged acts were the victim's first sexual experience but rather to elicit a response from the jury panel as to the potential difficulty of the victim to testify about the alleged acts of incest. Although defendant objected to the prosecutor's comment, he did not request the trial court to admonish the panel or give a cautionary instruction, nor did he request a mistrial. Under these circumstances, defendant was not denied a fair trial as a result of prosecutorial misconduct. St. v. Rhyne, 253 M 513, 833 P2d 1112, 49 St. Rep. 577 (1992). See also St. v. Hildreth, 267 M 423, 884 P2d 771, 51 St. Rep. 1086 (1994).

Assault and Sexual Intercourse Without Consent — Grandparent-Grandchild Relationship — Sentencing Under Incest Statute Not Required: When defendant was charged and convicted of sexual assault and sexual intercourse without consent, the District Court properly sentenced defendant under the sexual assault and sexual intercourse without consent statutes. Defendant's argument that he should have been sentenced under the incest statute because he and the victim had a grandparent-grandchild relationship has no merit. Such a relationship would not serve to alter the charges, convictions, or sentences against the defendant. St. v. Walters, 247 M 84, 806 P2d 497, 48 St. Rep. 102 (1991).

Letter of Admission Sufficient to Prove Incest: An admission in a letter from defendant in prison that he intimately touched his stepdaughter, although excluding what part of her body he touched, was sufficient to satisfy beyond a reasonable doubt that defendant knowingly had sexual contact with his stepdaughter and was thereby guilty of incest. St. v. Kao, 245 M 263, 800 P2d 714, 47 St. Rep. 2100 (1990).

Expert's Testimony Allowable as to Credibility of Child Abuse Victim if Child Also Testifies: In determining whether the District Court properly refused to allow into evidence out-of-court statements made by a child abuse victim to a counselor, the Supreme Court held that testimony by an expert evaluating the credibility of a witness is inadmissible except when the witness is a child victim of sexual assault and the child also testifies. However, the expert may not identify the alleged perpetrator because identification requires only the common logic that is well within the capacity of a lay jury. St. v. J.C.E., 235 M 264, 767 P2d 309, 45 St. Rep. 2373 (1988).

Hearsay Admissible When Alleged Child Abuse Victim Unavailable as Witness — Child Hearsay Guidelines Established: In determining whether the District Court properly refused to allow into evidence out-of-court statements made by a child abuse victim to a counselor and a social worker, the Supreme Court held that Rule 804(b)(5), M.R.Ev. (Title 26, ch. 10), henceforth is the rule under which proferred hearsay, other than expert testimony, is considered for admissibility in cases of sexual abuse of children when the alleged victim is unavailable as a witness. The court also established guidelines for consideration by the trial judge in determining the admissibility of hearsay testimony proffered when the alleged child victim is unavailable. In using these guidelines, the question of admissibility remains in the discretion of the trial judge. St. v. J.C.E., 235 M 264, 767 P2d 309, 45 St. Rep. 2373 (1988), followed in St. v. Osborne, 1999 MT 149, 295 M 54, 982 P2d 1045, 56 St. Rep. 589 (1999).

Medical Diagnosis and Treatment Exception — Applicable Only to Medical Doctors: In determining that the District Court properly refused to allow into evidence out-of-court statements made by a child abuse victim to a counselor, the Supreme Court declined to extend the medical diagnosis and treatment exception under Rule 803, M.R.Ev. (Title 26, ch. 10), beyond medical doctors. The counselor is not licensed to render medical diagnoses and therefore cannot testify about such diagnoses under this exception. St. v. J.C.E., 235 M 264, 767 P2d 309, 45 St. Rep. 2373 (1988).

Incest Conviction Reversed — Retrial for Sexual Assault Barred by Double Jeopardy: The prosecution's proof of sexual contact is the same in both the incest statute and the sexual assault statute. The prosecution in the original trial on a charge of incest, reversed on appeal, barred retrial on a charge of sexual assault. A defendant whose conviction was reversed because the evidence was insufficient as a matter of law could not be retried. The U.S. Supreme Court reversed, holding the constitution permits a retrial after a conviction is reversed because of a defection in the charging instrument. St. v. Hall, 224 M 187, 728 P2d 1339, 43 St. Rep. 2120 (1986), reversed, 481 US 400, 95 L Ed 2d 354, 107 S Ct 1825 (1987).

Retroactive Enforcement of Incest Statute — Unconstitutional Ex Post Facto Application: An April 1983 amendment added "stepdaughter" to the list of prohibited incestuous relationships; however, the amendment did not become effective until October 1, 1983, a fact that went unnoticed through trial and sentencing for acts committed July 2, 1983. The imposition of a sentence for a conviction under statutes not in force at the time the offense was committed was held to be an ex post facto application of the law and therefore unconstitutional under Art. II, sec. 31, Mont. Const. St. v. Hall, 224 M 187, 728 P2d 1339, 43 St. Rep. 2120 (1986), reversed regarding double jeopardy, 481 US 400, 95 L Ed 2d 1354, 107 S Ct 1825 (1987).

Privilege Applies to Statements of "Participant" Only: Section 41-5-402 (renumbered 41-5-1303) does not render privileged the testimony of defendant's mother concerning alleged acts of sexual abuse committed by defendant when he was a minor. No statement of a "participant" is involved. Thus, the mother may testify about the prior incidents in a criminal prosecution of defendant for incest. St. v. T.W., 220 M 280, 715 P2d 428, 43 St. Rep. 368 (1986).

Marital Status of Parties: There was no substantial change in the charge under 94-705, R.C.M. 1947 (a forerunner of this section) where the court allowed the State to amend an information charging defendant with incest by changing "fornication" to "adultery". Whether the defendant was married or unmarried at the time was not a material ingredient of the offense. In either event the defendant was guilty, if the intercourse charged was proved. St. v. Kuntz, 130 M 126, 295 P2d 707 (1956).

Single Act: A single act of sexual intercourse was sufficient to support a conviction under section 94-705, R.C.M. 1947 (a forerunner of this section), and it was not necessary that fornication be open as required under the section making fornication a crime. Territory v. Corbett, 3 M 50 (1877).

45-5-508. Aggravated sexual intercourse without consent.

Compiler's Comments

Effective Date: This section is effective October 1, 2017.

Applicability: Section 8, Ch. 279, L. 2017, provided: "[This act] applies to crimes committed on or after [the effective date of this act]." Effective October 1, 2017.

45-5-511. Provisions generally applicable to sexual crimes.

Criminal Law Commission Comments

Source: The source of subparts (1) and (2) is M.P.C. 1962, § 213.6. Subpart (3) is new.

This section rejects the concepts of "virtue," "chastity," or "good repute" as possible defenses in sex crimes but does envision cases of precocious fourteen (14) year old girls and even very young prostitutes who might be the "victimizers," rather than the victims.

Subsection (2) precludes a prosecution for rape where the woman is living with the accused as his wife, regardless of the legal validity of their marital status. Nor is it possible to prosecute where the spouses have been living apart without benefit of a judicial order. There is the possibility of consent in the resumption of sexual relations coupled with the special danger of fabricated accusations. [But see in this regard the 1979 and 1985 amendments noted below in the annotator's note.]

Conditions affecting a woman's capacity to "control" herself sexually will not involve criminal liability if her own actions were voluntary in bringing about the result.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: Deleted former (2) that read: "(2) Whenever the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as husband and wife regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart whether under a decree of judicial separation or otherwise. Where the definition of an offense excludes conduct with a spouse, this shall not preclude conviction of a spouse in a sexual act which he or she causes another person, not within the exclusion, to perform"; deleted former (3) that read: "(3) In a prosecution under the preceding sections on sexual crimes (45-5-502 through 45-5-504) in which the victim's lack of consent is based solely upon his incapacity to consent because he was mentally incapacitated, it is a defense to such prosecution that the victim was a voluntary social companion of the defendant and the intoxicating substance was voluntarily and knowingly taken"; in (3), in two places, changed subsection reference; and made minor changes in style. Amendment effective April 27, 1991.

1987 Amendment: Inserted (7) establishing that victim resistance is not required to show lack of consent.

1985 Amendment: Inserted (4) concerning admissibility of evidence of victim's sexual conduct; inserted (5) providing for a hearing out of presence of jury to determine admissibility of such evidence; and inserted (6) providing that evidence of failure to make timely complaint does not raise presumption as to credibility of victim.

Annotator's Note: Subsection (1) represents a complete turnabout from prior law in Montana and elsewhere as to the effect of mistake of age upon liability for "statutory rape". The prevailing view has been that it has no effect and that there is absolute liability for carnal knowledge of the underage girl. This is the case even where both her appearance and her positive statement indicated she was older than the age specified in the statute. St. v. Duncan, 82 Mont. 170, 266 P 400 (1928). The view adopted by this subsection is that an honest and reasonable belief in the existence of circumstances which, if true, would make the act an innocent one is a good defense. This view has been accepted by at least one court. People v. Hernandez, 39 Cal. Rptr. 361, 393 P2d 673 (1964). There is still absolute liability if the child is less than fourteen (14) years.

The 1977 amendment substituted "exclusion" in the first sentence of subsection (2) for "extension"; substituted "husband" in the first sentence of subsection (2) for "man"; and made minor changes in phraseology and punctuation. The 1979 amendment added the words "or otherwise" to subsection (2) following the phrase "under a decree of judicial separation", making prosecution for rape possible where the spouses have been living apart without the benefit of a judicial order. In 1985, 45-5-503 was amended to allow prosecution for sexual intercourse with one's spouse without consent.

Prior to the 1975 amendments there existed in Montana by court dictum, rules requiring immediate outcry by the victim and allowing admission of evidence of prior sexual conduct of the prosecutrix. The 1975 amendments were intended to eliminate an improper defense tactic of putting before the trier of fact the victim's sexual history although irrelevant to the alleged rape and also to eliminate the immediate outcry rule.

Subsections (4) and (5) established the general rule that evidence pertaining to the sexual conduct of the victim is not admissible into evidence at trial. The purpose of this rule is to prevent the trial of the charge against the defendant being converted into a trial of the victim. There are only two exceptions to the general rule prohibiting the use of the victim's sexual conduct as evidence, and both go directly to specific conduct which may be at issue in any given case. The first allows the defendant to introduce evidence pertaining to the victim's prior sexual conduct in relation to himself. Thus, if the victim and defendant have been sexually intimate previous to the alleged rape, the defendant may use evidence to this effect.

The second exception covers cases where the victim may claim that certain physical evidence supports her testimony as, for example, where she claims that semen found in her vagina by a physician after an alleged rape supports her claim that she was raped. The defendant may then introduce evidence to show that in fact she had had sexual intercourse with someone else just previous to the time of the alleged rape. The same kind of evidence would be allowed where the victim claimed that a pregnancy or disease had its origin in an alleged rape, and the defense may show specific instances of the victim's sexual activity to explain a different origin.

The 1975 amendment dealing with the immediate outcry rule had little or no positive effect. It did not eliminate the rule, it raised constitutional questions relating to the defendant's right to have guilt proven beyond a reasonable doubt and it seemingly allowed the trial judge to, in effect, comment on the evidence contrary to the Montana Rules of Evidence. The 1977 addition of subsection (6) eliminated this confusion by rewriting the section so that it clearly removes the common-law presumption in Montana that lack of immediate outcry goes to the prosecutrix's credibility. It also removes any constitutional question on guilt proven beyond a reasonable doubt or question as to whether the judge may comment on the weight of the evidence. The manner in which the immediate outcry rule seems to have been used historically is that it allowed the defense to obtain an instruction from the judge to the jury to the effect that the fact that the victim did not immediately report the alleged rape or seek medical attention or the like, casts doubt on the credibility of her entire story and that the jury should weigh all her testimony in view of this presumption. The amended immediate outcry provision is directed specifically toward preventing this sort of instruction and preventing, therefore, the victim's failure to report the alleged rape immediately from being used to attack her credibility.

Case Notes

Defendant Failed to Meet Threshold Inquiry That Victim's Allegations That Other Male Relatives Sexually Assaulted Her Were False — Evidence Rendered Inadmissible Under Rape Shield Law. St. v. McCaulou, 2022 MT 197, 410 Mont. 291, 518 P.3d 862.

Mazurek Hearing — Rape Shield Exception Regarding Victim's Prior False Accusation of Sexual Assault — District Court Properly Excluded Evidence of Minor's Statement — Forensic Interview and Testimony Unclear — Probative Value of Minor's Statement Limited — District Court Balanced Minor's Rights and Defendant's Right to Confront Accuser. St. v. Hansen, 2022 MT 163, 409 Mont. 495, 515 P.3d 799.

Evidence of Victim's Prior Sexual History Improperly Excluded — Probative Value Not Substantially Outweighed by Danger of Unfair Prejudice — Evidence Not Speculative or Unsupported: The defendant in a sexual abuse case was charged with several offenses in connection with an incident in which he allegedly trapped a 13-year-old girl in the car during a driving lesson and engaged her in a game of escalating "sexual truth or dare" resulting in oral sex and other abuse. The defendant learned that the minor had played an almost identical game of "sexual truth or dare" with a different man 13 days prior to their alleged encounter, resulting in a 1 ½-year "relationship" with the other man that the minor denied multiple times but ultimately admitted to in a separate proceeding. The defendant moved to introduce evidence of the similar encounter and evidence that the minor had lied to protect the other man in order to undermine the minor's credibility at trial. The District Court denied the defendant's motion in limine to address issues regarding the other incident and quashed a subpoena for the other man to testify at trial, citing Montana's rape shield statute. On appeal, the Supreme Court found that the District Court had erred, holding that the evidence of a nearly identical encounter less than 2 weeks prior to the encounter in the case was highly relevant and potentially exculpatory. The District Court's exclusion of the evidence prevented the defendant from presenting a complete defense, and thus the Supreme Court ordered a new trial. St. v. Twardoski, 2021 MT 179, 405 Mont. 43, 491 P.3d 711, distinguished in St. v. Mountain Chief, 2023 MT 147, 413 Mont. 131, 533 P.3d 663, holding that the defendant failed to demonstrate how evidence of the 4-year-old victim's sexual abuse by other men would assist the defendant's defense but instead had significant potential to prejudice the defendant and further bolster the state's case.

Prior History of Prostitution Excluded — Inadmissible Propensity Evidence — Motion to Exclude Proper: The defendant was charged with promoting prostitution of two young women. At trial, the state sought and received an order disallowing the defendant from introducing evidence that one of the women had previously engaged in prostitution. Following his conviction, the defendant appealed, claiming that the woman's prior history was relevant and that the District Court abused its discretion by excluding it. The Supreme Court affirmed, holding that the excluded evidence was not relevant and constituted inadmissible propensity evidence. St. v. Thomas, 2020 MT 281, 402 Mont. 62, 476 P.3d 26.

Defendant Prevented From Presenting Exculpatory Evidence: A defendant appealed his conviction on the grounds that the District Court's application of the rape shield law prevented him from presenting exculpatory evidence put in issue by the state. The Supreme Court reversed and remanded, finding that the District Court had not properly balanced the defendant's constitutional rights against the statutory rights provided by 45-5-511. St. v. Lake, 2019 MT 172, 396 Mont. 390, 445 P.3d 1211.

Victim's Past Sexual Conduct — Weighing of Competing Interests Required for Admissibility Determination: A stepfather accused of sexual abuse of his stepdaughter sought to introduce evidence of a prior incident in which the stepdaughter had initiated sexual contact with her 3-year-old sister. However, the District Court excluded evidence of the past sexual conduct, noting the lack of clear evidence regarding the incident and finding that the evidence was precisely the type of probe the rape shield law was designed to exclude and that the stepfather's constitutional rights did not outweigh the stepdaughter's rights given the circumstances. On appeal, the Supreme Court affirmed, noting approvingly that the District Court had not mechanically applied the rape shield law and had appropriately weighed the parties' competing interests. St. v. Walker, 2018 MT 312, 394 Mont. 1, 433 P.3d 202.

Massage Therapist Guilty of Sexual Intercourse Without Consent — Totality of Circumstances — Definition of Sexual Intercourse — Penetration Analyzed — Threat of Physical Force Supported: A jury found the defendant, a licensed massage therapist, guilty of sexual intercourse without consent while giving his victim a massage. The defendant argued on appeal that the prosecution did not present sufficient evidence to the jury to support the elements of penetration and force. The defendant further argued that testimony of clitoral rubbing did not prove that the vulva was penetrated. The Supreme Court determined that the defendant's arguments that clitoral rubbing did not constitute penetration under the law were without legal merit pursuant to the definition of sexual intercourse in 45-2-101. The Supreme Court held that viewed in a light most favorable to the prosecution, a rational trier of fact could conclude that the totality of the circumstances communicated a threat to the defendant's victim: the two were isolated in an empty office building after hours, the defendant was much larger than his victim, and the defendant persisted in his assault despite the victim's repeated objections. The victim testified that she told the defendant she was uncomfortable before he digitally penetrated her. After the penetration, she told the defendant pointedly to stop. Instead, the defendant returned to her groin area and started rubbing her clitoris. Montana law did not require the victim to push the defendant away, strike out at him, or attempt to flee. A rational jury could find that the defendant's actions communicated a threat of physical force to the victim. Viewing the evidence in the light most favorable to the prosecution, the Supreme Court affirmed the District Court's decision that a rational trier of fact could find all elements of sexual intercourse without consent beyond a reasonable doubt. St. v. Lerman, 2018 MT 5, 390 Mont. 117, 408 P.3d 1008, distinguishing St. v. Haser, 2001 MT 6, 304 Mont. 63, 20 P.3d 1, and St. v. Stevens, 2002 MT 181, 311 Mont. 52, 53 P.3d 356.

Inadmissible Hearsay — Rape Shield — Harmless Error: To the extent that the District Court applied the rape shield law to a victim's conduct, most of the evidence did not relate to the victim's sexual conduct. However, the evidence was inadmissible hearsay within hearsay or it was offered as an insufficient basis to prove a theory that the victim's health problems led her to make the sexual assault allegations. Because it was inadmissible at trial, the error was harmless. St. v. Daffin, 2017 MT 76, 387 Mont. 154, 392 P.3d 150.

Proper Suppression of Evidence on Young Victim's Sexuality — Rape Shield Statute: The defendant was charged with sexual abuse of children and sexual assault. The state successfully filed a motion to exclude any evidence of the 13-year-old victim's alleged bisexuality at trial. After his conviction, the defendant appealed, claiming that the exclusion of that evidence violated his confrontation rights. The defendant claimed that the evidence provided context; however, the District Court ruled that the evidence was not being offered to rebut or contextualize but, rather, would serve to prejudice the victim. On appeal, the Supreme Court affirmed, finding that the evidence was properly suppressed under the rape shield statute. St. v. Aguado, 2017 MT 54, 387 Mont. 1, 390 P.3d 628.

Prosecutor's Opening Statement Comments Not Improper — No Prejudice of Right to Fair Trial: In the defendant's trial for sexual abuse of his step-granddaughter, the District Court did not abuse its discretion in denying the defendant's motion for mistrial. The prosecutor's comments during the opening statement that the mother and the victim wanted to avoid trial and to keep the matter within the family was substantiated by evidence that the state intended to present and were not improper and did not prejudice the defendant's right to a fair trial. St. v. Pierce, 2016 MT 308, 385 Mont. 439, 384 P.3d 1042.

Closure of Mazurek Hearing — No Violation of Right to Public Trial: The defendant was accused of molesting his girlfriend's 11-year-old daughter. At trial, the defendant wanted to introduce evidence of the daughter accusing two other men of sexual assault when she was 4 years old. The District Court closed the hearing to determine whether that evidence would be allowed, a process also known as a Mazurek hearing after State ex. rel. Mazurek v. 4th Judicial District Court, 277 Mont. 349, 922 P.2d 474 (1996). After the District Court disallowed the evidence, a jury convicted the defendant. On appeal, the defendant claimed that the District Court had violated his right to a public trial when it closed the Mazurek hearing. The Supreme Court disagreed and affirmed, ruling that the factors of the victim's age and her well-being, as well as the statutory safeguards in 41-3-205 and 45-5-511, weighed in favor of closing the hearing. St. v. Hoff, 2016 MT 244, 385 Mont. 85, 385 P.3d 945.

Improper Audience Comment During Closing — No Miscarriage of Justice — Request for Plain Error Review Declined: During the defendant's trial on six counts of incest, an audience member interrupted closing argument by stating: "Well, I'd like to say that God is faithful and just to those who confess their sins." The District Court promptly chastised and warned the audience member, and defense counsel did not object. After his conviction, the defendant appealed to the Supreme Court, arguing that the court should apply the plain error rule and conclude that the District Court had committed reversible error by failing to directly address the comment. The Supreme Court agreed that the comment was improper but, concluding that the comment did not cause manifest miscarriage of justice, affirmed the District Court. St. v. Griffin, 2016 MT 231, 385 Mont. 1, 386 P.3d 559.

Exclusion of Evidence Under Rape Shield Law Proper — Plain Error Review Declined: The defendant was convicted of six felony charges, including incest, sexual assault, and sexual intercourse without consent. On appeal, the Supreme Court affirmed, holding that the rape shield law had been properly applied and had precluded the defense from presenting evidence and argument concerning prior incidents of sexual abuse involving three of the victims. The defense claimed that the prior abuse had inflicted posttraumatic stress disorder (PTSD) in three of the defendant's victims, which caused them to make erroneous reports against the defendant. The court concluded that no evidence was offered to suggest the victims had suffered PTSD prior to the incidents with the defendant. The court also declined to undertake plain error review, finding that the defendant's substantial rights had not been violated by the County Attorney's closing remarks. St. v. Awberry, 2016 MT 48, 382 Mont. 334, 367 P.3d 346.

Prosecutor's Statements During Closing Argument — Plain Error Review Declined: During closing arguments the prosecutor made remarks regarding three defense witnesses, including statements that the witnesses were liars from a different social stratum, that they were unemployed and collecting unemployment or workers' compensation, and that they played video games all day. On appeal, the defendant claimed reversible error based on prosecutorial misconduct, despite his failure to object in District Court. The Supreme Court reviewed the trial transcripts and considered the comments in the context of the entire argument and held that a failure to review the defendant's claims for plain error review would not result in a manifest miscarriage of justice, leave unsettled the fundamental fairness of his trial, or compromise the integrity of the judicial process. St. v. Aker, 2013 MT 253, 371 Mont. 491, 310 P.3d 506. See also St. v. Lindberg, 2008 MT 389, 347 Mont. 76, 196 P.3d 1252, St. v. Hayden, 2008 MT 274, 345 Mont. 252, 190 P.3d 1091, and St. v. Mercier, 2021 MT 12, 403 Mont. 34, 479 P.3d 967.

Application of Rape Shield Statute Not Dependent on Victim's Age — Defendant Not Denied Fair Trial: The defendant was convicted of two counts of sexual intercourse without consent and one count of felony sexual assault, involving three victims. One of the victims, an 11-year old girl, was wearing a shirt that had a DNA stain on it. DNA testing excluded the defendant as a possible DNA contributor. At trial, the District Court excluded the shirt from evidence under the rape shield law. On appeal, the defendant argued that excluding the shirt deprived him of his constitutional right to a fair trial and asserted that the victim's privacy was not an issue because any sexual conduct with an 11-year old girl would be illegal. The Supreme Court disagreed, noting that neither of the two types of admissible sexual conduct on the part of the victim was applicable in this case, and held that the evidence was properly excluded and the defendant was not denied a fair trial because of that exclusion. St. v. Patterson, 2012 MT 282, 367 Mont. 186, 291 P.3d 556.

Attempted Sexual Intercourse Without Consent — Evidence of Conversations Leading up to Violation Properly Excluded — Photos of Other Women Sent by Victim to Defendant Irrelevant and Prejudicial: After the defendant was convicted of attempted sexual intercourse without consent, he claimed that his due process rights were violated based on the District Court's exclusion of evidence that included alleged sexual conversations between the defendant and the victim in the days leading up to the violation and photos of semiclothed women that were allegedly sent from the victim's cell phone to the defendant. The Supreme Court determined that the rape shield law exception in 45-5-511 does not extend to alleged conversations leading up to the date of the violation. Moreover, the Supreme Court held that the exclusions were proper on the basis that the alleged conversations and photos were irrelevant or more prejudicial than probative under Rules 401 through 403, M.R.Ev. (Title 26, ch. 10). The District Court struck the appropriate balance between the defendant's right to develop his case and the rules of evidence. St. v. Bishop, 2012 MT 259, 367 Mont. 10, 291 P.3d 538.

Prosecutor's Comments on Credibility of Witnesses and Defendant's Failure to Present Evidence — Plain Error Review Declined: Lindberg claimed reversible error because the prosecutor, in closing arguments during Lindberg's trial on sex crimes, made personal comments regarding the credibility of witnesses and evidence presented by the defense, which Lindberg asserted shifted the burden to Lindberg to prove his innocence and violated the right to a fair trial. Because defense counsel did not object to the comments, Lindberg contended that the rights violation was reviewable under the plain error doctrine. Although not condoning the prosecutor's comments, the Supreme Court nevertheless declined to apply the plain error doctrine because, given the totality of the circumstances, the comments did not rise to a level sufficient to invoke plain error. The comments did not unconstitutionally shift the burden of proof to Lindberg. Failure to review Lindberg's claims would not have resulted in a manifest miscarriage of justice, so plain error review was unwarranted. St. v. Lindberg, 2008 MT 389, 347 M 76, 196 P3d 1252 (2008). See also St. v. Miller, 2022 MT 92, 408 Mont. 316, 510 P.3d 17.

Denial of Motion to Remove Juror for Cause Not Error Absent Showing of Juror Bias: During voir dire in Marble's trial for sexual intercourse without consent, defense counsel asked the panel whether the act of anal intercourse between two males would be considered so abhorrent as to affect their ability to view and weigh the evidence fairly. One juror responded that his religious convictions made the idea of such an act morally repugnant. Defense counsel moved to remove the juror for cause, but the motion was denied. After further questioning, counsel again moved to remove the juror for cause, but the motion was again denied. Counsel ultimately used a peremptory challenge to remove the juror. On appeal, Marble asserted that the trial court abused its discretion in denying the motions to remove the juror for cause. Analyzing the juror challenges in light of the statutory language and the totality of the circumstances, the Supreme Court held that the juror did not exhibit an actual bias during voir dire that would have prohibited the juror from acting with impartiality and without prejudice. Absent a showing of bias, denial of the motion to remove the juror for cause was not an abuse of discretion, and the Supreme Court affirmed. St. v. Marble, 2005 MT 208, 328 M 223, 119 P3d 88 (2005), following St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002).

No Error in Trial Court's Failure to Sever Counts of Sexual Assault and Sexual Abuse of Children — Defendant's Failure to Show Prejudice: Prior to trial, Yecovenko moved to sever charges of sexual abuse of his stepdaughters from charges of sexual abuse of children related to Yecovenko's downloading of child pornography from the Internet, asserting that prejudice would result, but failing to assert the type of prejudice that would occur if the charges were not severed, as required by St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002). Because Yecovenko failed in District Court to satisfy the threshold requirement of alleging the nature or type of prejudice that would occur, the Supreme Court declined to consider Yecovenko's prejudice arguments on appeal, and denial of the motion to sever was affirmed. St. v. Yecovenko, 2004 MT 196, 322 M 247, 95 P3d 145 (2004).

No Error in Denying Challenges for Cause for Two Jurors With Sex Crime Counseling or Evaluation Experience Absent Clearly Stated Bias or Coaxed Recantation — Fixed Opinion of Guilt Rule: During voir dire in Heath's trial for sexual intercourse without consent, Heath moved to dismiss for cause one juror who had been a victim of a sex crime and had counseled other sex crime victims and another juror with education and desire to become a sex offender evaluator. The motions were denied. On appeal, the Supreme Court noted that jurors may be challenged for cause based on a state of mind depriving impartiality but also on a fixed opinion of guilt or innocence depriving impartiality and took the opportunity to clarify the "fixed opinion of guilt" rule, holding that it is but one argument that can be asserted under the statutory state of mind basis for a challenge for cause. Further, challenges for cause must be determined pursuant to both the statutory language of 46-16-115 and the totality of the circumstances presented. In this case, both jurors indicated that they could look at the facts and not allow their experiences to affect their judgment. Despite Heath's argument that the jurors' responses were coaxed, their initial and spontaneous responses did not raise a serious question of bias, and Heath's allegations that the jurors would identify with the victim were purely speculative. The jurors' experience and training did not establish a state of mind that would prevent them from acting with impartiality and without affecting Heath's substantial rights; thus, the District Court was affirmed. St. v. Heath, 2004 MT 58, 320 M 211, 89 P3d 947 (2004), following St. v. DeVore, 1998 MT 340, 292 M 325, 972 P2d 816 (1998), St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002), and St. v. Falls Down, 2003 MT 300, 318 M 219, 79 P3d 797 (2003), and followed in St. v. Rogers, 2007 MT 227, 339 M 132, 168 P3d 669 (2007).

Juror Statements of Actual Bias Against Defense That Sex Crime Victim Was Old Enough to Consent — Reversal Warranted for Failure to Grant Challenge for Cause: Freshment's defense to charges of sexual intercourse without consent with a victim under age 16 was that he believed that the victim was old enough to give consent. During voir dire, two prospective jurors gave straightforward, consistent statements of actual bias against Freshment's legal defense. Following trial counsel's attempts to rehabilitate the jurors, the District Court denied Freshment's challenges for cause, so Freshment was required to use peremptory challenges to remove the jurors from the panel, ultimately exhausting all of his peremptory challenges. Under St. v. DeVore, 1998 MT 340, 292 M 325, 972 P2d 816 (1998), abuse of discretion occurs if a court fails to excuse a prospective juror when actual bias is discovered during voir dire, so both jurors should have been dismissed for cause. Under the rule in St. v. Good, 2002 MT 59, 309 M 113, 43 P3d 948 (2002), the District Court's error was conclusively prejudicial and automatic reversal was required. St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002).

DNA Evidence of Incest Victim's Other Sexual Conduct Properly Excluded Under Rape Shield Statute: Four months after an alleged incest incident, investigators recovered the blanket believed to have been on the bed on which the incident occurred; however, semen found on the blanket did not match defendant's DNA profile. At trial, the District Court excluded the crime lab report under the rape shield statute, but allowed the defense to make a limited inquiry to establish that no physical evidence linked defendant to the scene. With the essential findings of the DNA report inadvertently admitted into evidence, defendant claimed that the District Court abused its discretion in excluding a report that contradicted the victim's testimony. The two exceptions to the rape shield provision are: (1) evidence of the victim's prior sexual contact with defendant; and (2) evidence that refutes an inference derived from physical evidence of the crime offered by the victim. Because all sexual contact between defendant and his daughter was criminal, and the state offered no physical evidence to refute at trial, neither exception applied. Admitting the report into evidence would have served only to confuse or divert the jury and violate the rape shield statute, so the District Court did not abuse its discretion in excluding the report. St. v. Bauer, 2002 MT 7, 308 M 99, 39 P3d 689 (2002). See also St. v. Patterson, 2012 MT 282, 367 Mont. 186, 291 P.3d 556.

Flirtatious Behavior Not Considered Sexual Conduct in Context of Rape Shield Law: Defendant was charged with sexual intercourse without consent. At trial, he sought to introduce evidence relating to the extrinsic sexual conduct of the victim, contending that the victim had engaged in flirtatious conduct 2 days prior to the assault when she pulled defendant onto her lap at a birthday party. Under Montana's rape shield law, evidence concerning the conduct of the victim is not admissible, except evidence of the victim's past sexual conduct with the offender. The Supreme Court noted that evidence of sexual intimacy prior to the assault would have been admissible, but the court declined to broaden the definition of sexual conduct to include flirtatious behavior. An examination of the nuances of the victim's nonsexual interactions with defendant days before an alleged rape would effectively put the victim on trial, which is precisely the harm that the rape shield statute is designed to prevent. St. v. Detonancour, 2001 MT 213, 306 M 389, 34 P3d 487 (2001).

Evidence of Rape Victim's Alleged Involvement in Prostitution Properly Excluded: Ahto sought to introduce evidence of a rape victim's involvement in prostitution, contending that evidence of prostitution established his defense to felony assault (now assault with a weapon) charges and that the evidence related directly to her credibility and veracity as a witness and motive to testify falsely. The Supreme Court disagreed, finding that Ahto's speculative and unsupported allegations were insufficient to tip the scales in favor of Ahto's right to present a defense and against the victim's rights under the rape shield statute. Moreover, Ahto was given sufficient opportunity to question the victim's credibility and potential motives to testify falsely. Therefore, the District Court did not abuse its discretion in precluding Ahto from cross-examining the victim about her involvement in prostitution because that evidence would not have established a lack of credibility on the victim's part. Ahto further alleged that the trial court denied his right to confront witnesses by disallowing cross-examination after the state opened the door by inquiring as to the victim's employment, but did not demonstrate how he was prejudiced by the ruling. The Supreme Court affirmed the trial court's discretion in determining the latitude of cross-examination. St. v. Ahto, 1998 MT 200, 290 M 338, 965 P2d 240, 55 St. Rep. 851 (1998), distinguishing St. v. Scott, 257 M 454, 850 P2d 286 (1993).

Defendant's Constitutional Right to Present Evidence of Fabrication: The constitution does not require a blanket exception to a rape shield statute for all evidence related to motive to fabricate. Speculative or unsupported allegations are insufficient to tip the scales in favor of a defendant's right to present a defense and against the victim's rights under the statute. St. v. Johnson, 1998 MT 107, 288 M 513, 958 P2d 1182, 55 St. Rep. 408 (1998), followed in St. v. Lindberg, 2008 MT 389, 347 M 76, 196 P3d 1252 (2008).

Unsupported Testimony of Sexual Activity Occurring After Offense: It was not an abuse of discretion or a violation of defendant's due process and confrontation of witnesses rights for the court to refuse to allow testimony that the victim had been thrown out by her boyfriend because of her sexual conduct with other men. The alleged breakup was several months after the offense, and the allegation was unsupported. St. v. Johnson, 1998 MT 107, 288 M 513, 958 P2d 1182, 55 St. Rep. 408 (1998).

Cross-Examination Regarding Unrelated Incidents of Prior Sexual Abuse Properly Limited: The District Court did not err in limiting defendant's cross-examination of his ex-wife regarding two unrelated prior incidents of sexual abuse, one involving the ex-wife and the other involving her infant daughter. Defendant was allowed to present closing arguments concerning the ex-wife's motive, bias, or prejudice, based on evidence in the record. However, allowing cross-examination regarding the two prior unrelated incidents would have created unfair prejudice against the ex-wife and confused the issues for the jury. St. v. MacKinnon, 1998 MT 78, 288 M 329, 957 P2d 23, 55 St. Rep. 331 (1998).

Admission of Evidence Under Rape Shield Law — Proper Use of Supervisory Control: The Attorney General petitioned the Supreme Court for a writ of supervisory control in a case in which the District Court had ruled that certain evidence of prior sexual conduct by the victim was admissible in a case charging sexual intercourse without consent. The Supreme Court accepted original jurisdiction of the case, holding that it was a proper case for supervisory control because: (1) once the testimony on prior sexual conduct is given in open court, the injury that the rape shield law was intended to prevent has already occurred; and (2) under 46-20-103, evidentiary rulings under the rape shield law may not be appealed. State ex rel. Mazurek v. District Court, 277 M 349, 922 P2d 474, 53 St. Rep. 678 (1996).

Evidence of Prior False Allegations of Sexual Assault — Criteria and Procedure for Introduction of Evidence: In a case involving a charge against Johns of sexual intercourse without consent, the District Court ruled that it would admit testimony showing that one of the victims had previously made and recanted false allegations of sexual assault against the victim's former husband. Citing Miller v. St., 779 P2d 87 (Nev. 1989), the Supreme Court held that evidence of prior false allegations of sexual offenses is admissible only if written notice is given by counsel of the intent to cross-examine on this subject and then only if an in camera hearing is held to determine the propriety of the questioning and the admissibility of the corroborating evidence. At the in camera hearing, the defendant must establish: (1) that the accusation was made; (2) that the accusation was false; and (3) that the evidence is more probative than prejudicial. State ex rel. Mazurek v. District Court, 277 M 349, 922 P2d 474, 53 St. Rep. 678 (1996).

Period of Conception — Rape Shield Statute Properly Used to Exclude Evidence of Sex With Other Family Members Outside Calculated Time of Conception — Due Process Not Abridged: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based in part upon DNA evidence and in part upon the testimony of Weeks's stepdaughter. After an in camera hearing, the District Court excluded evidence of sexual acts with other members of her family that occurred outside the time of conception. Weeks argued that the District Court made it impossible for him to challenge the credibility of his stepdaughter. The Supreme Court held that the rape shield law was properly invoked by the District Court and that allowing only the evidence of sexual acts with other family members that occurred within the calculated time of conception was proper. Citing St. v. Van Pelt, 247 M 99, 805 P2d 549 (1991), the Supreme Court held that the limitations imposed by the District Court did not violate Weeks's right to due process of law. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995).

Defendant Prejudiced by Jury Instruction Giving Incomplete Version of Spousal Exemption: Bradley appealed his conviction for sexual intercourse without consent on the basis that the jury instruction did not require the jury to find that the victim was not his spouse. The state argued that Bradley's divorce from his former wife was not final before he married the victim and that therefore the instruction did not have to address the issue of whether or not the victim was his spouse. The Supreme Court held that the law in effect in 1989 when the crime was alleged to have occurred included an exemption for persons living together as husband and wife regardless of the legal status of their relationship. Therefore, the jury instruction was not an accurate version of the law. St. v. Bradley, 269 M 392, 889 P2d 1167, 52 St. Rep. 43 (1995).

Prosecution Comment on Sexual Abuse in Opening Statement — Door Not Opened — Testimony Properly Excluded Under Rape Shield Law: Stuit was charged with sexual abuse of S.M., a minor. At trial, the District Court cautioned both the defense and prosecution that testimony concerning prior acts of abuse of S.M. would not be admitted. However, in an opening statement, the prosecution made reference to past sexual abuse of S.M. No objection was made by the defense at the time. Later, in a conference in chambers, the District Court noted that the statement came close to opening the door on the issue of past abuse, but ultimately ruled that the door had not been opened on the issue. The Supreme Court held that failure of defense counsel to make a contemporaneous objection waived the issue and that the doctrine of plain error did not apply under the statute. The Supreme Court also held that any evidence of prior abuse was inadmissible under the rape shield law. St. v. Stuit, 268 M 176, 885 P2d 1290, 51 St. Rep. 1238 (1994).

Lack of Omnibus Hearing Not Prejudicial — Adequate Notice and Presentation of Case: Defendant claimed error because no omnibus hearing was held in his criminal case, which prejudiced his opportunities for preparation of a timely defense and led to surprise when the state attempted to introduce certain physical evidence at trial. One of the purposes of the omnibus hearing is to discuss the use of evidence regarding other bad acts. In this case, the acts were other sexual assaults defendant had purportedly committed. Twenty days before trial, the state gave notice to defendant, pursuant to St. v. Just, 184 M 262, 602 P2d 957 (1979), of its intent to use the evidence of other bad acts, which constituted ample notice and opportunity for defendant to prepare for that evidence. Defendant's claim of lack of ability to confront the witness failed because the Van Pelt exception to the rape shield law did not apply in this case because the defendant did not contend that the victim made accusations that had been adjudicated as false prior to trial. Defendant's argument of surprise also failed because even though he was not made aware at an omnibus hearing of the state's intent to introduce the rape victim's clothing as evidence, his objection to introduction of the evidence at trial was sustained and the evidence excluded. Defendant was not prejudiced by the lack of an omnibus hearing. St. v. Hildreth, 267 M 423, 884 P2d 771, 51 St. Rep. 1086 (1994).

Cumulative Evidence of Past Incidents of Consensual Sexual Contact Properly Excluded: The jury was presented with ample evidence of prior consensual acts between defendants and the victim from which it could determine without bias the credibility of defendants' claim that the sexual acts in question were also consensual. It was not an abuse of discretion for the trial court to restrict additional relevant and admissible evidence of the victim's past sexual conduct that was merely cumulative in nature and that could easily have had the effect of being more prejudicial to the victim than probative to the jury. In light of the abundance of evidence, the restriction did not prevent defendants from presenting their consent defense. St. v. Wing, 264 M 215, 870 P2d 1368, 51 St. Rep. 223 (1994).

Defendant Not Entitled to Question Victim About Sexual Assaults Committed by Other Persons: Passama, accused of sexual assault upon an 8-year-old girl, was prohibited by the lower court from questioning the girl about assaults on her by other persons despite Passama's argument that he could impeach the girl by showing that her source of knowledge about sexual abuse came from sources other than her experiences with him. The Supreme Court held that none of the specific statutory exceptions existed that would allow the defendant to question the victim concerning prior sexual conduct and held that the testimony had been properly excluded. St. v. Passama, 261 M 338, 863 P2d 378, 50 St. Rep. 1349 (1993). See also St. v. Colburn, 2016 MT 41, 382 Mont. 223, 366 P.3d 258, in which the Supreme Court held that the District Court abused its discretion by mechanistically applying the rape shield law to exclude the defendant's proffered evidence that the alleged victim's knowledge of sexual abuse came not from abuse by the defendant but from abuse inflicted by the victim's father, and St. v. Ragner, 2022 MT 211, 410 Mont. 361, 521 P.3d 29.

Inadmissibility of Medical Records Inextricably Related to Claims of Prior Sexual Abuse: Defendant sought, through the use of an incest victim's medical records, to present testimony of a doctor in an attempt to show that the victim suffered from depression and other mental disorders and that her mental condition may have existed before the alleged assaults and adversely affected her credibility. The trial court properly disallowed any testimony regarding the victim's mental condition that was based on the medical records because both the records and the victim's mental condition were inextricably related to claims of prior sexual abuse, testimony on which was prohibited under this section. Although the records were obtained during discovery and were reviewed by defendant, he failed to point out any examples from the records that would indicate a motive for the victim to testify falsely. St. v. Rhyne, 253 M 513, 833 P2d 1112, 49 St. Rep. 577 (1992).

Instructions on Required Proof of Lack of Consent — Statement of Law: In instructing the jury on the definition of "lack of consent", the District Court included language from 45-5-501, which defines "without consent", and general language from this section, which includes language applicable to sexual crimes. Defendant contended that the use of the general language improperly diluted the state's burden of proof. However, consistent with St. v. Thompson, 243 M 28, 792 P2d 1103 (1990), the element of force required to find a conviction was properly stated. Because the instruction was a direct statement of law and was consistent with prior case law, defendant was not prejudiced. St. v. Goodwin, 249 M 1, 813 P2d 953, 48 St. Rep. 539 (1991).

Alleged Past Sexual Abuse Not Admissible: The District Court did not err in granting the state's motion in limine to prevent defendant from introducing evidence of alleged prior sexual abuse of a child victim. The major purpose of defendant's attempt to bring the incidents of prior abuse into evidence is to attack the witness's credibility. Excluding the evidence was within the discretion of the District Court and will not be disturbed absent an abuse of discretion. St. v. Van Pelt, 247 M 99, 805 P2d 549, 48 St. Rep. 109 (1991), followed in St. v. Rhyne, 253 M 513, 833 P2d

1112, 49 St. Rep. 577 (1992), St. v. Howell, 254 M 438, 839 P2d 87, 49 St. Rep. 759 (1992), and St. v. Stuit, 268 M 176, 885 P2d 1290, 51 St. Rep. 1238 (1994).

Evidence of Sexual Abuse by Another Person Inadmissible in Incest Trial: Defendant on trial for incest with his stepdaughter sought to introduce evidence of sexual abuse by the victim's natural father under the "pertinent trait of character of the victim" standard of Rule 404(a)(2), M.R.Ev. (Title 26, ch. 10), or the "other crimes" exception of Rule 404(b), M.R.Ev. (Title 26, ch. 10). However, subsection (4) of this section provides no exception to warrant admittance of evidence to establish that another person had sexually abused the victim. St. v. Kao, 245 M 263, 800 P2d 714, 47 St. Rep. 2100 (1990), followed in St. v. Stuit, 268 M 176, 885 P2d 1290, 51 St. Rep. 1238 (1994).

Inadequate Offer of Proof— Statements Regarding Prior Assault: Statements made by a social worker regarding a possible earlier assault were an inadequate offer of proof and insufficient to support cross-examination under this section when the incident was not alleged to have occurred with defendant and the alleged assault may not have been sexual in nature. St. v. Laird, 225 M 306, 732 P2d 417, 44 St. Rep. 254 (1987).

Denial of Instructions on Victim's Medical and Court Records and Ease of Alleging Rape: The defendant was convicted of sexual intercourse without consent and on appeal contended that denial of two of his proposed jury instructions constituted error. At trial, he had sought to introduce the victim's medical and Youth Court records in an attempt to impeach her credibility as a witness. The District Court refused to allow inspection of the records, and the Supreme Court ruled that because of the refusal, a jury instruction relating to credibility based on such records could not be given. His second proposed instruction stated the precaution that rape is easy to allege and difficult to defend against and called for instructing the jury to view the victim's testimony with caution. The Supreme Court, quoting St. v. Liddell, 211 M 180, 685 P2d 918, 41 St. Rep. 1293 (1984), ruled that such a cautionary instruction "is an improper and unwarranted comment on the evidence and is not required under the law or by reason of public policy. Therefore, such an instruction should not be given." The propriety of denying the defendant's proposed jury instructions was adequately supported, and conviction was affirmed. St. v. Mendenhall, 219 M 328, 721 P2d 1255, 42 St. Rep. 2060 (1985).

Sex Crime Victim's Past Sexual Conduct and False Accusations — Admissibility — Veracity of Victim: Although there is a compelling interest in favor of preserving the integrity of a sex crime trial and preventing it from becoming a trial of the alleged victim and a general policy against sordid probes into a victim's sexual past, evidence on an alleged victim's past sexual conduct is admissible on the issue of veracity. To limit or bar cross-examination when there is evidence of prior false accusations by the alleged victim restricts the constitutional right to confront witnesses. The evidence is admissible only if the prior accusations were proven false or admitted to be false. If the prior charge was not adjudicated, the evidence is inadmissible. A separate hearing on the issue should be held outside the jury's presence. The evidence is properly barred when its only value is to prejudice the alleged victim's character and reputation. St. v. Anderson, 211 M 272, 686 P2d 193, 41 St. Rep. 1357 (1984), modifying St. v. McSloy, 127 M 265, 261 P2d 663 (1953), and followed in St. v. Fitzgerald, 238 M 261, 776 P2d 1222, 46 St. Rep. 1253 (1989), St. v. Rhyne, 253 M 513, 833 P2d 1112, 49 St. Rep. 577 (1992), St. v. Steffes, 269 M 214, 887 P2d 1196, 51 St. Rep. 1463 (1994), State ex rel. Mazurek v. District Court, 277 M 349, 922 P2d 474, 53 St. Rep. 678 (1996), and St. v. Ahto, 1998 MT 200, 290 M 338, 965 P2d 240, 55 St. Rep. 851 (1998).

Victim's Past Sexual Conduct — Inadmissible as Not Central to Case: Evidence of a sexual assault victim's past sexual conduct should be admitted only when central to the outcome of a case. Here, offered evidence of past sexual conduct, alleged to indicate that the victim's charge may have been motivated by a psychological syndrome resulting from a previous sexual assault, was properly excluded because it: (1) did not control the outcome of the case as there was overwhelming evidence supporting her testimony; and (2) did not fall within the exceptions to prohibition of evidence on past sexual conduct. St. v. Lamb, 198 M 323, 646 P2d 516, 39 St. Rep. 1021 (1982).

Character of Victim — Right to Witness and Confrontation — Sexual Intercourse Without Consent: While the sixth amendment to the United States Constitution guarantees a criminal the right to testimony of witnesses in his favor, it does not guarantee him the right to any and all witnesses, regardless of their competency or knowledge. There is the competing interest of the fairness and reliability of the trial. Here, in a sexual intercourse without consent case, the defendant was precluded by these rules from calling witnesses to establish the victim's sexual views and from cross-examining the victim concerning a quote on her jacket ("Liquor in the front, poker in the back"). Since the victim's character is not in issue and her sexual views are not probative of her truthfulness, it is clearly within the judge's discretion to exclude this evidence if it is irrelevant or too prejudicial. The Supreme Court found no merit in defendant's argument that he was denied his right to confront witnesses. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980), followed in St. v. Fitzgerald, 238 M 261, 776 P2d 1222, 46 St. Rep. 1253 (1989), and State ex rel. Mazurek v. District Court, 277 M 349, 922 P2d 474, 53 St. Rep. 678 (1996).

Burden of Proving Defense: The court did not err in instructing the jury that defendant had the burden of proving the defense of reasonable belief of age by a preponderance of the evidence. St. v. Smith, 176 M 159, 576 P2d 1110 (1978).

45-5-512. Chemical treatment of sex offenders.

Compiler's Comments

2007 Amendment: Chapter 483 in (1) near beginning after "45-5-507(4)" inserted "or (5)"; and made minor changes in style. Amendment effective May 11, 2007.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

Applicability: Section 3, Ch. 334, L. 1997, provided: "[Section 1] [45-5-512] applies to offenses committed after [the effective date of this act] [effective October 1, 1997], except that subsection (3) of [section 1] [45-5-512] also applies to offenses committed before [the effective date of this act]."

Coordination: Section 2(2), Ch. 341, L. 1997, a coordination section, provided: "If [section 1] of Senate Bill No. 31 is passed and approved, then:

(a) the words "medically safe" are inserted after "sentenced to undergo" in each place in which that phrase appears in subsections (1) through (3) of [section 1] of Senate Bill No. 31;

(b) the words "or other medically safe drug treatment that reduces sexual fantasies, sex drive, or both" are inserted after the word "equivalent" in each place in which "equivalent" appears in subsections (1) and (2) of [section 1] of Senate Bill No. 31; and

(c) the words "or other medically safe drug treatment that reduces sexual fantasies, sex drive, or both," are inserted after the word "equivalent" in subsection (3) of [section 1] of Senate Bill No. 31." Senate Bill No. 31 was passed and approved as Ch. 334, L. 1997.

Source: This section is based on sec. 645 of the California Penal Code.

45-5-513. Geographic restrictions applicable to high-risk sexual offenders.

Compiler's Comments

Effective Date: Section 5, Ch. 412, L. 2015, provided: "[This act] is effective on passage and approval." Approved May 5, 2015.

Retroactive Applicability: Section 6, Ch. 412, L. 2015, provided: "Except as provided in [section 1(1)(a)] [45-5-513(1)(a)], [this act] applies retroactively, within the meaning of 1-2-109, to sexually violent predators who have been convicted of a sexual offense against a victim 12 years of age or younger on or before [the effective date of this act] [May 5, 2015]."

Part 6
Offenses Against the Family

Part Case Notes

Prior History of Prostitution Excluded — Inadmissible Propensity Evidence — Motion to Exclude Proper: The defendant was charged with promoting prostitution of two young women. At trial, the state sought and received an order disallowing the defendant from introducing evidence that one of the women had previously engaged in prostitution. Following his conviction, the defendant appealed, claiming that the woman's prior history was relevant and that the District Court abused its discretion by excluding it. The Supreme Court affirmed, holding that the excluded evidence was not relevant and constituted inadmissible propensity evidence. St. v. Thomas, 2020 MT 281, 402 Mont. 62, 476 P.3d 26.

No Error in Admitting Evidence of Past Deviant Sexual Acts as Grooming for Future Sexual Abuse: At Marshall's trial for attempted sexual abuse of children, the trial court admitted evidence of Marshall's prior deviant sexual acts and comments over Marshall's objection that the prior acts were too spread out to constitute the same transaction and because the requirements of Rule 404(b), M.R.Ev. (Title 26, ch. 10), were not met. The Supreme Court held that the evidence was admissible as grooming, defined as the process of cultivating trust with a victim and gradually introducing sexual behaviors until reaching the point at which it is possible to perpetrate a sex crime against the victim. Thus, even though Marshall's prior acts may have been remote in time, grooming by definition must occur over a period of time, so the acts were inextricably linked to the charged offense. St. v. Marshall, 2007 MT 198, 338 M 395, 165 P3d 1129 (2007), followed in St. v. Bieber, 2007 MT 262, 339 M 309, 170 P3d 444 (2007), to the extent that evidence of defendant's legal acts was inextricably linked to and explanatory of the charged offense and therefore admissible, notwithstanding the rules related to admissibility of evidence of other acts, and in St. v. Gaither, 2009 MT 391, 353 M 344, 220 P3d 640 (2009). See also St. v. Buck, 2006 MT 81, 331 M 517, 134 P3d 53 (2006).

Sufficient Evidence of Attempted Sexual Abuse of Children — Grooming: Marshall contended that the state did not present sufficient evidence to prove attempted sexual abuse of children because Marshall did not take a material step to engage a child in sexual conduct or to prove that Marshall's specific purpose was to employ a child in sexual conduct. The Supreme Court disagreed with both arguments. Marshall engaged in a series of activities viewed as grooming the victim for future sexual contact, and a rational trier of fact could have found beyond a reasonable doubt that Marshall took a material step toward committing the crime. Also, if the child victim had taken Marshall's offer of money to remove her clothes for him, the action would have flouted community standards, and a jury could therefore have found beyond a reasonable doubt that Marshall sought to employ the child in the sexual conduct of a lewd exhibition of her intimate parts. The state's evidence was sufficient, and the conviction was affirmed. St. v. Marshall, 2007 MT 198, 338 M 395, 165 P3d 1129 (2007).

Admission of Evidence of Other Crime — Living Upon Earnings of Prostitute: The court did not err in rejecting defendant's contention that a mistrial should have been declared upon his testimony on cross-examination that he lived with and was supported by a female who was a prostitute. The evidence was introduced to show financial status, not that he acted in conformity with his character in committing the crime charged. St. v. Williams, 185 M 140, 604 P2d 1224 (1979).

Procuring: Evidence that defendant obtained and paid rent on prostitute's apartment, forced her to stay there, procured for her, and took all money was sufficient for conviction under 94-4110, R.C.M. 1947 (since repealed). St. v. Crockett, 148 M 402, 421 P2d 722 (1966).

Receiving Prostitutes Earnings:

Evidence that defendant cashed check given to prostitute by male brought to her by defendant who coerced her to prostitute for him was sufficient to support conviction under section 94-4114, R.C.M. 1947 (since repealed). St. v. Crockett, 148 M 402, 421 P2d 722 (1966).

Provision in 94-4116, R.C.M. 1947 (since repealed) making the acceptance of money from a prostitute presumptive evidence of lack of consideration was valid. St. v. Pippi, 59 M 116, 195 P 556 (1921).

Interstate Transportation: Section 94-4109, R.C.M. 1947 (since repealed), prohibiting the importation or exportation of females for immoral purposes was wholly void since Congress had legislated upon the matter in the Mann Act (U.S.C. Title 18, §§ 2421-2424). Ex parte Anderson, 125 M 331, 238 P2d 910 (1950).

Receiving Prostitute's Earnings:

Knowingly and without consideration taking or receiving from a prostitute any of her earnings was a separate and distinct offense under 94-4116, R.C.M. 1947 (since repealed) from that of living upon her earnings. St. v. Kanakaris, 54 M 180, 169 P 42 (1917).

Where defendant had given his note for money he obtained from a prostitute, he was not guilty of a violation of 94-4116, R.C.M. 1947 (since repealed), prohibiting the accepting of money from such persons without consideration, even though he later refused to pay the note placed in a bank for collection. St. v. Jones, 51 M 390, 153 P 282 (1915).

Inducement: An attempt to induce a female to take up her residence in another state for immoral purposes, which was complete before transportation had commenced, was punishable under 94-4110, R.C.M. 1947 (since repealed) and not under the Mann Act. St. v. Reed, 53 M 292, 163 P 477 (1917).

45-5-601. Prostitution — patronizing prostitute — exception.

Criminal Law Commission Comments

Source: New.

The prior law reflects the common-law concern for prostitution—i.e. the public nuisance aspects of open solicitation. The requirement that the solicitation be public seems at odds with the modern conception that prostitution, discreetly or indiscreetly carried on, ought to be controlled. Thus section 94-5-603(1)(a) [now MCA, 45-5-602(1)(a), now repealed] reflects the position that professional prostitution is criminal even if carried on in private. Section 94-5-603(1)(b) [now MCA, 45-5-602(1)(b), now repealed] adopts the idea that prostitution should be controlled when it manifests itself in public solicitation, which may be an annoyance to passers-by and an outrage to the moral sensibilities of a large part of the public. The penalty is a misdemeanor, the same as prior law.

Compiler's Comments

2023 Amendments — Composite Section: Section 9, Ch. 167, L. 2023, in (2)(b) near middle substituted $5,000 fine for $1,000 fine and substituted a 5-year term for 1-year term of imprisonment and near end for second offense substituted a 10-year term of imprisonment for 5 years; deleted former (4) (see sec. 9, Ch. 167, L. 2023, for former text); in (4) deleted reference to 45-5-602 and 45-5-603; and inserted (5) and (6) providing that certain defenses to prosecution are unavailable regarding consent and sexual activity with a child; and made minor changes in style. Amendment effective April 19, 2023.

Section 25, Ch. 713, L. 2023, in (4) at end substituted "a clinical social worker, marriage and family therapist, or clinical professional counselor licensed under Title 37, chapter 39" for "a social worker, professional counselor, or licensed clinical professional counselor licensed under Title 37, chapter 22 or 23". Amendment effective October 1, 2023.

Severability: Section 38, Ch. 167, L. 2023, was a severability clause.

2019 Amendment: Chapter 308 in (1) at beginning inserted exception clause and substituted "the offense of prostitution is committed if a person" for "A person commits the offense of prostitution if the person" and near middle after "sexual intercourse" inserted "or sexual contact that is direct and not through clothing"; in (2)(a) substituted current text for former text that read: "A prostitute convicted of prostitution shall be fined an amount not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both"; in (2)(b) at beginning inserted first sentence concerning when a patron may be convicted of patronizing a prostitute and near beginning of second sentence substituted "subsections (3) and (4)" for "subsection (3)"; inserted (4) providing enhanced penalties for convictions when patronizing a trafficking victim; inserted (5) providing an exception for sex therapy with a partner surrogate in certain situations; and made minor changes in style. Amendment effective May 7, 2019.

Applicability: Section 16, Ch. 308, L. 2019, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective May 7, 2019.

2013 Amendment: Chapter 374 in (2)(b) near beginning substituted "patron" for "prostitute's client"; and in (3)(a) in first sentence substituted "person patronized was a child" for "prostitute was 12 years of age or younger", substituted "patron" for "prostitute's client", after "offense" inserted "whether or not the patron was aware of the child's age", and before "offender" inserted "patron". Amendment effective July 1, 2013.

Applicability: Section 19, Ch. 374, L. 2013, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective July 1, 2013.

2007 Amendment: Chapter 483 in (2)(b) at beginning inserted exception clause; inserted (3) providing punishment if the prostitute was 12 years of age or younger and the prostitute's client was 18 years of age or older at the time of the offense; and made minor changes in style. Amendment effective May 11, 2007.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

2001 Amendment: Chapter 312 in (2)(a) at beginning substituted "prostitute" for "person"; inserted (2)(b) relating to a prostitute's client; and made minor changes in style. Amendment effective October 1, 2001.

Annotator's Note: The 1975 amendment incorporated the text of former subdivision (1)(a) into the body of subsection (1); added "whether such compensation is received or to be received, or paid or to be paid" to subsection (1); deleted former subdivision (1)(b) which read: "loiters in or within view of any public place for the purpose of being hired to engage in sexual intercourse"; and made minor changes in style.

The purpose of this section of the 1973 criminal code as enacted was to control all aspects of prostitution. To that end the 1973 enactment prohibited prostitution carried on publicly or in private and it continued the former law which made criminal any public solicitation for the purpose of prostitution. However, as enacted, the 1973 section raised the question whether compensation had to be actually paid or received before the offense was committed or whether simple tender was sufficient. The 1975 amendment makes clear that the offense of prostitution will be committed when sexual intercourse has been or is to be engaged in for compensation whether or not such compensation has yet been paid or received. Therefore, actual receipt of compensation is not an element of the offense, rather all that is necessary is the intent to give or receive compensation. Furthermore, the language "whether such compensation is received or to be received, or paid or to be paid" indicates that the compensation need not be just monetary but can include anything given as compensation.

The section applies equally to both parties to the transaction, prostitute and customer.

The 1975 amendment also deleted the subdivision making criminal loitering for the purpose of being hired to engage in sexual intercourse. This, however, does not decriminalize open solicitation for the purpose of prostitution. The broadening of the language in subdivision (1) will encompass the crime of solicitation for prostitution since the compensation now need not change hands to render the act criminal.

Case Notes

Conflicting Facts — Entrapment Question Properly Submitted to Jury: The District Court did not err in denying the defendant's motion to dismiss for entrapment as a matter of law on the charge of felony attempted prostitution with a minor, in violation of 45-4-103 and 45-5-601. The defendant argued that the task force entrapped him into attempted prostitution with a minor by inducing him into replying to an ad on Backpage.com with a seductive photo, luring him to a motel room, and cajoling him into retrieving money from an ATM to pay for sex. However, there were several affirmative decisions from which a reasonable jury could conclude that the idea to engage in the criminal behavior originated in the defendant's mind. After reading the advertisement, the defendant dialed the contact information, learned that the prospective sex workers were minors, and arranged a meeting at a motel. In the motel room, the defendant proceeded to negotiate for sex with a 15-year-old girl. After indicating that he did not bring cash with him, the defendant retrieved cash from an ATM, returned to the room, and paid the undercover officer so he could have sex with a minor. Given these facts, the defendant's entrapment defense would have been a tough sell to a jury, much less warranting dismissal as a matter of law. Because conflicting facts existed as to whether the defendant had the requisite intent to commit the criminal act, the District Court correctly denied the motion and concluded the issue of entrapment must be submitted to a jury. St. v. Lindquist, 2018 MT 38, 390 Mont. 329, 413 P.3d 455.

Prostitution at Nude Dancing and Body Painting Business — Relevance of Condom and Photo Album: When an individual openly advertises mutual nude dancing and body painting for a price, displays a photo album containing a photo of a prostrate nude male with erection and genitals painted with body paint, advertises edible body paint and edible bikinis, takes money from another for the services to be performed, escorts the customer to a private room, clothes are removed, massage of the genitals results, sexual arousal occurs, sexual intercourse is imminent, and the individuals are found in a compromising position, there is substantial evidence supporting a jury verdict that the individual committed the crime of prostitution in that she agreed to have sexual intercourse for compensation paid. A photo album and packaged condom seized on the premises under a search warrant were relevant to the question of whether prostitution was the business regularly conducted on the premises and were thus properly admitted in evidence. St. v. Baldwin, 217 M 189, 703 P2d 858, 42 St. Rep. 1126 (1985).

45-5-611. Bigamy.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 230.1.

This section has a broader coverage than prior law in that it applies to anyone who has "contracted a marriage." It is possible to contract a marriage which is a legal nullity. A man could marry a woman who, unknown to him, is already married to another and could marry again without bothering to divorce the first woman. Or a man could marry successively two women who, by reason of youth or mental defect, are incapable of contracting marriage.

In each case he demonstrates a disposition to plural marriage, unless he comes within the good faith defense of subsection (1)(c). The concept of marriage in this section includes common-law marriage contracted in a jurisdiction that recognizes this form of marriage. Subsection (1)(a) absolves the defendant in a bigamy case that he believed his spouse to be dead. On policy grounds there is no valid reason to stigmatize or punish remarriage by people who in good faith believe themselves to be widows or widowers.

Subsection (1)(b) creates an exception based on a five-year conclusive presumption of death. Subsections (1)(c) and (d) provide that one who has a reasonable basis for believing himself legally eligible to marry does not commit a criminal offense by a second marriage. Questions of the validity of foreign divorces are so perplexing that lawyers and the courts are often divided on the legal issues. It is well-settled that a single person who marries a divorced person is not liable to punishment if he made a reasonable mistake as to the legal validity of the other's divorce. It seems harsh to subject a defendant, who remarries following an out-of-state divorce, to a criminal bigamy prosecution where a person sophisticated in law might be unsure as to the validity of the foreign divorce. This section is intended to avoid such a result.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Annotator's Note: This section replaces R.C.M. 1947, §§ 94-701, 94-702 and 94-703 and continues the prior policy of discouraging plural marriage. On its face the new law is somewhat broader than the prior provisions in that it applies to anyone who "contracts or purports to contract" another marriage while married, while the old law condemned anyone who "married" while having a husband or wife living. The expansion would, however, seem intended to work no substantive change in current Montana law since St. v. Crosby, 148 M 307, 420 P2d 431 (1966) established the Montana rule that a marriage will not be considered void for the purposes of bigamy unless it has been pronounced void, annulled or dissolved by a competent court. Accordingly, under both old and new law an individual could be guilty of bigamy even though his first marriage was a legal nullity or there was some legal impediment (other than his own prior marriage) which rendered the subsequent marriage void.

Subsections (1)(a), (b), (c) and (d) set out the exceptions to the bigamy statute. Section 94-702(1) created a presumption of death after a 5-year absence without any indication that the prior spouse was still alive and 94-702(2) excepted those whose marriage had been dissolved by a court of competent jurisdiction. These exceptions have been continued by the new statute in subsections (1)(b) and (1)(c) respectively. In addition, the new section adds as exceptions subsection (1)(a) which requires a reasonable belief in the death of the prior spouse and subsection (1)(d) which requires a reasonable belief in legal eligibility to remarry. The offense has also been reduced from a felony to a misdemeanor.

Case Notes

Prior Bigamous Marriage: A bigamous marriage, though void for civil purposes under 48-111, R.C.M. 1947 (since repealed), is still valid for criminal purposes until pronounced void by a competent court, and a third marriage without a decree declaring the second marriage void was bigamous even though defendant had obtained a divorce from his first wife and even though the second marriage was void from the beginning for civil purposes under 48-111, R.C.M. 1947 (since repealed). Crosby v. Ellsworth, 431 F2d 35 (9th Cir. 1970); St. v. Crosby, 148 M 307, 420 P2d 431 (1966).

45-5-612. Marrying a bigamist.

Criminal Law Commission Comments

Source: New.

This section also applies to someone who purports to contract a marriage. Like prior law, this section punishes the knowing participation in a bigamous marriage. The punishment has been reduced to a misdemeanor which should provide sufficient deterrent.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This section continues prior law by penalizing knowing participation in a bigamous marriage. This section is also apparently expanded in its coverage in that it applies to "contracting or purporting to contract" a marriage instead of the old section's "marries". The punishment has been reduced to a misdemeanor which should provide sufficient deterrent.

45-5-621. Nonsupport.

Criminal Law Commission Comments

Source: New.

This section confines the criminal offense of nonsupport to failure to provide support which the accused knows he is legally obliged to provide. The policy of the former law is retained, that is, the section is designed to compel the defendant to perform his duty rather than make him an object of exemplary punishment. Exemplary punishment is of doubtful efficacy in complex family situations, where many forces, both social and economic, may combine to excuse the behavior. The fact that nonsupport can be prosecuted lays the basis for intervention by the county attorney, who can thus provide legal aid to indigent families and coerce the accused to support his family. The problem of enforcing support obligations of defendants who leave their families and go to another state has been largely solved by the Uniform Reciprocal Enforcement of Support Act. However, extraditing the defendant on a felony criminal charge is still possible under the aggravating circumstances of subsection (2).

Compiler's Comments

2003 Amendment: Chapter 286 in (7)(b) near end after "not to exceed" increased term from 2 years to 10 years and after "years" inserted "all but 2 years of which must be suspended, with the person placed on probation for the remainder of the imprisonment term"; in (8) in second sentence near middle after "period of" deleted "2 years or, in the case of aggravated nonsupport, for a period of"; and made minor changes in style. Amendment effective April 11, 2003.

1999 Amendment: Chapter 395 in (8) near beginning after "guilty" inserted "or nolo contendere"; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 546 in (12) substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 429 in (2)(a)(i), at end, substituted "without making reasonable provisions for the support of a spouse, child, or other dependent" for "to avoid the duty of support"; inserted (2)(b) defining conviction; inserted (3) concerning defense of inability to pay; inserted (4) concerning evidence of obligation of support; inserted (5) concerning evidence of amount of support paid and arrearage; inserted (6) concerning defense to charge of nonsupport; in (7)(a), at beginning, inserted exception clause; inserted (7)(b) providing penalty for nonsupport; inserted (8) authorizing posting of security after nonsupport conviction; inserted (9) concerning forfeiture of security; inserted (10) concerning restitution; in (11) inserted second sentence concerning payment of forfeited security; inserted (12) authorizing criminal complaint by Department of Social and Rehabilitation Services; inserted (13) authorizing imprisonment of defendant; and made minor changes in style.

Severability: Section 5, Ch. 429, L. 1993, was a severability clause.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section represents a change from prior law in that the criminal offense of nonsupport is limited to those situations in which the defendant fails to provide support which he knows he is legally obligated to provide. Under old law an accused could be found guilty of nonsupport without showing that he knew he was legally obligated to provide support.

The sexually neutral term "spouse" has been substituted in the new code for the term "wife" used in the former statute. The purpose of this section remains the same as that of prior law, that is, the section is designed to enforce the support obligation rather than punish the offender. As under prior law there must be a showing that the accused has the ability to provide support. To further the enforcement of the support obligation the court is given the authority in subsection (4) to order any fine or bond forfeited paid to or for the benefit of the persons to whom the accused owed the duty of support.

Another change from prior law is in the penalty for nonsupport. Under prior law nonsupport of a wife was a misdemeanor and nonsupport of children was a felony. Under this section both are misdemeanors unless the aggravating factors listed in subsection (2) are present, in which case nonsupport of either a wife or child is punishable as a felony.

The 1977 amendment added "or" to the end of subsection (2)(a); substituted "any person" for "person or persons" in subsection (4); and made minor changes in style.

Case Notes

Adequate Notice of Amount of Support Owed — Guilty Plea Not Involuntary Based on Defendant's Belief That Different Amount Owed: Milligan contended that he would not have pleaded guilty to felony nonsupport if he had known that he would be liable for $55,404.65 in restitution rather than $45,000 indicated in the affidavit attached to the charging information. However, when the information and affidavit were considered in conjunction with the plea agreement, statements of the District Court at the change of plea hearing, and the presentence investigation report, all of which apprised Milligan that the actual amount due was $55,404.65, Milligan was reasonably notified that he could be required to pay the full amount due, including restitution owing during the 2 years that had elapsed after the information was filed. Milligan was not laboring under a fundamental mistake when he pleaded guilty, and his plea was not involuntary. Restitution of $55,404.65 was affirmed. St. v. Milligan, 2008 MT 36, 341 M 316, 177 P3d 500 (2008).

Conviction of Felony Nonsupport Prior to Legislative Creation of Felony Offense Considered Improper Ex Post Facto Application Warranting Reversal — Common-Law Plain Error Doctrine Applied: Price was convicted of felony nonsupport for failure to make payments from 1988 through 1996 and was given the maximum 2-year sentence; however, the felony nonsupport statute was not enacted until 1993. On appeal, Price contended that the manner in which the felony nonsupport statute was applied violated the fundamental constitutional right to be free from ex post facto laws. The state argued that because Price failed to object at trial, the issue could not be raised on appeal. The issue of whether Price was convicted of felony nonsupport that occurred before the statute was enacted brought into question the fundamental fairness of Price's trial. The Supreme Court held that because a fundamental right was at issue, the common-law plain error doctrine applied despite Price's failure to preserve the issue at trial. A jury instruction allowed the jury to find Price guilty based on acts committed from 1988 through 1996 and thus subjected Price to increased punishment for conduct that occurred prior to enactment of the felony statute. This was an unconstitutional ex post facto application of the felony nonsupport law, constituting reversible error. St. v. Price, 2002 MT 284, 312 M 458, 59 P3d 1122 (2002).

Proof of Ability to Pay Some if Not All Support Sufficient for Prosecution for Nonsupport: Price was convicted on nonsupport and received the maximum 2-year sentence. Price appealed, contending that there was insufficient evidence to prove that he was financially capable of making all payments during the period in which nonsupport was a felony after 1993. Price maintained that because the definition of support obligation in this section includes the amount created by a failure to provide support or the amount owed pursuant to a support order, the ability to pay support means the ability to meet the total support obligation and because evidence at trial was insufficient to prove that Price could meet the total support obligation, he could not be convicted of nonsupport. The Supreme Court disagreed. The plain language of this section compels a person to pay support that that person is capable of paying, but a defendant who is not capable of paying the entire amount is not immune from prosecution if the person failed to pay support even though support could have been paid in whatever amount. Evidence showed that Price was employed part of the time, but made no voluntary payments whatsoever. A rational trier of fact could have found that Price had the ability to pay some support, even if the amount was limited, and that satisfied the state's burden to prove that Price was able to pay support. St. v. Price, 2002 MT 284, 312 M 458, 59 P3d 1122 (2002).

Payment of Child Support Improper Condition of Sentence for Felony DUI — Victim and Correlation to Underlying Offense Necessary for Imposition of Restitution: Horton was arrested for DUI, and a search of his driving record revealed nine prior DUI convictions. A further search showed that Horton also owed more than $47,000 in back child support. Horton was charged with felony DUI, with driving with a suspended or revoked license, as a habitual traffic offender operating a motor vehicle, and with felony nonsupport. By plea agreement, Horton agreed to plead guilty to the traffic offenses in exchange for dismissal of the nonsupport charge. The plea agreement stated that the state would recommend a 13-month sentence to be served in prerelease, followed by 4 years of probation, and, as a condition of the probationary sentence, provided that Horton would also make regular child support payments plus an additional sum monthly toward the support arrearage. As set out in the agreement, Horton pleaded guilty to the traffic offenses, and the nonsupport charge was dismissed. At sentencing, the habitual traffic offender charge was subsequently dismissed for failure of the state to prove that a valid habitual offender designation was in place at the time of the offense, and in addition, Horton's counsel objected to the court ordering payment of any child support arrearage, arguing that because the nonsupport charge had been dismissed, Horton would be paying restitution on a count for which he had not been convicted. Nevertheless, the court ordered Horton to pay support and promised to revoke his probation and sentence him to 4 years in prison with no parole if support was not paid. On appeal, Horton argued that the District Court abused its discretion and exceeded statutory mandates when it required him to pay restitution for an offense that was dismissed, citing St. v. Brown, 263 M 223, 867 P2d 1098 (1994), for the position that restitution is statutorily limited to the victim of the crime and that because there was no victim who sustained pecuniary or economic loss as a result of the felony DUI or driving with a suspended or revoked license, restitution was inappropriate. The state argued that Horton was attempting to receive the benefit of the plea agreement—having the felony nonsupport charge dismissed—without holding up his end of the bargain by paying child support. The Supreme Court noted that a plea agreement is subject to contract law and that the court will not assist a defendant in escaping the obligations of a plea agreement once its benefits are received. However, the court also pointed out that a District Court's authority to impose sentences in criminal cases is defined and constrained by statute. The statutory authority for payment of restitution is in 46-18-201, which limits payment of restitution to the victim of a crime for which a defendant is convicted, and because Horton was not convicted of nonsupport, there was no victim to whom Horton could be ordered to pay restitution.

The state also contended that ordering Horton to pay child support was proper because under 46-18-202(1), a sentencing court may impose any condition reasonably related to the objectives of rehabilitation and the protection of the victim and society. The Supreme Court noted that under St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), a sentencing condition must have some correlation or connection to the underlying offense, but there was no correlation or connection between Horton's conviction for DUI and ordering him to pay child support. Thus, the Supreme Court ordered that the portion of Horton's sentence requiring payment of child support be stricken. St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001), followed in St. v. Setters, 2001 MT 101, 305 M 253, 25 P3d 893 (2001).

45-5-622. Endangering welfare of children.

Criminal Law Commission Comments

Source: New.

This section penalizes a limited class of misbehavior by a parent or other person legally responsible for the care and supervision of children. This offense can be committed only by an act or omission in violation of a legal duty. That legal duty may be one which does not itself carry a penal sanction; this section adds the penal sanction when violation of the duty creates a known danger to the child. Although the commission recognizes that prosecution of parents will seldom be a constructive solution to intra-family problems, it seems worthwhile to retain a penal sanction for gross breach of parental responsibility. Also provision is made that any criminal fine levied against the offender may be used to aid the disadvantaged minor. The age designation is arbitrary but consistent with the other provisions in the code intended to protect children.

Compiler's Comments

2023 Codification: Section 1, Ch. 408, L. 2023, concerning independent childhood activities, was codified as subsection (1)(b) of this section. Effective October 1, 2023.

Preamble: The preamble attached to Ch. 408, L. 2023, provided: "WHEREAS, we can mitigate the rise in childhood obesity and its lifelong negative impacts by encouraging a healthy, active lifestyle through outdoor play; and

WHEREAS, it is in the best interest of children to give them independence proportional to their intellectual, emotional, and physical maturity; and

WHEREAS, a child's parent or guardian is best poised to determine that child's intellectual, emotional, and physical maturity; and

WHEREAS, the Legislature wishes to protect and promote the right of parents to raise their own children."

2007 Amendment: Chapter 75 inserted (3) including certain methamphetamine-related activities in the crime of child endangerment; in (5)(a) at beginning of first sentence inserted exception clause; inserted (5)(b) providing a penalty for methamphetamine-related child endangerment; and made minor changes in style. Amendment effective October 1, 2007.

1997 Amendment: Chapter 333 inserted (3) providing that a person responsible for supervising the welfare of a child less than 16 years of age may request a person over 18 years of age to stop contacting the child, authorizing the supervising person to seek an order of protection, and providing that a person violating an order of protection commits the offense of endangering the welfare of children; and made minor changes in style.

1989 Amendment: In (2), at beginning, inserted exception clause citing 16-6-305; and made minor change in grammar.

1987 Amendment: In (1) increased age to 18 from 16; in (2)(a) and (2)(b) separated offenses by age; inserted (2)(a)(ii) providing that person over 18 commits offense of endangering the welfare of a child by engaging in sexual conduct with child less than 16 years of age; and made minor changes in phraseology.

Annotator's Note: The 1975 amendment inserted subsection (2); redesignated former subsections (2) to (4) as (3) to (5); and added the second sentence in subsection (3).

The first of the 1977 amendments substituted "any person who is eighteen years of age or older, whether or nor he is supervising the welfare of the child" near the middle of subsection (2) for "other person"; substituted "child" for "youth" near the end of subsection (2); divided portions of subsection (2)(b) into separate items; deleted "leave or" after "encouraging a child to" at the end of the introductory paragraph of subdivision (2)(b); deleted "or to enter places exclusively for adults" at the end of the subdivision (2)(b); separated subdivision (2)(b) into distinct acts and made minor phraseology and punctuation changes.

The second of the 1977 amendments substituted "child less than sixteen years old" near the end of subsection (2) for "youth"; deleted "evidence" at the beginning of subsection (4); and made minor stylistic changes.

The purpose of subdivision (1) of this section is the punishment of a limited class of misbehavior by parents or guardians. This subdivision expands the coverage of the criminal law in that any breach of duty owed to a child by his parent or guardian is made a criminal offense. Criminal sanctions are thus made applicable to situations which under prior law could be remedied only by civil law. In this context it should be noted that this section is in a sense "quasi-civil" in that subdivision (5) allows the court to use a criminal fine levied under this section to aid the wronged child.

Subdivision (1) is applicable to any act or omission by a parent or guardian which is in violation of a legal duty to a child. The duty can be created by either a civil or criminal statute or by common law. It is applicable even though the legal duty which is breached does not itself carry with it a criminal penalty.

The amendments to this section taken together have further expanded its scope to include not only parents or guardians but anyone eighteen years or older whether or not he has custody of the child, who under any of the enumerations in subdivision (2) is contributing to the delinquency of a child less than sixteen years old. The doing of any of the acts in subdivision (2) with respect to a child less than sixteen years old will subject the actor, be it parent or guardian or anyone eighteen years or older, to the penalties of this section. As amended in 1975, a second offense under this statute will result in increased penalties.

Subdivision (4) adopts expanded rules for the admissibility of evidence which allow the introduction of evidence bearing not only on the violation charged but also on the general treatment of the child and the parents' course of conduct toward him.

Case Notes

Appeal of City Court Ruling — Trial De Novo in District Court Proper Remedy: Defendant was charged in Three Forks City Court with four counts of endangering the welfare of a minor. The City Court determined that a fair trial could not be had in Three Forks and, upon motion by the city for a change of venue, ordered the case and jurisdiction transferred to Madison County. A Madison County Justice's Court jury convicted defendant of one count and acquitted on three counts. Defendant appealed to Gallatin County District Court, requesting that the case be dismissed because the Three Forks City Court improperly granted the change of venue. The District Court denied the motion to dismiss, but concluded that the change of venue was an abuse of discretion and remanded to the Three Forks City Court for a new trial. The city appealed, and the Supreme Court reversed. The general rule is that, with few exceptions, District Courts must try appeals from Justices' Courts and City Courts de novo, rather than acting as courts of review. In this case, none of the statutory or case law exceptions to the general rule applied, so the District Court was limited to the remedy of conducting a de novo trial as required by 46-17-311, regardless whether the City Court's change of venue was erroneous. A trial de novo in District Court also cured any prejudice that might have been suffered by defendant occasioned by the change of venue. The case was remanded for a trial de novo in Gallatin County District Court. Three Forks v. Schillinger, 2007 MT 331, 340 M 211, 173 P3d 681 (2007), distinguishing Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800 (1998), and St. v. Rensvold, 2006 MT 146, 332 M 392, 139 P3d 154 (2006).

Endangering Welfare of Children Not Lesser Included Offense of Sexual Intercourse Without Consent: At a felony sexual intercourse without consent trial, Grindheim requested a jury instruction on a lesser included offense of endangering the welfare of a child. The motion was denied, and on appeal, the Supreme Court affirmed. Because the elements of the crimes are different and require different elements of proof, endangering the welfare of a child cannot be considered a lesser included offense of sexual intercourse without consent. St. v. Grindheim, 2004 MT 311, 323 M 519, 101 P3d 267 (2004). See also St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371 (1999), and St. v. Jay, 2013 MT 79, 369 Mont. 332, 298 P.3d 396.

Endangering Welfare of Child Not Lesser Included Offense of Deviate Sexual Conduct: As evidenced by the plain language of 45-5-505 (renumbered 45-8-218), the offense of deviate sexual conduct requires proof that the persons were of the same sex, while this section plainly requires proof of the ages of the offender and the victim. Each crime requires proof of additional facts that the other does not. Therefore, applying the test in Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932), the crime of endangering the welfare of a child is not a lesser included offense of deviate sexual conduct. St. v. Steffes, 269 M 214, 887 P2d 1196, 51 St. Rep. 1463 (1994). (See 2013 amendments to 45-2-101 and 45-8-218.)

Endangerment by Providing Controlled Substance — Uncorroborated Testimony of Minor Insufficient to Convict: Henrich was convicted, based upon testimony by one of his daughters, of endangering the welfare of a child by giving her a controlled substance. Henrich challenged the evidence as insufficient to convict him. The Supreme Court distinguished the case from the case of St. v. Dunn, 155 M 319, 472 P2d 288 (1970), in which two teenage girls testified that they were given LSD and the testimony was corroborated by the testimony of a physician after hearing a description of how one of the girls acted after taking the drug. Because there was no other evidence introduced as to the nature of the substance that Henrich gave to his daughter, the Supreme Court found that the verdict was not supported by substantial evidence and reversed the conviction. St. v. Henrich, 268 M 258, 886 P2d 402, 51 St. Rep. 1275 (1994). See also St. v. Burwell, 2013 MT 332, 372 Mont. 401, 313 P.3d 119.

Justice's Court as Having Jurisdiction Despite Associated Felony Violation: A District Court does not have jurisdiction to try a misdemeanor offense of endangering the welfare of children, proscribed in 45-5-622, even though this offense was committed together with a felony offense. Section 46-11-404, which states that an information may charge two or more different offenses connected together in their commission, is not a grant of jurisdiction but is simply a permissive joinder statute for offenses within the jurisdiction of a given court. Under 3-5-302 and 3-10-303, providing that the District Court has original jurisdiction in the felony criminal cases and "cases of misdemeanor not otherwise provided for", the Justice's Court has jurisdiction over the misdemeanor offense of endangering the welfare of children. St. v. Campbell, 191 M 75, 622 P2d 200, 38 St. Rep. 19 (1981).

45-5-623. Unlawful transactions with children.

Criminal Law Commission Comments

Source: New.

This section is merely a partial recodification of a number of statutes on unlawful transactions with children. (See R.C.M. 1947, sections 94-35-106 to 94-35-106.2, 94-3702 and 69-1902.) Other statutes relating to children were repealed. (See R.C.M. 1947, sections 94-35-138, 94-35-137 and 94-35-208.) The substance of still other statutes relating to children [was] placed elsewhere in the code.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 9, Ch. 746, L. 2023. Amendment effective May 22, 2023.

Severability: Section 15, Ch. 746, L. 2023, was a severability clause.

2021 Amendment: Chapter 66 inserted (1)(d) concerning tobacco products, alternative nicotine products, or vapor products; and made minor changes in style. Amendment effective March 23, 2021.

Applicability: Section 3, Ch. 66, L. 2021, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective March 23, 2021.

2005 Amendment: Chapter 386 in (1)(e) in first sentence at beginning after "tattoos" inserted "or provides a body piercing on", after "subsection" substituted ""tattoo" and "body piercing" have" for ""tattoo" has", and substituted "provided in 50-48-102" for "provided in 50-2-116"; and made minor changes in style. Amendment effective January 1, 2006.

2003 Amendment: Chapter 391 in (1)(e) at end of second sentence after "provided in" substituted "50-2-116" for "50-2-116(2)(k)(vi)". Amendment effective April 17, 2003.

1997 Amendment: Chapter 155 inserted (1)(e) relating to tattoos; and made minor changes in style. Amendment effective March 26, 1997.

1989 Amendment: In (1), at beginning, inserted exception clause citing 16-6-305; and made minor change in grammar.

1987 Amendment: In (1)(c) changed 19 to 21.

Applicability: Section 8, Ch. 217, L. 1987, provided: "The provisions of this act do not apply to persons who were born on or between April 1, 1966, and April 1, 1968."

Effective Date: Section 9(1), Ch. 217, L. 1987, provided: "This act is effective April 1, 1987."

Severability: Section 7, Ch. 217, L. 1987, was a severability section.

Annotator's Note: The area covered by subsection (1)(a) is uncertain in the absence of an applicable statutory definition of the word explosives, but the exception which allows municipalities to permit, under appropriate ordinances, the sale of explosives to minors, suggests that the framers intended to include even fireworks within the section's coverage.

Subsection (1)(b) replaces R.C.M. 1947, § 94-35-106 and expands the prior law's prohibition on the sale or gift of intoxicating liquor to minors to include the sale or gift of any intoxicating substance. The term "intoxicating substance" is defined by MCA, 45-2-101 to include both the alcoholic beverages described by R.C.M. 1947, § 94-35-107 and any other substance having an hallucinogenic, depressant, stimulating or narcotic effect.

Subsection (1)(c) was adopted following approval by the voters in the general election of November 7, 1978, of the constitutional amendment which raised the drinking age to 19 years or older. (See 1987 amendment note.) Subsection (1)(d) reenacts the prohibition on the purchase or acceptance of property from minors by pawnbrokers, second-hand dealers and junk dealers contained in R.C.M. 1947, § 94-3704. This section also lowers the age limit on the prohibition to 18 from 21 in accordance with the Constitutional requirement in Art. II, sec. 14.

Effective Date: Amendment proposed by Referendum 74 (Ch. 264, L. 1977) and approved at the general election held Nov. 7, 1978, was effective Jan. 1, 1979.

Case Notes

Warrantless Entry Justified Under Exigent Circumstances Exception — Evidence Admissible Under Plain View Doctrine: Officer Cameron investigated a report that Kenfield was on the way to a remote small town to purchase alcohol for minors. The officer arrived at Kenfield's residence and heard loud music and smelled marijuana. Cameron was out of radio range. No one answered when Cameron knocked at the door and announced himself, but Cameron heard running feet. Concerned with the minors' well-being, Cameron entered the residence and saw drug paraphernalia and residue on the kitchen sink. Cameron then called dispatch from the residence and requested backup, and officers subsequently seized drugs and other contraband. Kenfield was arrested for drug production or manufacture, distribution of drugs to minors, and sexual abuse of children. Kenfield moved to suppress the fruits of the warrantless search, but the motion was denied, and Kenfield appealed, but the Supreme Court affirmed. The odor of marijuana, coupled with the facts that the occupants attempted to avoid contact with Cameron and that Kenfield was believed to have been on the way to purchasing alcohol for minors, was sufficient for Cameron to form a reasonable belief that Kenfield had committed or was committing an offense. Additionally, the remoteness of the area, the time of the incident, the failure of Cameron's radio communication, Cameron's concern for the minors, the lack of response to the knock and announce, and the possibility that relevant evidence would be destroyed constituted exigent circumstances warranting immediate entry into the residence. Therefore, warrantless entry into Kenfield's home was justified, as was the seizure of drug evidence in plain view. St. v. Kenfield, 2009 MT 242, 351 M 409, 213 P3d 461 (2009), following St. v. Wakeford, 1998 MT 16, 287 M 220, 953 P2d 1065 (1998), distinguishing St. v. McBride, 1999 MT 127, 294 M 461, 982 P2d 453 (1999).

Intoxicating Beverage:

In prosecution for violation of 94-35-106, R.C.M. 1947 (a forerunner of this section), corpus delicti was established by evidence that the defendant poured minor a drink from a bottle marked "Vodka". St. v. Moore, 138 M 379, 357 P2d 346 (1960).

Information charging defendant with selling intoxicating liquor to minor was sufficient even though it did not specify the kind of liquor furnished. St. v. Baker, 87 M 295, 286 P 1113 (1930).

Misrepresentation of Age: In a prosecution under 94-35-106, R.C.M. 1947 (a forerunner of this section) for furnishing liquor to a minor, misrepresentation of age by the minor was no defense, and it was immaterial what precautions defendant took to ascertain the buyer's age. St. v. Paskvan, 131 M 316, 309 P2d 1019 (1957).

License: In prosecution for selling intoxicating liquor to a minor, it was immaterial whether defendant was licensed under the alcoholic beverage laws, and amendment of information to insert allegation that defendant was an employee of a licensee was surplusage and not prejudicial to defendant. St. v. Winter, 129 M 207, 285 P2d 149 (1955).

Entrapment: Entrapment was no defense in a prosecution for selling liquor to a minor even though a public officer gave the minor money and instructed him to buy whiskey, whereupon the minor entered defendant's bar, offered to buy and was sold whiskey, where the officers did not induce the sale by defendant or mislead him as to the minor's age. St. v. Parr, 129 M 175, 283 P2d 1086, 55 ALR 2d 1313 (1955).

Furnishing Liquor: Evidence that defendant poured drinks containing intoxicating liquor and set them out on a dresser in his hotel room and that a minor picked one up and consumed it supported conviction under 94-35-106, R.C.M. 1947 (a forerunner of this section). St. v. Clark, 87 M 416, 288 P 186 (1930).

Attorney General's Opinions

"Explosives" Not to Include Small Arms Ammunition or Fireworks: The term "explosives" in this section does not include small arms ammunition or fireworks permitted to be sold to the public under 50-37-104. 42 A.G. Op. 83 (1988).

Legal Age for Serving Alcoholic Beverages: A person who is 18 years of age may be employed as a bartender, waiter, or waitress to serve customers purchasing alcoholic beverages at retail. 38 A.G. Op. 15 (1979).

45-5-624. Possession of or unlawful attempt to purchase intoxicating substance — interference with sentence or court order.

Criminal Law Commission Comments

Source: Substantially the same as R.C.M. 1947, § 94-35-106.2.

This section is merely a recodification of the present statute on this subject.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 131, L. 2023. Amendment effective April 18, 2023.

2021 Amendment: Chapter 312 in (1) in middle of first sentence after "consumes" inserted "uses" and after "person's possession" inserted "or delivers or distributes without consideration" and at end of second and last sentences after "alcoholic beverages" inserted "or marijuana"; in (3)(b)(iii), (3)(c)(iii), and (8)(b) substituted "alcohol or drug information course" for "alcohol information course" and substituted "alcohol or drug treatment program" for "alcohol treatment program"; in (4) at end of first sentence inserted "or marijuana"; and made minor changes in style. Amendment effective April 26, 2021.

2017 Amendment: Chapter 45 deleted former (7) that read: "(7) A conviction or youth court adjudication under this section must be reported by the court to the department of public health and human services if treatment is ordered under subsection (8)"; deleted former (8)(f) that read: "(f) The court shall report to the department of public health and human services the name of any person who is convicted under this section. The department of public health and human services shall maintain a list of those persons who have been convicted under this section. This list must be made available on request to peace officers and to any court"; and made minor changes in style. Amendment effective October 1, 2017.

2015 Amendment: Chapter 152 in (2)(b) after "abuse" inserted "information"; inserted (11) prohibiting charge or prosecution when seeking or receiving medical treatment and providing definitions; and made minor changes in style. Amendment effective October 1, 2015.

2007 Amendment: Chapter 245 in (1) inserted second sentence concerning person not being arrested or charged solely because person was at place where others were possessing or consuming alcoholic beverages; and made minor changes in style. Amendment effective October 1, 2007.

2005 Amendments — Composite Section: Chapter 183 inserted (10) providing that information and statements by a person under 21 years of age to law enforcement and health care personnel about a sexual offense against that person may not be used in a prosecution of that person under this section and extending that protection to a person who helps the victim get medical or other assistance or report the offense. Amendment effective April 7, 2005.

Chapter 546 in (3)(a)(i) substituted "not less than $100 or more than $300" for "not to exceed $200"; in (3)(a)(ii), (3)(b)(ii), and (3)(c)(ii) substituted "shall" for "may"; in (3)(a)(ii) inserted "20 hours of"; inserted (3)(a)(iii) regarding community-based substance abuse course; in (3)(b)(i) substituted "not less than $200 or more than $600" for "not to exceed $200"; in (3)(b)(ii) inserted "40 hours of"; inserted (3)(b)(iii) regarding alcohol information course; in (3)(c)(i) substituted "not less than $300 or more than $900" for "not to exceed $500"; in (3)(c)(ii) inserted "60 hours of"; in (3)(c)(iii) near beginning inserted "and pay for"; in (9)(a) inserted reference to subsection (3)(a)(iii); in (9)(b) inserted reference to subsection (3)(b)(iii); and made minor changes in style. Amendment effective October 1, 2005.

2003 Amendment: Chapter 611 in (2) and (3) substituted text increasing and adding to the penalties for former (2) and (3) that read: "(2) (a) In addition to any disposition by the youth court under 41-5-1512, a person under 18 years of age who is convicted of the offense of possession of an intoxicating substance:

(i) for the first offense, shall be fined an amount not to exceed $150 and:

(A) may be ordered to perform community service; and

(B) shall be ordered to complete and pay, either directly with money or indirectly through court-ordered community service, all costs of participation in a community-based substance abuse information course, if one is available;

(ii) for a second offense, shall be fined an amount not to exceed $200 and:

(A) may be ordered to perform community service; and

(B) shall be ordered to complete and pay, either directly with money or indirectly through court-ordered community service, all costs of participation in a community-based substance abuse information course, if one is available;

(iii) for a third or subsequent offense, shall be fined an amount not less than $300 or more than $500 and shall be ordered to complete and pay, either directly with money or indirectly through court-ordered community service, all costs of participation in a community-based substance abuse information course, if one is available, which may include alcohol or drug treatment, or both, approved by the department of public health and human services, if determined by the court to be appropriate.

(b) In addition to the penalties provided in subsection (2)(a), the court may order suspension of the offender's driver's license. The duration of the suspension must be set forth by court order and may not be less than 60 days or more than 1 year. Upon recommendation from the court, a restricted probationary driver's license under 61-2-302 may be issued during the suspension period after the person has completed at least 30 days of the suspension period.

(3) A person 18 years of age or older who is convicted of the offense of possession of an intoxicating substance:

(a) for a first offense, shall be fined an amount not to exceed $150 and may be ordered to perform community service;

(b) for a second offense, shall be fined an amount not to exceed $200 and may be ordered to perform community service;

(c) for a third or subsequent offense, shall be fined an amount not to exceed $300 and:

(i) may be ordered to perform community service;

(ii) shall be ordered to complete an alcohol information course at an alcohol treatment program approved by the department of public health and human services, which may, in the sentencing court's discretion and upon recommendation of a licensed addiction counselor, include alcohol or drug treatment, or both; and

(iii) in the discretion of the court, shall be imprisoned in the county jail for a term not to exceed 6 months"; in (7) near beginning substituted "must be reported" for "may not be reported" and at end substituted "department of public health and human services if treatment is ordered under subsection (8)" for "department of justice under 61-11-101 unless suspension of the offender's driver's license is ordered by the court pursuant to subsection (2)(b)"; inserted (8) relating to chemical dependency assessment and treatment upon a second or subsequent offense; inserted (9) relating to which courses and assessment programs may be used; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendments — Composite Section: Chapter 23 in (3)(c)(ii) substituted "licensed addiction counselor" for "certified chemical dependency counselor". Amendment effective January 1, 2002.

Chapter 64 deleted former (2)(a)(i) requiring that a person's driver's license be confiscated by the court for 30 to 90 days and that if the person was in control of a motor vehicle when the offense occurred, the person be ordered not to drive during the confiscation period; deleted former (2)(b)(i) requiring driver's license suspension for 60 to 120 days; deleted former (2)(c)(i) requiring driver's license suspension for 120 days to 1 year, except that if the person was in control of a motor vehicle when the offense occurred, the license was to be revoked for 1 year or until the person reached 18 years of age; inserted (2)(b) allowing the court to order suspension of the driver's license for 60 days to 1 year and allowing a restricted driver's license to be issued after 30 days upon the court's recommendation; deleted former (3)(b)(ii) requiring driver's license suspension for up to 60 days if the person was in control of a motor vehicle when the offense occurred; deleted former (3)(c)(ii) requiring that the person's driver's license be suspended for up to 120 days if the person was in control of a motor vehicle when the offense occurred; in (7) near beginning substituted "may not be reported" for "must be reported" and after reference to 61-11-101 substituted "unless suspension of the offender's driver's license is ordered by the court pursuant to subsection (2)(b)" for "for the purpose of keeping a record of the number of offenses committed but may not be considered part of the person's driving record for insurance purposes unless a second or subsequent conviction or adjudication under this section occurs"; and made minor changes in style. Amendment effective March 16, 2001.

Chapter 498 throughout section after "community service" deleted "if a community service program is available"; in (2)(a)(i) increased fine from $100 to $150; in (2)(a)(i)(A), (2)(a)(ii)(A), (3)(b), and (3)(c)(i) at beginning substituted "may" for "shall"; in (3)(a) increased fine from $50 to $150 and before "be ordered" inserted "may"; in (3)(b) increased fine from $100 to $200; in (3)(c) in introductory clause increased fine from $200 to $300; in (4) substituted "shall be fined an amount not to exceed $150 if the person was under 21 years of age at the time that the offense was committed and may be ordered to perform community service" for "shall be fined an amount not to exceed $50 if the person was 18 years of age or older at the time that the offense was committed or $100 if the person was under 18 years of age at the time that the offense was committed"; and made minor changes in style. Amendment effective October 1, 2001.

Removal of References to Convictions Prior to March 16, 2001: Section 3, Ch. 64, L. 2001, provided: "Within 30 days after [the effective date of this act] [effective March 16, 2001], the department of justice shall remove from drivers' records that may be released under 61-11-105 all references to convictions for violations of 45-5-624 that were previously reported to the department."

Applicability: Section 5, Ch. 64, L. 2001, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective March 16, 2001.

1997 Amendments: Chapter 42 in (2)(c)(ii) and (3)(c)(iii) substituted "department of public health and human services" for "department of corrections"; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 182 in (1) deleted former second sentence that read: "The person need not be consuming or in possession of the intoxicating substance at the time of arrest to violate this subsection"; and made minor changes in style. Amendment effective April 1, 1997.

Chapter 550 in (5), near end of second sentence, substituted "youth in need of intervention" for "youth in need of supervision"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

1995 Amendment: Chapter 481 in (1), near beginning of first sentence after "age of", substituted "21" for "19" and in third sentence, at beginning after "A person", deleted "under the age of 21 commits the offense of possession of an intoxicating substance if the person knowingly has in the person's possession an alcoholic beverage, except as provided in 16-6-305 and except that a person"; in (2), at beginning, inserted "In addition to any disposition by the youth court under 41-5-523 [renumbered 41-5-1512]" and after "person" inserted "under 18 years of age who is"; in (2)(a) substituted present $100 fine for first offense for former language that read: "is less than 18 years of age, be fined not to exceed $50"; in (2)(a)(i), after "court for", inserted "not less than 30 days and"; in (2)(a)(ii), at end, inserted "if a community service program is available"; deleted former (2)(a)(iii) that read: "(iii) have the person's driver's license suspended if convicted of a second or subsequent offense under this section"; deleted (2)(a)(iv) that read: "(iv) be sentenced to any combination of the penalties provided for in subsections (2)(a)(i) through (2)(a)(iii)"; deleted former (2)(b) that read: "(b) is 18 years of age or older, be fined an amount not to exceed $50 for a first offense, $100 for a second offense, and $200 for a third offense or be fined an amount not to exceed $300 or be imprisoned in the county jail for a term not to exceed 6 months, or both, for a fourth or subsequent offense and"; in (2)(a)(iii), after "service", inserted "if any is available" and after "course" inserted "if one is available"; inserted (2)(b) regarding the fine for second offense; in (2)(b)(i), after "license", substituted "suspended for not less than 60 days and not more than 120 days" for "confiscated by the court for not more than 90 days and be ordered not to drive during that period if the person was driving or otherwise in actual physical control of a motor vehicle when the offense occurred"; in (2)(b)(ii), at end, inserted "if a community service program is available"; deleted (2)(b)(iv) that read: "(iv) be sentenced to any combination of the penalties provided for in subsections (2)(b)(i) through (2)(b)(iii)"; inserted (2)(b)(iii) requiring payment of costs of participation in a substance abuse information course; inserted (2)(c) regarding fine and penalties for a third possession offense; inserted (3) establishing fine and penalties for possession by a person 18 years of age or older; in (4), in second sentence after "$50", inserted "if the person was 18 years of age or older at the time the offense was committed or $100 if the person was under 18 years of age at the time that the offense was committed"; in (5) deleted former second sentence that read: "If proceedings for violation of subsection (1) are held in the youth court, the penalties in subsection (2) do not apply" and in second sentence, after "proceedings for", deleted "violation of subsection (1) or for"; inserted (7) regarding reporting of a conviction or Youth Court adjudication; and made minor changes in style.

Code Commissioner Change: Pursuant to sec. 5, Ch. 546, L. 1995, the Code Commissioner substituted Department of Corrections for Department of Corrections and Human Services.

1993 Amendment: Chapter 233 inserted (3) creating the offense of attempt by a person under 21 years of age to purchase an alcoholic beverage; and made minor changes in style.

1991 Amendment: In (2)(a) inserted subsections (i) through (iv) relating to license confiscation, community service, and license suspension; in (2)(b), after "third offense", substituted "or" for "for a fourth or subsequent offense a person may" and at end inserted "for a fourth or subsequent offense"; inserted (2)(b)(iii) relating to community service; in (2)(b)(iv), at end, inserted references to subsections (2)(b)(i) through (2)(b)(iii); and made minor changes in style.

1989 Amendments: Chapter 412 in (2)(a) inserted "if the person"; in (2)(a)(i) inserted introductory clause relating to age; inserted (2)(a)(ii) relating to graduated penalties for persons 18 years or older; and in (2)(b), after "complete and", deleted "if financially able" and after "pay" inserted clause relating to direct or indirect payment.

Chapter 448 in (1)(b) inserted "except as provided in 16-6-305 and".

Chapter 477 in (1)(a), in first sentence near beginning, increased age to 19 years from 18 years, near middle, after "knowingly", inserted "consumes or", and at end deleted "other than an alcoholic beverage" and inserted second sentence providing that person need not be consuming or in possession of intoxicating substance at time of arrest to violate subsection; in (1)(b), near middle, inserted "if he consumes or gains possession of the beverage because it was lawfully supplied to him under 16-6-305"; and made minor changes in form and phraseology.

1987 Amendments: Chapter 217 in second sentence in (1) changed 19 to 21.

Chapter 609 at end of third sentence of (3) deleted reference to subsection (13) of 41-5-103.

Applicability: Section 8, Ch. 217, L. 1987, provided: "The provisions of this act do not apply to persons who were born on or between April 1, 1966, and April 1, 1968."

Effective Date: Section 9(1), Ch. 217, L. 1987, provided: "This act is effective April 1, 1987."

Severability: Section 7, Ch. 217, L. 1987, was a severability clause.

1985 Amendment: In (2)(a) after "$50" deleted "or be imprisoned in the county jail for any term not to exceed 10 days, or both"; inserted (2)(b) requiring offender to complete and, if able, to pay costs of substance abuse information course; inserted (2)(c) requiring court to confiscate offender's driver's license and prohibit driving for 90 days; inserted (2)(d) authorizing court to sentence offender to combination of fine, substance abuse course, or loss of license; in (3) substituted language concerning procedure for violation of sentence for: "If proceedings are held in the youth court, the preceding penalty does not apply, and the offender shall be treated as an alleged youth in need of supervision as defined in 41-5-103(13). In such case, the youth court may enter its judgment under 41-5-523"; and inserted (4) establishing civil and criminal penalties for interference with a sentence or court order.

Annotator's Note: This section is a recodification of the former statute on the subject and continues the policy of preventing the exposure of minors to intoxicating substances. The penalty has been changed.

The 1974 amendment removes the possibility that an individual under the minimum legal age who carries alcoholic beverages in the course of his employment as, for example, a grocery carry-out person, would be technically in violation of the statute. The 1977 and 1985 amendments indicate that when the proceedings are held in Youth Court for a violation of this statute, the Youth Court Act controls the proceedings. The amendment that was adopted by referendum in 1978 makes an individual under the age of 19 culpable under this section if the intoxicating substance he possessed was an alcoholic beverage.

The 1977 amendment took effect following the approval of the constitutional amendment, raising the drinking age to 19 years or older (see 1987 amendment note), by the voters in the general election held November 7, 1978. The 1974 amendment added the exception at the end of subsection (1) and the approved 1977 amendment added the last two sentences of subsection (2).

Effective Date: Amendment proposed by Referendum 74 (Ch. 264, L. 1977) and approved at the general election held Nov. 7, 1978, was effective Jan. 1, 1979.

Administrative Rules

ARM 37.27.507 Education course requirements for MIP offenders (MIP program).

Case Notes

Smell of Alcohol and Driver's Admission of Minority Age — Sufficient Probable Cause for Search of Vehicle: When Shaw was stopped for speeding, she told the officer that she was 18 years old, could not produce proof of insurance, and had a suspended driver's license. During the conversation, the officer smelled alcohol on Shaw and in the vehicle. Shaw consented to a search of the car, and the officer discovered an open container of alcohol and drug paraphernalia. Following conviction, Shaw appealed on grounds that the officer threatened to impound the car and illegally obtained the evidence underlying the charges. The Supreme Court affirmed. The smell of alcohol, coupled with Shaw's admission that she was a minor, provided sufficient probable cause for a search of the vehicle, and Shaw knowingly and voluntarily consented to the search. Despite conflicting evidence, the trial court assessed the credibility and demeanor of the witnesses, and the Supreme Court declined to impose its own resolution of the conflicts on appeal. St. v. Shaw, 2005 MT 141, 327 M 281, 114 P3d 198 (2005), overruled, to the extent that a finding of probable cause is required in conjunction with the consent exception to the search warrant requirement, in St. v. Copelton, 2006 MT 182, 333 M 91, 140 P3d 1074 (2006).

Transient Party Guest's Reasonable Expectation of Privacy in Host's Bathroom During Warrantless Search — Community Caretaker Doctrine Inapplicable: When officers executed a warrantless search of Tash's apartment based on a complaint of a loud party, Smith, an 18-year-old transient party guest, was in the bathroom vomiting. An officer opened the closed bathroom door, smelled what was believed to be an intoxicating substance, concluded that Smith was intoxicated, and charged Smith with being a minor in (former?) possession of alcohol. Smith moved to suppress the evidence on grounds that the search was illegal and that the officer violated Smith's expectation of privacy in Tash's bathroom. The state contended that Smith lacked the requisite standing to challenge the officers' initial entry into the apartment because Smith was a guest and had no reasonable expectation of privacy in the common rooms of the apartment. Applying the factors in St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004), the Supreme Court agreed with the state. The state also argued that an officer's intrusion into the closed bathroom was justified under the community caretaker doctrine. On this point, the Supreme Court reversed. The community caretaker doctrine stands for the proposition that officers have a duty to investigate uncertain situations in order to ensure public safety, but the facts in this case did not warrant the officer's intrusion absent objective, specific, articulable facts supporting a conclusion that Smith was in need of officer assistance. Smith had a legitimate expectation of privacy in Tash's bathroom and was entitled to constitutional privacy protections. St. v. Smith, 2004 MT 234, 322 M 466, 97 P3d 567 (2004), followed, with regard to a guest's lack of standing to challenge a search of common areas of another person's apartment, in St. v. Redlich, 2004 MT 235, 322 M 476, 97 P3d 1090 (2004), and St. v. Shelton, 2008 MT 282, 345 M 330, 191 P3d 420 (2008).

Lack of Physical Description Not Precluding Particularized Suspicion Warranting Investigatory Stop — Defendant in Proximity to Suspects at Crime Scene: A convenience store clerk called police to report a possible theft and gave physical descriptions of two suspects. When a police officer arrived at the scene, he observed three people nearby, two of whom matched the physical description. Niles did not match the description, but was standing with those who did. The officer cornered one of the persons described by the clerk, after which Niles and the other person began walking away. When ordered to stop, the two tried to flee but were apprehended and arrested. Niles was charged with obstructing a peace officer and with possession of alcohol by a minor. During criminal proceedings, Niles moved to suppress evidence based on the contention that the officer lacked a particularized suspicion to detain. The motion was denied. On appeal, the Supreme Court affirmed. Although Niles was not physically described in the police report, he nevertheless was clearly associated with the two described suspects near the area of the crime, and although Niles did not initially run away from the officer, he did walk away in the presence of a suspect and in a manner that, under the totality of the circumstances, the officer could form a particularized suspicion that Niles was engaged in or had been engaged in criminal wrongdoing. St. v. Niles, 2002 MT 282, 312 M 453, 59 P3d 1129 (2002), distinguishing St. v. Broken Rope, 278 M 427, 925 P2d 1157 (1996), and St. v. Bauer, 2001 MT 248, 307 M 105, 36 P3d 892 (2001). See also St. v. Zeimer, 2022 MT 96, 408 Mont. 433, 510 P.3d 100.

Possession of Alcohol by Youth — Prosecutor's Choice of Forum: In light of 45-5-624, the County Attorney has sole discretion over which court (Justice's or Youth Court) hears a case involving illegal possession of alcohol by a minor. Edward C. v. Collings, 193 M 426, 632 P2d 325, 38 St. Rep. 1240 (1981).

Attorney General's Opinions

No Local Authority to Prohibit Minors in Licensed Premises: An incorporated town with general powers does not have the authority to enact an ordinance prohibiting persons under the age of 19 (now 21) from being on licensed premises where alcoholic beverages are sold and consumed. The local government may not enact an ordinance providing for greater penalties than those found in this section for a person under the age of 19 (now 21) convicted of possession of alcoholic beverages. 41 A.G. Op. 84 (1986).

Youth Court Act — Applicability to Alcohol Possession Proceedings in Other Courts: The provisions of the Montana Youth Court Act that apply to a youth charged with a violation of 45-5-624, illegal possession of alcohol, in justice's, municipal, or city court proceedings are

41-5-303 through 41-5-307 (renumbered 41-5-331, 41-5-1206, 41-5-341, 41-5-344, and 41-5-322), 41-5-402 (renumbered 41-5-1303), 41-5-601 (now repealed), 41-5-602 (now repealed), and 41-5-604 (renumbered 41-5-216). A youth charged with a violation of 45-5-624 is further entitled to the following rights in addition to those normally accorded defendants in justice's, municipal, or city court criminal proceedings: (1) service of the criminal summons on both the youth and a custodial parent or guardian; (2) advisement of the right to retained or, if appropriate, appointed counsel; and (3) waiver of the right to counsel only by both the youth and a custodial parent or guardian. 40 A.G. Op. 43 (1984).

Legal Age for Serving Alcoholic Beverages: A person who is 18 years of age may be employed as a bartender, waiter, or waitress to serve customers purchasing alcoholic beverages at retail. 38 A.G. Op. 15 (1979).

45-5-625. Sexual abuse of children.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 22, Ch. 685, L. 2023. Amendment effective October 1, 2023.

Severability: Section 42, Ch. 685, L. 2023, was a severability clause.

2019 Amendment: Chapter 228 in (4)(a)(i) in two places substituted "25 years" for "10 years". Amendment effective October 1, 2019.

Applicability: Section 4, Ch. 228, L. 2019, provided: "[This act] applies to offenses committed on or after October 1, 2019."

2017 Amendments — Composite Section: Chapter 134 in (1)(c) after "electronic communication" inserted "or in person", after "counsels" inserted "coerces, encourages, directs", and at end after "simulated" inserted "or to view sexually explicit material or acts for the purpose of inducing or persuading a child to participate in any sexual activity that is illegal"; and made minor changes in style. Amendment effective October 1, 2017.

Chapter 321 in (4)(a)(i) in two places substituted "10 years" for "25 years", substituted "46-18-222(1) through (5)" for "46-18-222", and inserted last sentence concerning exception. Amendment effective July 1, 2017.

Applicability: Section 2, Ch. 134, L. 2017, provided: "[This act] applies to all offenses committed on or after [the effective date of this act]." Effective October 1, 2017.

Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

2009 Amendment: Chapter 198 inserted (1)(h) criminalizing travel to meet a child for sexual purposes; inserted (1)(i) criminalizing conduct that facilitates the travel of a child for sexual purposes; and made minor changes in style. Amendment effective October 1, 2009.

2007 Amendments — Composite Section: Chapter 29 in (1)(c), (1)(d), (1)(e), and (1)(g) after "communication" deleted "as defined in 45-8-213"; inserted (5) defining electronic communication, sexual conduct, stimulated, and visual medium; and made minor changes in style. Amendment effective October 1, 2007.

Chapter 483 in (2)(a) at beginning inserted exception clause; inserted (4) providing punishment if the victim was 12 years of age or younger and the offender was 18 years of age or older at the time of the offense; and made minor changes in style. Amendment effective May 11, 2007.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

2005 Amendment: Chapter 364 in (1)(c) after "knowingly" inserted reference to any means of communication including electronic communication, after "child" inserted reference to under 16 years of age or person believed to be under 16 years of age, and at end after "simulated" deleted "for use as designated in subsection (1)(a), (1)(b), or (1)(d)"; in (1)(d), (1)(e), and (1)(g) substituted "child" for "children"; and made minor changes in style. Amendment effective October 1, 2005.

2003 Amendment: Chapter 344 in (1)(d), (1)(e), and (1)(g) near middle after "medium" inserted "including a medium by use of electronic communication, as defined in 45-8-213"; and made minor changes in style. Amendment effective October 1, 2003.

1995 Amendments — Composite Section: Chapter 187 in (1), at end, deleted "knowingly"; in (1)(a), (1)(b), (1)(c), (1)(d), and (1)(e) inserted "knowingly"; in (1)(d), after "sells", deleted "possesses with intent to sell"; in (1)(f) inserted reference to subsection (1)(g); inserted (1)(g) expanding sexual abuse of children offense to a person who possesses with intent to sell any visual or print medium in which children are engaged in actual or simulated sexual conduct; in (2)(c) increased fine from $500 to $10,000, substituted "state prison" for "county jail", and increased term of incarceration to 10 years from 6 months; adjusted subsection references; and made minor changes in style.

Chapter 482 in version effective July 1, 1997, in (2)(a), (2)(b), and (2)(c), near beginning, inserted reference to exception in 46-18-219; and made minor changes in style. The amendment in (2)(a) was rendered void by Ch. 550.

Chapter 546 in (3) substituted "department of corrections" for "department of corrections and human services"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 550 in (1)(d), after "sells", deleted "possesses with intent to sell"; in (1)(e), after "possesses", substituted "any visual or print medium in which children are engaged in sexual conduct, actual or simulated" for "material referred to in subsection (1)(d)"; in (1)(f) inserted reference to subsection (1)(g); inserted (1)(g) regarding possession with intent to sell; in (2)(a), at beginning, deleted "Except as provided in subsections (2)(b) and (2)(c)", after "shall be" substituted "punished by life imprisonment or by imprisonment" for "fined not to exceed $10,000 or be imprisoned", after "exceed" substituted "100" for "20", and at end substituted "and may be fined not more than $10,000" for "or both"; in (2)(b), after "shall be", substituted "punished by life imprisonment or by imprisonment" for "fined not to exceed $10,000 or be imprisoned" and after "prison for" substituted "a term of not less than 4 years or more than 100 years and may be fined not more than $10,000" for "any term not to exceed 50 years, or both"; in (3) expanded subsection reference to include subsection (1)(g); and made minor changes in style.

Coordination Instruction — Effective Dates: Section 21, Ch. 482, L. 1995, provided: "(1) If House Bill No. 357 and [this act] [Senate Bill No. 66] are both passed and approved:

(a) [sections 1 through 18] of [this act] are effective July 1, 1997; and

(b) the sentencing commission shall include recommendations for implementing the public policy contained in [sections 1 through 18] of [this act].

(2) [Sections 19, 20, and this section] [enacted as codification and coordination instructions] are effective July 1, 1995.

(3) If House Bill No. 357 is not passed and approved, then this section is void." House Bill No. 357 was approved March 31, 1995, as Ch. 306, L. 1995. Therefore, the amendments to 45-5-625, enacted as sec. 9 of Senate Bill No. 66, are effective July 1, 1997.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 638 in (1)(a), (1)(b), and (1)(c), after "sexual", substituted "conduct" for "contact"; in (1)(b), before "or records", inserted "develops or duplicates the photographs, films, or videotapes"; in (1)(d), after "advertises", substituted "any visual or print medium in which children are engaged in sexual conduct" for "material consisting of or including a photograph, photographic negative, undeveloped film, videotape, or recording representing a child engaging in sexual contact"; inserted (1)(e) expanding sexual abuse of children offense to person who knowingly "possesses material referred to in subsection (1)(d)"; at beginning of (2)(a) inserted exception clause; inserted (2)(b) establishing maximum $10,000 fine and 50-year imprisonment if victim of sexual abuse is under 16 years of age; inserted (2)(c) establishing maximum $500 fine and 6-month imprisonment for person convicted of possessing material depicting children engaged in sexual conduct; deleted former (3) that read: "(3) For the purposes of this section, "child" means any person less than 16 years old"; inserted (3) relating to use of visual or print material as part of sex offender information or treatment program approved by Department; and made minor changes in style.

Codification: Sec. 2, Ch. 505, L. 1979, provided: "Section 1 is intended to be codified as an integral part of Title 45, chapter 5, part 6, and the provisions contained in Title 45 apply to section 1."

Case Notes

Jury Instruction Regarding Text Messages to Minor Offering Money in Exchange for Seeing Minor Nude — District Court Did Not Abuse Discretion by Refusing to Give Jury Instruction for Violation of Privacy in Communication as Lesser-Included Offense of Sexual Abuse of Children — Crime Charged Is Matter of Prosecutorial Discretion. St. v. Brown, 2022 MT 176, 410 Mont. 38, 517 P.3d 177.

Sexual Abuse of Children Statute Not Reviewed on Appeal for Vagueness or Cruel and Unusual Punishment — Issue Not Preserved — As-Applied Constitutional Challenge May Not Be Raised First Time on Appeal. St. v. Brown, 2022 MT 176, 410 Mont. 38, 517 P.3d 177.

Text Messages to Minor Offering Money in Exchange for Seeing Minor Nude — Same as Encouraging Minor to Exhibit Intimate Parts — Sufficient Evidence to Support Conviction. St. v. Brown, 2022 MT 176, 410 Mont. 38, 517 P.3d 177.

Failure to Challenge Statutory Basis for Charge — Ineffective Assistance of Counsel: The defendant was charged with several counts of sexual misconduct with young family members. One of the alleged events occurred prior to the statute outlawing the conduct went into effect.

Following his conviction on all counts, the defendant appealed to the Supreme Court and alleged that he had received ineffective assistance of counsel because his counsel had not objected to the inclusion of conduct that was not outlawed. The Supreme Court reversed and remanded for a new trial, agreeing that the record demonstrated that the defendant had received ineffective assistance of counsel. St. v. Tipton, 2021 MT 281, 406 Mont. 186, 497 P.3d 610.

Multiple Convictions for Possession of Child Pornography When Images Found on Single Day, Single Device: The defendant was charged with multiple counts of possessing child pornography. Although he had downloaded and possessed numerous different images on his computer, he argued he could only be charged with one offense because the images were located on the same device and discovered on the same day. The state argued that each unduplicated picture included a different child, and therefore each picture constituted one count. The defendant pleaded guilty to one count and preserved the issue of whether he could be charged for multiple counts for appeal. On appeal, the Supreme Court affirmed, agreeing that the plain language of the charging and sentencing statutes permits the prosecution and conviction of a separate offense for each image the defendant possessed. St. v. Felde, 2021 MT 1, 402 Mont. 391, 478 P.3d 825.

Sexual Abuse of Children — Noncompliance Violation — Revocation Proper: After a police detective corroborated an informant's claim that the defendant had child pornography on his phone, the state filed a petition to revoke his suspended sentence for failing to register and for committing sexual abuse of children. At the revocation hearing, the detective testified about how the photos on the defendant's phone involved minor children in erotic poses. After the District Court revoked his sentence, the defendant appealed. The defendant argued that because the state did not submit the photos as evidence, there was insufficient evidence to revoke his sentence. The Supreme Court affirmed, finding that the testimony provided sufficient evidence to find the defendant had committed sexual abuse of children by a preponderance of the evidence. St. v. Howard, 2020 MT 279, 402 Mont. 54, 475 P.3d 392.

Sexual Abuse of Children Statute Constitutional: Defendant appealed his conviction of sexual abuse of children for counseling a child over the Internet to engage in masturbatory conduct, arguing that 45-5-625 violates the First Amendment and Commerce Clause of the United States Constitution by criminalizing any means of communication that serves to induce a child to engage in sexual conduct. The Supreme Court affirmed, concluding that the knowing communication requirement of 45-5-625 narrowly tailors the statute's reach to apply only to conduct that would contravene the state's interest in protecting children from online sexual predators and that the state's regulatory effort to prevent sexual abuse of children constitutes a permissible regulation of commerce that fails to unlawfully infringe on commerce among the several states. St. v. Hantz, 2013 MT 311, 372 Mont. 281, 311 P.3d 800.

Three Definitions of "Knowingly" — Sexual Abuse of Children: Of the three definitions of "knowingly" in 45-2-101, the conduct/circumstance definition, the result-of-conduct definition, and the fact definition, the same definition does not have to apply to each element of a crime. With the crime of sexual abuse of children, the correct definition must describe conduct of the defendant, so the conduct/circumstance definition would apply. It was not an abuse of discretion to give the fact definition to help the jury determine whether the defendant knew the pictures he downloaded were of children. St. v. Hovey, 2011 MT 3, 359 Mont. 100, 248 P.3d 303.

Actual Sexual Contact Between Children Not Essential Element of Attempted Sexual Abuse of Children: At Gaither's trial for felony attempted sexual abuse of children, Gaither contended that the charge should be dismissed because there was no evidence that sexual contact or activity actually occurred between children that Gaither was attempting to videotape having sex. The District Court declined to dismiss the charge or to instruct the jury that contact was an essential element of the crime. Gaither appealed, but the Supreme Court affirmed. Actual sexual contact or activity between alleged victims is not an essential element of the offense of attempted sexual abuse of children. The attempt statute does not require that the defendant actually completed the alleged crime, only that the defendant intended that the conduct occur and took steps toward its act or commission. Therefore, the District Court did not err in refusing to dismiss the charge or abuse its discretion in declining to instruct the jury that actual contact was an element of the crime. St. v. Gaither, 2009 MT 391, 353 M 344, 220 P3d 640 (2009), distinguishing St. v. Fuller, 266 M 420, 880 P2d 1340, 51 St. Rep. 890 (1994).

No Error in Admitting Evidence of Past Deviant Sexual Acts as Grooming for Future Sexual Abuse: At Marshall's trial for attempted sexual abuse of children, the trial court admitted evidence of Marshall's prior deviant sexual acts and comments over Marshall's objection that the prior acts were too spread out to constitute the same transaction and because the requirements of Rule 404(b), M.R.Ev. (Title 26, ch. 10), were not met. The Supreme Court held that the evidence was admissible as grooming, defined as the process of cultivating trust with a victim and gradually introducing sexual behaviors until reaching the point at which it is possible to perpetrate a sex crime against the victim. Thus, even though Marshall's prior acts may have been remote in time, grooming by definition must occur over a period of time, so the acts were inextricably linked to the charged offense. St. v. Marshall, 2007 MT 198, 338 M 395, 165 P3d 1129 (2007), followed in St. v. Bieber, 2007 MT 262, 339 M 309, 170 P3d 444 (2007), to the extent that evidence of defendant's legal acts was inextricably linked to and explanatory of the charged offense and therefore admissible, notwithstanding the rules related to admissibility of evidence of other acts, and in St. v. Gaither, 2009 MT 391, 353 M 344, 220 P3d 640 (2009). See also St. v. Buck, 2006 MT 81, 331 M 517, 134 P3d 53 (2006).

Sufficient Evidence of Attempted Sexual Abuse of Children — Grooming: Marshall contended that the state did not present sufficient evidence to prove attempted sexual abuse of children because Marshall did not take a material step to engage a child in sexual conduct or to prove that Marshall's specific purpose was to employ a child in sexual conduct. The Supreme Court disagreed with both arguments. Marshall engaged in a series of activities viewed as grooming the victim for future sexual contact, and a rational trier of fact could have found beyond a reasonable doubt that Marshall took a material step toward committing the crime. Also, if the child victim had taken Marshall's offer of money to remove her clothes for him, the action would have flouted community standards, and a jury could therefore have found beyond a reasonable doubt that Marshall sought to employ the child in the sexual conduct of a lewd exhibition of her intimate parts. The state's evidence was sufficient, and the conviction was affirmed. St. v. Marshall, 2007 MT 198, 338 M 395, 165 P3d 1129 (2007).

Defendant Not Precluded From Presenting "Mistake of Age" Defense: Although the term "child" was not statutorily defined, during Dasen's trial for sexual abuse of children, the trial court submitted a jury instruction that a child is anyone less than 18 years of age. However, the court did not instruct the jury that Dasen's reasonable belief that the girls he photographed were older than 18 would constitute a defense to the charge, nor did Dasen submit a "mistake of age" instruction concerning the charge. The state did argue for a "mistake of age" instruction, but the court refused the instruction and commented that Dasen's ideas concerning the age of the girls had nothing to do with the offense. On appeal, Dasen asserted that he was improperly prevented from presenting the "mistake of age" defense. The Supreme Court disagreed. The trial court's comment was not an explicit prohibition. Because Dasen did not ask for clarification of the comment or submit a proposed jury instruction concerning the "mistake of age" defense, he could not argue on appeal that the court ruling prevented a "mistake of age" defense. St. v. Dasen, 2007 MT 87, 337 M 74, 155 P3d 1282 (2007).

No Error in Trial Court's Failure to Sever Counts of Sexual Assault and Sexual Abuse of Children — Defendant's Failure to Show Prejudice: Prior to trial, Yecovenko moved to sever charges of sexual abuse of his stepdaughters from charges of sexual abuse of children related to Yecovenko's downloading of child pornography from the Internet, asserting that prejudice would result, but failing to assert the type of prejudice that would occur if the charges were not severed, as required by St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002). Because Yecovenko failed in District Court to satisfy the threshold requirement of alleging the nature or type of prejudice that would occur, the Supreme Court declined to consider Yecovenko's prejudice arguments on appeal, and denial of the motion to sever was affirmed. St. v. Yecovenko, 2004 MT 196, 322 M 247, 95 P3d 145 (2004).

Prohibition on Child Pornography Using Actual Children Not Unconstitutionally Overbroad: Griffin was convicted of 10 counts of sexual abuse of children relating to the possession of child pornography. On appeal, Griffin contended that subsection (1)(e) of this section was unconstitutionally overbroad, based on Ashcroft v. Free Speech Coalition, 535 US 234 (2002), wherein the U.S. Supreme Court held that 18 U.S.C. 2256(8)(B) unconstitutionally prohibited virtual child pornography using images created without using actual children. However, the images in Griffin's possession were clearly created by someone photographing real children engaging in sexual activities with other real children or adults, rather than virtual images. Thus, because neither subsection (1)(e) of this section nor Griffin's crimes dealt with virtual pornography, Ashcroft did not apply, and Griffin's conviction was affirmed. Griffin v. St., 2003 MT 267, 317 M 457, 77 P3d 545 (2003).

Sexual Abuse — Failure of District Court to Consider Sentencing Alternatives — No Objection — Sentence Not Illegal or Violation of Due Process: Swoboda pleaded guilty to sexual abuse of children, was classified as a nondangerous offender, and was sentenced to 15 years with the Department of Corrections. On appeal, she claimed as error the District Court's failure to consider alternatives to incarceration. The Supreme Court noted that she had not objected at sentencing to the District Court's failure and declined to review the judgment. The Supreme Court noted that in the past, it had made an exception and reviewed such a failure of the District Court when the state conceded the failure of the District Court or when the sentence was illegal. Here, however, the Supreme Court noted that the sentence was not beyond the District Court's jurisdiction. Citing St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep 310 (1996), the Supreme Court also held that the failure of the District Court was not a manifest miscarriage of justice and would not leave unsettled the question of the fundamental fairness of the trial or the proceedings. St. v. Swoboda, 276 M 479, 918 P2d 296, 53 St. Rep. 478 (1996).

Enforcement Not Eliminated by Lack of Past Violations: Opponents of a licensing fee on adult movie video booths argued that costs for enforcement of the child pornography law were in no way connected to operation of the booths. The Supreme Court found that the need for enforcement of the law was not eliminated because no child pornography was found in the booths in the past. Great Falls v. M.K. Enterprises, Inc., 225 M 292, 732 P2d 413, 44 St. Rep. 242 (1987).

45-5-626. Violation of order of protection.

Compiler's Comments

2017 Amendment: Chapter 253 in (1) at beginning inserted exception clause; and made minor changes in style. Amendment effective May 3, 2017.

Preamble: The preamble attached to Ch. 253, L. 2017, provided: "WHEREAS, according to data from the United States Centers for Disease Control and Prevention (CDC), more than 28,000 deaths in the United States in 2014 involved opioid-related overdoses. In 2015, nationwide overdose deaths involving opioids rose to more than 33,000. The CDC also reports that deaths involving heroin have more than tripled since 2010, with more than 10,500 persons dying in 2014 and almost 13,000 dying in 2015. More than 60% of the opioid-related overdose deaths in 2015 were attributed to primarily illicit opioids, including heroin, to synthetic opioids other than methadone, or to a mixture of the two. The CDC calls opioid-related deaths a national epidemic; and

WHEREAS, many opioid-related overdose deaths could be prevented by the timely administration of an opioid antagonist, such as naloxone hydrochloride. Naloxone is a prescription medication that, when administered to a person experiencing an opioid-related overdose, restores the person to consciousness and normal breathing. Naloxone has been in use for more than 30 years and is virtually always effective when administered correctly. Furthermore, naloxone is nonaddictive and has no potential for abuse; and

WHEREAS, treatment of a suspected opioid-related drug overdose must be performed by someone other than the person overdosing, and, for this reason, the United States Food and Drug Administration labels naloxone for third-party administration. Naloxone can be successfully administered outside of a clinical setting or facility by friends, family members, or bystanders who have received minimal training in overdose recognition and naloxone administration; and

WHEREAS, it is common for a family member or friend to be the first one to find a person who is experiencing a drug overdose. It is also common for first responders, such as law enforcement officers or firefighters, to be among the first persons on the scene of a reported drug overdose. Studies show widespread success in preventing deaths from opioid-related overdoses through timely administration of naloxone. It is imperative, therefore, that persons who are in a position to render timely assistance to an overdose victim have immediate access to naloxone when it is needed; and

WHEREAS, overdose education and naloxone distribution programs that train family members, friends, and others in a position to assist someone experiencing an opioid-related overdose can effectively reduce opioid overdose death rates. Moreover, naloxone distribution for administration by nonmedical experts can be highly cost-effective; and

WHEREAS, an opioid-related overdose is a medical emergency. After the administration of naloxone, it is critical to summon emergency medical assistance. However, persons who witness an overdose are sometimes reluctant to call 9-1-1 for fear of being arrested and prosecuted for a crime. Thirty-six states and the District of Columbia have passed laws providing limited immunity to persons who call for help when someone has experienced an opioid-related overdose; and

WHEREAS, numerous state and national public health and other organizations support increased access to naloxone, including the American Medical Association, the American Society of Addiction Medicine, the American Pharmacists Association, the United States Conference of Mayors, the National Governors Association, the federal Office of National Drug Control Policy, the American Public Health Association, the Harm Reduction Coalition, the National Association of State Alcohol and Drug Abuse Directors, the American Association of Poison Control Centers, and state and local law enforcement and other organizations representing first responders."

1995 Amendment: Chapter 350 in (1), at end of first sentence, inserted "or an order of protection under Title 40, chapter 15" and inserted second and third sentences regarding an inference of defendant's knowledge of an order of protection; inserted (2) regarding citations for violations of an order of protection; in (3), at end of first sentence, inserted "for a first offense" and inserted second and third sentences regarding penalties for second or subsequent offenses; and made minor changes in style.

Case Notes

Violation of Protective Order — No Evidence in Record to Establish Invalid Underlying Order: The defendant appealed his conviction of four counts of felony violation of a protective order. The defendant had argued that the underlying protection order was invalid but had unsuccessfully moved the District Court to dismiss the charges. After conducting its own independent review of the record, the Supreme Court held that there was no basis for finding the order invalid and that the District Court had not erred in denying the motion. St. v. Huffine, 2018 MT 175, 392 Mont. 103, 422 P.3d 102.

Four Violations of Protection Order With Four Phone Calls in One Day — Multiple Offenses Within Same Transaction: The defendant was charged with four counts of violating a protective order when he called his estranged wife from jail four times on the same day. The first two counts were charged as misdemeanors, and the second two were charged as felonies. The defendant argued that the calls were made as part of the same transaction and he therefore should be charged with only one count. The District Court concluded that the charges did not meet any of the exceptions under 46-11-410(2)(e) and thus could be charged separately. On appeal, the Supreme Court affirmed, finding that although the defendant's conduct met the statutory definition of "same transaction", he could still be convicted of multiple offenses arising from this single transaction. St. v. Strong, 2015 MT 251, 380 Mont. 471, 356 P.3d 1078.

Restitution for Victim's Counseling Services Received Prior to Crime Improper: The defendant was charged with violating a restraining order that had been granted based on allegations he had sexually assaulted a girl. As a part of his sentence, he was ordered to pay restitution for counseling services received by the girl. However, some of her counseling had been received prior to her knowing that the defendant had violated the restraining order. The defendant appealed the order of restitution, arguing that he had never been convicted of sexual assault and therefore could not be ordered to pay restitution for counseling that occurred prior to his violating the restraining order. The Supreme Court, agreeing that there was no requisite causal connection between violation of the protective order and counseling services rendered before the violation, vacated the award and remanded the matter for a recalculation of restitution for counseling services rendered after the girl learned of the violation of the restraining order. St. v. Thorpe, 2015 MT 14, 378 Mont. 62, 342 P.3d 5, followed in St. v. Henderson, 2015 MT 56, 378 Mont. 301, 343 P.3d 566.

No Ineffective Assistance Provided — Jury Fully and Fairly Instructed: Following a conviction for violating a permanent order of protection and tampering with a witness, the defendant alleged his counsel rendered ineffective assistance by offering instructions that included the standard definitions of "purposely" and "knowingly" in 45-2-101 and by failing to move to conform the written sentence to the oral sentence. The Supreme Court, however, found that the defendant suffered no prejudice as a result of the instructions but that remand was appropriate to provide the defendant with an opportunity to respond to the additional terms and conditions in the written sentence. St. v. Andress, 2013 MT 12, 368 Mont. 248, 299 P.3d 316, followed in St. v. Tellegen, 2013 MT 337, 372 Mont. 454, 314 P.3d 902, and in St. v. Daniels, 2019 MT 214, 397 Mont. 204, 448 P.3d 511.

Sufficient Evidence of Theft of Child's Snowmobile and Violation of Protective Order: When defendant was divorced, his ex-wife received a protective order prohibiting defendant from going to the ex-wife's residence and from contacting the ex-wife or the children. Subsequently, defendant and his ex-wife each gave their son $2,400 to purchase two snowmobiles, which were registered in the son's name. When defendant became desperate for money, he called both the ex-wife and the son and told them that he intended to take a snowmobile from the ex-wife's residence in order to sell it. When defendant took a snowmobile, he was arrested for theft and for violating the protective order. Following conviction on both charges, defendant appealed, but the Supreme Court affirmed. Viewed in a light most favorable to the prosecution, the jury had sufficient evidence to find that defendant purposely or knowingly obtained or exerted unauthorized control of property owned by the son, with the purpose of depriving the son of the property, and that defendant's action in taking the snowmobile violated the terms of the protective order beyond a reasonable doubt. St. v. Kuipers, 2005 MT 156, 327 M 431, 114 P3d 1033 (2005).

Attempt to Contact Former Spouse Through Unauthorized Third Party — Order of Protection Violation: In 1993, a Missoula County District Court issued a permanent injunction, based on a stalking violation of 45-5-220, prohibiting Gillispie from contacting his former wife "by a third person, except by telephone or correspondence through her attorney of record". In 1997, Gillispie admitted contacting his former wife's mother in Missoula and was charged with and convicted of an order of protection violation pursuant to this section. Gillispie contended that the 1993 injunction was no longer in effect in 1997 because the 1997 version of this section does not make criminal a violation of the permanent injunction imposed upon him in 1993. The Supreme Court disagreed. By broadening protections available to victims of partner and family assault in 1995 and clarifying the law in 1997, the Legislature did not intend to do away with any existing orders of protection already in place. The 1993 permanent order of protection remained in place in 1997, and Gillispie was properly charged and convicted when he admittedly violated the terms of the 1993 order. Missoula v. Gillispie, 1999 MT 268, 296 M 444, 989 P2d 401, 56 St. Rep. 1085 (1999).

Jurisdiction Over Municipal Court Protection Order: A Missoula County District Court issued a permanent injunction, based on a stalking violation of 45-5-220, prohibiting Gillispie from contacting his former wife "by a third person, except by telephone or correspondence through her attorney of record". Gillispie admitted contacting his former wife's mother in Missoula and was charged with and convicted in Municipal Court of an order of protection violation pursuant to this section. On appeal, Gillispie contended that the Municipal Court did not have jurisdiction over the offense. A Municipal Court has geographic jurisdiction over misdemeanors coextensive with the jurisdiction of Justices' Courts located in the same county. Although neither Gillispie nor the former wife was present in Missoula County at the time of the prohibited phone call, the former wife's mother received the call in Missoula County. Thus, the Municipal Court was vested with jurisdiction over the misdemeanor order of protection violation when the necessary result of Gillispie's third-party contact by telephone was committed within Missoula County. Missoula v. Gillispie, 1999 MT 268, 296 M 444, 989 P2d 401, 56 St. Rep. 1085 (1999).

45-5-627. Ritual abuse of minor — exceptions — penalty.

Compiler's Comments

1999 Amendment: Chapter 432 in (1)(a) inserted "assault on a minor" and substituted "assault with a weapon" for "felony assault". Amendment effective October 1, 1999.

1995 Amendment: Chapter 482 in version effective July 1, 1997, in (3), at beginning, inserted "Except as provided in 46-18-219".

Coordination Instruction — Effective Dates: Section 21, Ch. 482, L. 1995, provided: "(1) If House Bill No. 357 and [this act] [Senate Bill No. 66] are both passed and approved:

(a) [sections 1 through 18] of [this act] are effective July 1, 1997; and

(b) the sentencing commission shall include recommendations for implementing the public policy contained in [sections 1 through 18] of [this act].

(2) [Sections 19, 20, and this section] [enacted as codification and coordination instructions] are effective July 1, 1995.

(3) If House Bill No. 357 is not passed and approved, then this section is void." House Bill No. 357 was approved March 31, 1995, as Ch. 306, L. 1995. Therefore, the amendments to 45-5-627, enacted as sec. 10 of Senate Bill No. 66, are effective July 1, 1997.

1993 Statement of Intent: The statement of intent attached to Ch. 452, L. 1993, provided: "It is the intent of the legislature that the phrase "ceremony, rite, or ritual" be interpreted in a manner that does not include a ceremony, rite, or ritual performed in a formal, commonly recognized religious ceremony."

Severability: Section 6, Ch. 560, L. 1993, was a severability clause.

45-5-628. Criminal child endangerment.

Compiler's Comments

2021 Amendment: Chapter 498 in (1)(e) substituted "61-8-1002 or committing aggravated driving under the influence as defined in 61-8-1001" for "61-8-401, 61-8-406, 61-8-410, or 61-8-465". Amendment effective January 1, 2022.

Applicability: Section 48, Ch. 498, L. 2021, provided: "[This act] applies to DUI incidents taking place on or after [the effective date of this act]." Effective January 1, 2022.

Saving Clause: Section 45, Ch. 498, L. 2021, was a saving clause.

Effective Date: Section 3, Ch. 304, L. 2013, provided: "[This act] is effective on passage and approval." Approved April 25, 2013.

Applicability: Section 4, Ch. 304, L. 2013, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective April 25, 2013.

Case Notes

DUI and DUI Per Se As Lesser-Included Offenses of Criminal Child Endangerment by DUI — Conviction Reversed for Failure to Include Lesser-Included Jury Instructions: The defendant was stopped after an officer observed him driving through a campground. At the time of the stop, other passengers in the defendant's vehicle included his three children under the age of 14, as well as a woman and her 5-year old child. The defendant was charged with child endangerment by DUI and child endangerment by DUI per se. At trial, the defendant asked the court to include jury instructions on DUI and DUI per se as lesser-included offenses to the respective child endangerment charges, but the request was declined. The defendant was convicted of child endangerment by DUI and appealed to the Supreme Court on the question of the exclusion of the lesser-included offense instructions. The Supreme Court agreed with the defendant, noting that the defendant's presentation of the case to the jury allowed the possibility for a jury to rationally conclude the defendant was guilty of the lesser, but not the greater offense. The Supreme Court held that the greater offense of child endangerment requires additional proof of the required mental state and the causing of the substantial risk of death or serious bodily injury to a child. The Supreme Court concluded that it was possible for the jury to find that the defendant committed DUI or DUI per se without purposely, knowingly, or negligently causing substantial risk of death or serious injury to the children in the defendant's vehicle, and thus the jury should have been instructed on the lesser-included offenses. St. v. Freiburg, 2018 MT 145, 391 Mont. 502, 419 P.3d 1234, following St. v. Daniels, 2017 MT 163, 388 Mont. 89, 397 P.3d. 460.

45-5-631. Interference with parent-child contact.

Compiler's Comments

1997 Amendment: Chapter 343 throughout section substituted reference to interference with parent-child contact for "visitation interference"; in (1), near beginning after "has", substituted "been granted parent-child contact under a parenting plan" for "legal custody of a minor child"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Case Notes

Allegations of Constructive Fraud and Visitation Interference Unsubstantiated by Fact — Summary Judgment Proper: Appellant alleged that a counselor's testimony at a dissolution hearing was a misrepresentation constituting constructive fraud and that her observations and professional opinions affected the outcome of the visitation order to the point of visitation interference. However, the allegations were based on appellant's own speculation and opinion rather than substantial objective evidence contained in the record. Absent any genuine issue of material fact, summary judgment on both questions was proper. Thomas v. Hale, 246 M 64, 802 P2d 1255, 47 St. Rep. 2261 (1990).

45-5-632. Aggravated interference with parent-child contact.

Compiler's Comments

1997 Amendment: Chapter 343 throughout section substituted reference to interference with parent-child contact for "visitation interference"; and in (1), near beginning after "minor child", deleted "over whom he has legal custody" and after 40-4-217 inserted "unless the notice requirement has been precluded under 40-4-234".

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

45-5-633. Defenses to interference with parent-child contact and aggravated interference with parent-child contact.

Compiler's Comments

1997 Amendment: Chapter 343 throughout section substituted reference to interference with parent-child contact for "visitation interference"; at end of (1)(a) substituted "parent-child contact" for "visitation"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

45-5-634. Parenting interference.

Compiler's Comments

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modifications of orders or decrees existing on October 1, 1997."

Case Notes

Parenting Interference Conviction — Imposition of Conditions Restricting Alcohol Consumption and Gambling Reversed — Requirement for Mental Health Evaluation Affirmed: As a sentencing condition for conviction of parenting interference, a mother was required to refrain from consuming alcohol and frequenting casinos and was ordered to undergo a mental health evaluation. The mother appealed the imposition of the conditions. The Supreme Court noted that a sentencing condition must have some correlation or connection to the underlying offense, and in this case there was no nexus between alcohol consumption or gambling and parenting interference, so those conditions were stricken. However, the mother's past actions and the conduct forming the basis for the underlying offense revealed a correlation between the evaluation ordered and the conviction for parenting interference, so the sentencing court did not err in requiring a mental health evaluation as a sentencing condition in this case, and that requirement was affirmed. St. v. Young, 2007 MT 323, 340 M 153, 174 P3d 460 (2007), following St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999).

Sufficient Evidence of Paternity to Qualify Person as Parent for Purposes of Charging Parenting Interference: A mother who appealed a parenting interference conviction contended that there was insufficient evidence of the crime because the purported father had not established paternity and therefore had no parental rights that could be interfered with. The Supreme Court disagreed. At trial, the purported father testified that: (1) he was the father; (2) the child had been conceived while the couple was living together after the couple discussed having a baby and made a deliberate decision to engage in sexual intercourse without using birth control; (3) the mother had told him that she had a surprise for him and handed him a positive pregnancy test; (4) the mother told him that he was the father; and (5) he had accompanied the mother on two prenatal visits and witnessed a sonogram revealing a baby girl and that the mother had given him the sonogram images. This testimony provided sufficient evidence of paternity under the Uniform Parentage Act. Although the state may not impose parenting obligations without a hearing, this does not necessarily mean that a natural parent possesses no parental rights without a hearing. The purported father in this case inherently possessed parental rights as a natural parent before a court had entered an order determining those rights, so the same evidence supporting paternity also established his parental rights and supported the jury's verdict that the mother interfered with those rights. St. v. Young, 2007 MT 323, 340 M 153, 174 P3d 460 (2007).

45-5-637. Possession or consumption of tobacco products, alternative nicotine products, or vapor products by persons under 18 years of age prohibited — unlawful attempt to purchase — penalties.

Compiler's Comments

2015 Amendment: Chapter 337 in (1) in two places, (2), (3), and (4) in three places after "tobacco product" inserted "alternative nicotine product, or vapor product"; and made minor changes in style. Amendment effective January 1, 2016.

2001 Amendment: Chapter 498 in (2)(a) increased first offense fine from $35 to $50; inserted (4) creating offense of attempt to purchase a tobacco product by a person under 18 and providing penalties; in (5) near beginning inserted reference to subsection (4); and made minor changes in style. Amendment effective October 1, 2001.

1997 Amendment: Chapter 550 in (2)(b) substituted "youth in need of intervention" for "youth in need of supervision". Amendment effective July 1, 1997.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

Part 7
Human Trafficking

Part Compiler's Comments

Effective Date: Section 30, Ch. 285, L. 2015, provided: "[This act] is effective July 1, 2015."

45-5-701. Definitions.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 10, Ch. 167, L. 2023. Amendment effective April 19, 2023.

Severability: Section 38, Ch. 167, L. 2023, was a severability clause.

45-5-702. Sex trafficking.

Compiler's Comments

2023 Amendment — Coordination: See 2023 Session Law for amendment made by sec. 5, Ch. 666, L. 2023. Amendment effective May 19, 2023.

The amendments to this section made by sec. 11, Ch. 167, L. 2023, and sec. 1, Ch. 666, L. 2023, were replaced by sec. 5, Ch. 666, L. 2023, a coordination section.

Severability: Section 38, Ch. 167, L. 2023, was a severability clause.

2019 Amendment: Chapter 308 in (1)(b) near middle inserted "facilitating any conduct described in subsection (1)(a) or from"; in (2)(a) substituted "subsections (2)(b) and (2)(c)" for "subsection (2)(b)"; in (2)(b) substituted "fined an amount not to exceed $100,000, or both" for "and may be fined not more than $100,000"; deleted former (2)(b)(i) that read: "(i) the violation involves aggravated kidnapping, sexual intercourse without consent, or deliberate homicide"; inserted (2)(c) providing enhanced penalties when a violation involves aggravated kidnapping, aggravated sexual intercourse without consent, or deliberate homicide; and made minor changes in style. Amendment effective May 7, 2019.

Applicability: Section 16, Ch. 308, L. 2019, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective May 7, 2019.

45-5-703. Labor trafficking.

Compiler's Comments

2023 Amendment — Coordination: See 2023 Session Law for amendment made by sec. 7, Ch. 666, L. 2023. Amendment effective May 19, 2023.

The amendments to this section made by sec. 12, Ch. 167, L. 2023, and sec. 2, Ch. 666, L. 2023, were replaced by sec. 7, Ch. 666, L. 2023, a coordination section.

45-5-705. Patronizing victim of sex trafficking.

Compiler's Comments

2023 Amendment — Coordination: See 2023 Session Law for amendment made by sec. 8, Ch. 666, L. 2023. Amendment effective May 19, 2023.

The amendments to this section made by sec. 13, Ch. 167, L. 2023, and sec. 4, Ch. 666, L. 2023, were replaced by sec. 8, Ch. 666, L. 2023, a coordination section.

2019 Amendment: Chapter 308 in (1) at end after "sexual activity" deleted "with"; in (1)(a) at beginning inserted "that involves sexual contact that is direct and not through clothing with" and after "person knows" inserted "or reasonably should have known"; in (1)(b) at beginning inserted "with"; and in (2)(a) near middle after "term of" inserted "not more than". Amendment effective May 7, 2019.

Applicability: Section 16, Ch. 308, L. 2019, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective May 7, 2019.

45-5-706. Aggravated sex trafficking.

Compiler's Comments

2023 Amendment — Coordination: See 2023 Session Law for amendment made by sec. 9, Ch. 666, L. 2023. Amendment effective May 19, 2023.

The amendment to this section made by sec. 14, Ch. 167, L. 2023, was replaced by sec. 9, Ch. 666, L. 2023, a coordination section.

45-5-707. Property subject to forfeiture — human trafficking.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 15, Ch. 167, L. 2023. Amendment effective April 19, 2023.

Severability: Section 38, Ch. 167, L. 2023, was a severability clause.

2015 Code Commissioner Correction: Pursuant to sec. 40, Ch. 55, L. 2015, the code commissioner in (6) substituted "Title 44, chapter 12, part 2" for "44-12-201 through 44-12-205" to reflect the repeal and reassignment of those sections by Ch. 421, L. 2015.

45-5-708. Past sexual behavior of victim.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 16, Ch. 167, L. 2023. Amendment effective April 19, 2023.

Severability: Section 38, Ch. 167, L. 2023, was a severability clause.

45-5-709. Immunity of child — sex therapy participants.

Compiler's Comments

2023 Amendments — Composite Section: Section 17, Ch. 167, L. 2023, in (1) near middle substituted "sex trafficking or prior similar laws in effect at the time the act occurred" for "promoting prostitution". Amendment effective April 19, 2023.

Section 26, Ch. 713, L. 2023, in (5) substituted "clinical social worker, marriage and family therapist, or clinical professional counselor licensed under Title 37, chapter 39" for "social worker, professional counselor, or licensed clinical professional counselor licensed under Title 37, chapter 22 or 23". Amendment effective October 1, 2023.

Severability: Section 38, Ch. 167, L. 2023, was a severability clause.

2019 Amendments — Composite Section: Chapter 308 in (2) after "prostitution" deleted "or promoting prostitution"; in (4) at beginning substituted "Subsections (1) through (3)" for "This section does"; inserted (5) concerning an exception for a person engaging in sex therapy with a parter surrogate; and made minor changes in style. Amendment effective May 7, 2019.

Chapter 468 in (3) at the end after "chapter 3" inserted entitlement for child victim of sex trafficking to specialized services and care; and made minor changes in style. Amendment effective October 1, 2019.

Applicability: Section 16, Ch. 308, L. 2019, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective May 7, 2019.

45-5-710. Affirmative defense.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 18, Ch. 167, L. 2023. Amendment effective April 19, 2023.

Severability: Section 38, Ch. 167, L. 2023, was a severability clause.

45-5-711. Child sex trafficking.

Compiler's Comments

Effective Date: Section 10, Ch. 666, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 19, 2023.

2023 Enactment — Coordination: The enactment of this section by sec. 19, Ch. 167, L. 2023, was replaced by sec. 6, Ch. 666, L. 2023, a coordination section.

45-5-712. Evidence in cases of sex trafficking, aggravated sex trafficking, or child sex trafficking.

Compiler's Comments

Effective Date: Section 39, Ch. 167, L. 2023, provided: "[This act] is effective on passage and approval." Approved April 19, 2023.

Severability: Section 38, Ch. 167, L. 2023, was a severability clause.

CHAPTER 6
OFFENSES AGAINST PROPERTY

Chapter Compiler's Comments

Annotator's Note — Source: The compiler's comments entitled "Annotator's Note" are taken from the Montana Criminal Code of 1973 Annotated (1980 rev. ed.) produced by the Montana Criminal Law Information Research Center (MONTCLIRC) and printed under cosponsorship of the State Bar of Montana. Minor revisions have been made to conform to the style and format of the annotations.

Part 1
Criminal Mischief and Arson

45-6-101. Criminal mischief.

Criminal Law Commission Comments

Source: New.

This section defines the behavior that is punishable because it harms or threatens to harm property. In so far as the section deals with purposeful, unjustified actual harm to property, it corresponds to the traditional "malicious mischief" offense. This section would include killing, maiming, or poisoning livestock. The section is more comprehensive and requires proof of a different mental state than prior law.

Subsection [3] classifies some criminal mischief a felony by providing imprisonment up to ten (10) years in the state prison for causing pecuniary loss in excess of $150 [raised to $300 in 1983]. Under the old malicious mischief section (R.C.M. 1947, section 94-3301) the amount of loss required for a felony conviction was only fifty ($50) dollars and there was a mandatory minimum penalty of one year. This section has changed the minimum amount necessary for a felony conviction to conform with changing values.

Compiler's Comments

2011 Amendment: Chapter 258 in (5) near middle after "wildlife, and parks" substituted remainder of sentence for "is subject to an additional penalty as provided in 87-1-102(2)(e)". Amendment effective October 1, 2011.

Preamble: The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

Saving Clause: Section 131, Ch. 258, L. 2011, was a saving clause.

Severability: Section 132, Ch. 258, L. 2011, was a severability clause.

2009 Amendments — Composite Section: Chapter 121 inserted (5) adding an additional penalty for criminal mischief involving property owned or administered by the department of fish, wildlife, and parks. Amendment effective October 1, 2009.

Chapter 473 in (3) in first sentence increased maximum fine from $1,000 to $1,500, and in second sentence near middle increased amount of pecuniary loss from $1,000 to $1,500. Amendment effective October 1, 2009.

1999 Amendment: Chapter 397 in (3) in first sentence increased maximum fine from $500 to $1,000 and in second sentence increased maximum value of pecuniary loss from more than $500 to more than $1,000; and made minor changes in style. Amendment effective October 1, 1999.

1993 Amendment: Chapter 616 in (3), in second sentence, increased pecuniary loss amount from $300 to $500; and made minor changes in style.

1989 Amendment: Inserted (4) relating to aggregation of amounts in determining pecuniary loss.

1983 Amendment: In (3), after "loss in excess of" changed "$150" to "$300".

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Chapter 560 inserted (2) requiring restitution by person convicted of criminal mischief.

Annotator's Note: This part of chapter 6 dealing with Criminal Mischief and Arson has been drafted to provide a comprehensive treatment of activities which either intentionally or negligently destroy or damage personal or real property. Under the old code there were six sections in chapter 5 of Title 94, R.C.M. 1947, which dealt with arson and at least thirty-four sections in chapter 33 dealing with malicious mischief. In addition, this part encompasses numerous sections contained in chapter 35 of the old code on "Miscellaneous Offenses". Because the offenses in this part of the new code are closely interrelated and heavily dependent upon precise construction and application of the terminology in the various subsections, attention is directed to MCA, 45-2-101 in which the key words and phrases are defined.

This section on Criminal Mischief is the lowest offense in the hierarchy of crimes which deal with behavior that harms or threatens to harm property. While each subsection has its own requirements for culpability, in general, the prosecution under this section must establish: (1) that the prohibited conduct occurred—damage, destruction, tampering, etc.; (2) that the defendant possessed the required mental states of "knowingly" or "purposely", as defined in 45-2-101; and (3) that the defendant had no reasonable ground to believe he was right as indicated by the phrase "without consent", which is construed according to its normal grammatical meaning. Negligent or inadvertent damage to property is not covered by this section.

Under this definition of "without consent" the defense could raise the affirmative defense that the actor owned the property or believed that he had authority for the act. Similarly, the U.S. Supreme Court has ruled that a person who intentionally destroys property of another, but held an honest belief that it was abandoned, cannot be convicted. See Morisette v. United States, 342 US 246 (1952).

Subsection (1)(a) which proscribes actual harm to property of another, corresponds to traditional malicious mischief. "Property of another", MCA, 45-2-101, includes both real and personal property. The subsection is intentionally broad to eliminate the need for having a number of offenses which define more specific types of behavior such as the destruction of art, literature, crops, livestock, etc. This subsection would also include forms of arson which may not fit into the more exacting requirements of the arson statute which follow. For example, if a person intentionally sets fire to a shack, to livestock housing or to any other articles which do not meet the criteria of an "occupied structure" as required in the Arson statute, MCA, 45-6-103, he may be prosecuted under subsection (1)(a) of this statute.

Subsection (1)(b), which deals with tampering, encompasses numerous offenses such as the meddling with and disarrangement of papers, files, and records, and the breaking or obstruction of public utility equipment. "Tampering" as defined by § 45-2-101 implies meddling, interfering, or altering property. The definition of "tampering" also includes depositing refuse—thus allowing prosecution for littering under this section.

Subsection (1)(c), which prohibits the destruction of property with the intent to defraud an insurer, encompasses section 94-506. Since the offense defined in this subsection is ordinarily occasioned upon the offender's property, it is not necessary that the property destroyed belong to another. The offense does, however, require a purpose to defraud as well as the purpose to perform the act. Property, as defined in § 45-2-101 includes anything tangible or intangible of value.

Subsection (1)(d) provides a criminal penalty for the failure to close gates previously unopened. It should be noted that this subsection only prohibits intentional acts. Negligent or accidental failure to close a gate is not a criminal act. The provision only applies to rural areas where the danger to livestock from such acts is generally high. This subsection replaces section 94-35-116.

Subsection (3) classifies Criminal Mischief as either a felony or misdemeanor depending upon the value of the injured property. [See "Pecuniary Loss v. Value" note below.] The sentencing provision is broad to allow use of this section as an alternative or lesser included offense in arson prosecutions. Attention is directed to MCA, 45-2-101, which defines the manner in which the value of property is to be ascertained.

The 1975 amendment inserted "or public property" after "property of another" in subdivisions (1)(a) and (b). There was some question whether public property was included in the original statute because "property of another" was defined as property in which another person had an interest (§ 45-2-101). The amendment was intended to make certain that property owned by any governmental entity or agency, or any other public body is within the protection of the statute.

Pecuniary Loss Versus Value: In St. v. Palmer, 207 M 152, 673 P2d 1234, 40 St. Rep. 1957, at 1962, (1983), the court made the following statements:

Most criminal statutes, including theft, draw the line between a felony and a misdemeanor based upon the "value" of the property involved. It is to these statutes that the definition [of "value"] contained in Section 45-2-101 applies. The distinction between felony and misdemeanor criminal mischief, however, is not measured by the "value" of property damaged or destroyed. On the contrary, the difference is controlled by the amount of "pecuniary loss" to the owner of the property. See Section 45-6-101(3). The term "value," as defined by Section 45-2-101, does not appear in the criminal mischief statute. [Appellant] Palmer points to certain Compiler's Comments to the statute [definition of "value" in 45-2-101] which use the word "value" in the context of criminal mischief, but these comments, apparently drafted by the Montana Criminal Law Information and Research Center at the University of Montana [now University of Montana-Missoula] Law School, are not part of the statute and thus do not have the force of law. Moreover, they are clearly misleading with respect to classifying categories of criminal mischief. . . .

Simply defined, "pecuniary loss" means "[a] loss of money, or something by which money or something of money value may be acquired." Black's Law Dictionary 1018 (5th ed. 1979). . . . Obviously, the statute [45-6-101(3)] was carefully drafted to avoid reference to "value," because property damaged or destroyed by criminal mischief may not, in some instances, have a market value or replacement cost.

Case Notes

Calculation of Restitution Reversed and Remanded — No Joint and Several Liability for Restitution for 11-Day Vandalism Spree When Youth Participated Only 2 Days: A youth pleaded guilty to participating in 2 nights of an 11-day vandalism spree. The judge ordered that he was jointly and severally liable for the amount of damage caused throughout the entire spree, which exceeded $70,000. The youth argued he should be ordered to pay restitution for only the damages caused during the 2 days instead because the state did not establish his accountability for the vandalism that occurred during the other 9 days of the spree. The state argued it did not have to establish his accountability under the criminal mischief statutes for each day of the spree. The youth appealed to the Supreme Court, which agreed with the youth that the state was required to prove his accountability for the acts of others. The Court reversed the District Court's order of restitution and remanded for a recalculation of restitution for the 2 days on which the youth participated in the acts of vandalism. In re B.W., 2014 MT 27, 373 Mont. 409, 318 P.3d 682.

Youth Offender Jointly and Severally Liable for Restitution Award — Failure to Consider Youth's Ability to Pay — Plain Error Warranting New Restitution Hearing: At his plea hearing, the youth defendant admitted to having committed criminal mischief as part of a common scheme, in violation of 45-6-101 and 45-2-101. The youth admitted his participation in 2 nights of vandalism, causing $16,020.63 in damages, out of 11 total nights of vandalism, worth total damages of $78,702.09. At the restitution hearing, the Youth Court held the youth jointly and severally liable for the entire $78,702.09 without inquiring into the extent of the youth's assets or prospects for future earnings. On appeal, the Supreme Court held that it was plain error for the Youth Court to fail to consider the youth's ability to pay the restitution. The Supreme Court took up the issue sua sponte because the error implicated the youth's fundamental constitutional rights under Article II, sec. 15, Mont. Const., as a youth in the Youth Court system faces a different disposition and therefore is not similarly situated to an adult who commits the same offense. Additionally, the criminal mischief statute at 45-6-101(2) expressly requires the court to impose restitution only after fully considering the convicted person's ability to pay. The Supreme Court held that the Youth Court's failure to consider the youth's ability to pay raised questions of the fundamental fairness of the proceedings against him and remanded for a new restitution hearing to consider the youth's ability to pay the full amount of restitution. In re K.E.G., 2013 MT 82, 369 Mont. 375, 298 P.3d 1151.

Criminal Mischief Guilty Plea Based on Quality of Construction Work — Lack of Factual Basis for Plea Casting Doubt on Voluntariness — Remand: Wise was charged with elder abuse by exploitation and criminal mischief for allegedly performing shoddy construction work on an elderly woman's property. Wise agreed to plead guilty to criminal mischief in exchange for dismissal of the elder abuse charge. At the change of plea hearing, Wise acknowledged performing shoddy construction work but did not admit guilt sufficient to be convicted of criminal mischief. Nevertheless, the trial court did not allow Wise to withdraw the guilty plea and Wise was convicted. On appeal, the Supreme Court reversed. Although a court need not extract an admission from a defendant of every element of a crime in order to establish a factual basis for a guilty plea, the court must ascertain from the defendant's admissions that the defendant's acts generally satisfy the elements of the crime to which the defendant is pleading guilty. In this case, shoddy construction work, without more, did not constitute criminal mischief, and the trial court incorrectly concluded that there was a factual basis for Wise's plea, which cast doubt on the voluntariness of the plea, warranting reversal and remand for further proceedings. St. v. Wise, 2009 MT 32, 349 M 187, 203 P3d 741 (2009), following St. v. Frazier, 2007 MT 40, 336 M 81, 153 P3d 18 (2007).

Valuation of Damaged Automobile of "At Least $1,000" in Youth Court Held Insufficient to Support Adjudication as Delinquent Youth — Failure to Develop Argument in Brief: J.D.N. was adjudicated in Youth Court of damaging an automobile that the court valued to be of "at least $1,000" for the purposes of 45-6-101. The court concluded that J.D.N. committed felony criminal mischief and was therefore adjudicated to be a delinquent youth under 41-5-1502. J.D.N. argued that the finding by the court that the vehicle was worth "at least $1,000" was insufficient to support an adjudication that he was a delinquent youth as defined in 41-5-103. The Supreme Court agreed, noting that the criminal mischief statute uses the language "in excess of $1,000." The Supreme Court therefore remanded the case to the Youth Court and directed a disposition consistent with the finding that J.D.N. committed an offense that, if committed by an adult, would be a misdemeanor. The court declined to enter an order dismissing the petition charging J.D.N. to be a delinquent youth, saying that J.D.N. had failed to develop an argument for that result in his brief and that the court would not do it for him, citing St. v. Torgerson, 2008 MT 303, 345 M 532, 192 P3d 695 (2008). In re J.D.N., 2008 MT 420, 347 M 368, 199 P3d 189 (2008).

Sufficient Evidence of Felony Criminal Mischief by Accountability — Denial of Directed Verdict Proper: Maetche had a rental contract for a mobile home and gave the owner 2 weeks' notice of the intent to move out. During that 2-week period, the home sustained over $11,000 in damages. Maetche's husband confessed to causing the damage, but Maetche was charged with felony criminal mischief by accountability. At the close of the state's case, Maetche moved for a directed verdict, asserting that the state failed to present any evidence that, either before or during the damage, Maetche had "solicited, aided, abetted, agreed, or attempted to aid" in committing the damage and thus could not be held legally accountable. The District Court denied the motion and found Maetche guilty, and on appeal, the Supreme Court affirmed. Circumstantial evidence placed Maetche at the crime scene while the damage was occurring, and an eyewitness observed Maetche removing a washer and dryer from the home, thereby contributing to the damage. This evidence, combined with direct evidence of the purposeful nature of the destruction, was sufficient to permit a rational trier of fact to conclude that Maetche was criminally accountable for other destruction to the home and thus guilty of criminal mischief beyond a reasonable doubt and provided a circumstantial basis for a determination that Maetche was also involved in destruction of other parts of the home as well. St. v. Maetche, 2008 MT 184, 343 M 464, 185 P3d 980 (2008), distinguishing St. v. Johnston, 267 M 474, 885 P2d 402 (1994), and St. v. Cochran, 1998 MT 138, 290 M 1, 964 P2d 707 (1998).

Evidence to Support Theft Conviction Despite Acquittal of Burglary and Criminal Mischief Charges: Kelley was convicted of theft, but acquitted of criminal mischief and burglary charges in connection with a break-in at a pet store. On appeal, Kelley asserted that the acquittals demonstrated the insufficiency of the evidence underlying the theft conviction. The Supreme Court disagreed. Each of the crimes charged consisted of distinct elements, and the theft charge was not inseparable from the criminal mischief and burglary charges. When each act is a separate offense, an acquittal or conviction of one or more counts does not affect the other counts, and it is permissible for a jury to convict on one count and acquit on another when it is within the province of the jury to convict on both counts on the same evidence. Thus, Kelley's contention that acquittal of criminal mischief and burglary had the effect of negating his participation in a theft was rejected, and the theft conviction was affirmed. St. v. Kelley, 2005 MT 200, 328 M 187, 119 P3d 67 (2005), followed in St. v. Borsberry, 2006 MT 126, 332 M 271, 136 P3d 993 (2006), with regard to the ability of a jury to convict on one count and acquit on another when it is within the jury's province to convict on both counts on the same evidence and the fact that an acquittal resulting from the state's failure to prove an element of a crime cannot be considered tantamount to an affirmative proposition that a defendant did or did not engage in a particular act. See also St. v. Daly, 77 M 387, 250 P 976 (1926), St. v. Azure, 2002 MT 22, 308 M 201, 41 P3d 899 (2002), and St. v. Bailey, 2003 MT 150, 316 M 211, 70 P3d 1231 (2003).

Evidence of Victim's Failure to Repair Car Not Grounds for New Trial Because Evidence Not Relevant to Amount of Pecuniary Loss Suffered by Victim: Allen argued that the trial court erred in not granting him a new trial in his felony mischief case, based on newly discovered evidence that his sister had not had her car repaired after he shot bullet holes in it. The Supreme Court stated that a new trial based on newly discovered evidence could be granted only if the evidence is so material that it would probably produce a different result upon a new trial. The Supreme Court ruled that in the case before it, evidence of failure to make repairs did not affect the amount of pecuniary loss suffered by the victim and therefore Allen's conviction for felony mischief was proper and he was not entitled to a new trial. St. v. Allen, 2001 MT 17, 304 M 129, 18 P3d 1006 (2001).

Exclusivity of Title 87 as Remedy for Fish and Game Violations:

Section 87-1-102(1) (1993, now repealed, but see 87-6-102) provided in part that a "person who purposely or knowingly violates any provision of this title, any other state law pertaining to fish and game, or the orders or rules of the commission or department is guilty of a misdemeanor, except if a felony is expressly provided by law, and shall be fined not less than $50 or more than $500, imprisoned in the county jail for not more than 6 months, or both, unless a different punishment is expressly provided by law for the violation". This provision limits penalties for fish and game violations to those provided in Title 87 and precludes the charging of appellant with felony criminal mischief under Title 45. The portion of St. v. Fertterer, 255 M 73, 841 P2d 467 (1992), holding that Title 87 does not provide the exclusive remedy for fish and game violations and allowing defendant to be charged with felony criminal mischief under Title 45, is manifestly wrong and is expressly overruled. St. v. Gatts, 279 M 42, 928 P2d 114, 53 St. Rep. 1042 (1996). (See 87-6-104, enacted as 87-1-110 (now repealed) in 1997.)

Defendants Richard and David Fertterer were convicted of criminal mischief for illegally killing game. They contended on appeal that because of the differences in misdemeanor penalties under Title 87 and felony penalties under Title 45, it is manifestly unjust for them to be convicted under this section and is contrary to the intent of the Legislature. Citing the language of 87-1-102 (now repealed), the Supreme Court held that the Legislature did not intend Title 87 to constitute the exclusive penalties for fish and game violations because the penalties under this section constitute the "different punishment" contemplated by 87-1-102. St. v. Fertterer, 255 M 73, 841 P2d 467, 49 St. Rep. 846 (1992).

Testimony of Accomplice Charged With Same Offense as Principal Defendant — Conviction Reversed: Johnson was charged with criminal mischief in vandalizing an automobile. Perez, also present at the scene of the offense, was also charged but was offered a deferred prosecution if she would testify against Johnson. At trial, the state sought to connect Johnson's presence at the scene of the offense only by the testimony of Perez. Johnson moved for a directed verdict of acquittal on the grounds that Perez's testimony violated 46-16-213, but the District Court denied the motion. The Supreme Court reversed, holding that because Perez was charged with being an accomplice, the District Court could not convict on the basis of her testimony alone. The Supreme Court noted that the statutes authorizing the complaint and arrest warrant against Perez required probable cause as a precondition and also noted that Rule 3.8 of the Rules of Professional Responsibility requires a prosecutor to dismiss charges that are not supported by probable cause. The Supreme Court referred to cases cited by the state in which witnesses were accomplices as distinguishable because those witnesses were not charged as accomplices. St. v. Johnson, 276 M 447, 918 P2d 293, 53 St. Rep. 464 (1996), distinguished in St. v. Dewitz, 2009 MT 202, 351 M 182, 212 P3d 1040 (2009).

Criminal Mischief Statute Not Unconstitutionally Vague: Defendants Richard and David Fertterer were convicted of criminal mischief for illegally killing game. They contended on appeal that the statute violated principles of due process in that it was vague and did not provide them with sufficient notice that their conduct violated the criminal mischief statute. The Supreme Court held that wild animals are public property and that reasonable persons would have realized that destroying wild animals without the consent of the state violated the statute. The court also held that the criminal mischief statute applies explicit standards that prevent arbitrary and discriminatory application and that the statute therefore does not violate due process. St. v. Fertterer, 255 M 73, 841 P2d 467, 49 St. Rep. 846 (1992).

Poaching of Wild Game Animals — Ownership Interest of State Held Sufficient: Defendants Richard and David Fertterer were convicted of criminal mischief for illegally killing game. They contended on appeal that the state did not have title ownership in the animals killed and that Fertterers could therefore not be convicted of damaging the property of another. The Supreme Court held that St. v. Tome, 228 M 398, 742 P2d 479 (1987), and the statutory definitions require only that the property be held by another with an interest superior to the person who damages that property and that the property need not be held in title ownership. Relying upon Baldwin v. Mont., 436 US 371 (1978), the Supreme Court held that wild animals are public property within the meaning of the criminal mischief statute and that the state's ownership interest in wild animals for the use and benefit of the people was a sufficient ownership interest, superior to Fertterers', to sustain the conviction. St. v. Fertterer, 255 M 73, 841 P2d 467, 49 St. Rep. 846 (1992).

Possession of Explosives and Criminal Mischief — Neither an Inchoate Crime: Wolfe argued that he had been subjected to double jeopardy in being convicted of both possession of explosives and criminal mischief. The Supreme Court held that the statute prohibiting double jeopardy applied only to inchoate crimes and that neither of the two crimes Wolfe was convicted of was inchoate. The Supreme Court also held that under the test used in Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932), Wolfe had not been subjected to double jeopardy. St. v. Wolfe, 250 M 400, 821 P2d 339, 48 St. Rep. 1001 (1991).

Evidence Sufficient to Support Conviction — Possession Sufficient to Show Ownership: A defendant convicted of criminal mischief for damaging a vending machine and clubhouse during a burglary contended evidence was insufficient because the only loss sustained by the city was $191 damage to the clubhouse. However, the vending machine was leased to the golf pro (who was a city employee) and was located on city property. The state properly introduced an itemized repair bill for $359. The golf pro maintained possessory control of the machine and was personally responsible for repair costs. Mere possession was sufficient to show ownership in this property crime, and the conviction was affirmed. St. v. Tome, 228 M 398, 742 P2d 479, 44 St. Rep. 1629 (1987).

Elements — Presence — Identity of Arsonist: Presence at a fire at the time it was set is not a requisite to finding someone responsible for the fire, nor is the identity of the person who set the fire. Each is a factor to be weighed by the jury. The identity of the person who set the fire is also not a requisite to proving an agreement or conspiracy to set the fire. The jury need only find that a person agreed with another that the fire be set. Mtn. W. Farm Bureau Mut. Ins. Co. v. Girton, 215 M 408, 697 P2d 1362, 42 St. Rep. 500 (1985).

Evidence of Absent Home Owners' Responsibility Sufficient: In insurer's action for declaratory judgment that owners of house were responsible for setting it afire, jury verdict for insurer was supported by substantial evidence and was affirmed. The record on appeal showed that several months before the fire the owners moved valuable uninsured coin and stamp collections from the house; that they stored in the house valuable insured business inventory and equipment; that the house payments were a significant expense; that the house was at one time up for sale and did not sell; that the house was heavily insured; that an unusually large amount of gasoline, some in containers compatible with the arson scheme, was stored on the premises; that some of the arson paraphernalia belonged to the insureds; and that the scheme fit the insurance arsonist profile and was incompatible with other arson profiles. Mtn. W. Farm Bureau Mut. Ins. Co. v. Girton, 215 M 408, 697 P2d 1362, 42 St. Rep. 500 (1985).

Prior Statement of Defendant — Arson Suggestion: Insurer of house sought declaratory judgment that owners of house were responsible for fire that damaged it. The District Court allowed a witness to testify that several years before the fire one of the owners was interested in purchasing a building but the building's owner wanted a high price. The house owner stated in a laughing manner, "Why not torch it, maybe we could get a better price". The witness testified that he took the statement in jest. The testimony had little bearing on the past or present motive of the house owner, but admitting the testimony was within the court's discretion. Mtn. W. Farm Bureau Mut. Ins. Co. v. Girton, 215 M 408, 697 P2d 1362, 42 St. Rep. 500 (1985).

Criminal Mischief for Damage to One's Own Property to Defraud Insurer — Relevance of Pictures of Property: Defendant was charged with criminal mischief in that he purposely drove his pickup over a steep bank to wreck it so he could collect from his insurance company. Later the pickup was vandalized. Pictures of the pickup taken after the vandalism were properly admitted as proof of defendant's motive, and their probative value was substantial and was not outweighed by prejudice to defendant, who claimed that they should not have been admitted because they were evidence of other crimes as well as the one with which he was charged and that he had not been charged with vandalism. St. v. Gray, 207 M 261, 673 P2d 1262, 40 St. Rep. 2023 (1983).

Unsworn Falsification to Authorities — Not Lesser Included Offense of Criminal Mischief by Destroying Property to Defraud Insurer: In trial for criminal mischief for knowingly or purposely damaging or destroying property with the intent to defraud an insurer, it was not error to refuse to give defendant's requested instruction on the alleged lesser included offense of unsworn falsification to authorities. The elements of the two offenses were separate and distinct and had little in common, and the elements of unsworn falsification to authorities do not have to be proved to establish criminal mischief. St. v. Gray, 207 M 261, 673 P2d 1262, 40 St. Rep. 2023 (1983).

Proof of "Pecuniary Loss": The distinction between felony and misdemeanor criminal mischief is not measured by the value of property destroyed or damaged but rather by the amount of "pecuniary loss" to the owner of the property. St. v. Palmer, 207 M 152, 673 P2d 1234, 40 St. Rep. 1957 (1983).

Theft and Criminal Mischief — Conviction From Same Act — No Error: Conviction of a defendant of both the crime of felony theft and the crime of felony criminal mischief as a result of the defendant's involvement in one criminal incident is permissible under 46-11-502 (renumbered 46-11-410) and is not a violation of the constitutional prohibition against double jeopardy. St. v. Palmer, 207 M 152, 673 P2d 1234, 40 St. Rep. 1957 (1983).

Evidence of Other Crimes — Procedural Requirements Not Followed: Gray drove his pickup off an embankment and reported to the police that he was forced off the road. The truck was not totaled and was taken to a body shop for repairs. While at the body shop, the truck was vandalized on Gray's instructions. After the vandalism, the truck was not repairable. Gray was charged with criminal mischief with the purpose to defraud an insurer for driving the truck off an embankment. The evidence of Gray's involvement in the vandalism is evidence of other crimes. The court held that the four-element test to determine the admissibility of evidence of other crimes set out in St. v. Just, 184 M 263, 602 P2d 957 (1979), was met but that the procedural requirements of Just were not followed. The judgment was reversed and a new trial ordered. St. v. Gray, 197 M 348, 643 P2d 233, 39 St. Rep. 622 (1982).

Burning One's Own Store — Sufficiency of Evidence: Evidence was sufficient to support verdicts of guilty of criminal mischief and arson in relation to burning of appellant's store where he controlled keys to the premises; there were no signs of forced entry (the store was burned after business hours); flammable materials had been placed on the floor at three different places and two empty Coleman fuel cans were in the store; appellant had doubled his fire insurance and reduced his inventory 6 months before the fire; he was heavily in debt and his business had severe financial stress; he was seen at the store shortly before the fire; he told a number of untruths to investigating officers; and he had motive and opportunity to the exclusion of anyone else. St. v. Johnson, 197 M 122, 641 P2d 462, 39 St. Rep. 419 (1982).

Reckless Driving and Criminal Mischief From Same Transaction: The State of Montana is barred from prosecuting a criminal mischief charge under 46-11-504 where the defendant was previously convicted of reckless driving. The acts that are concerned with reckless driving are also those necessary to establish the felony crime of criminal mischief; the "same transaction" test so required in 46-11-501 (now repealed) is met. St. v. Houser, 192 M 164, 626 P2d 256, 38 St. Rep. 538 (1981).

Conviction for Both Solicitation and Criminal Mischief Barred by Statute — Failure to Object When Error Occurred After Judgment: In a prosecution of the defendant for soliciting another to set fire to a mobile home and for felony criminal mischief, the District Court erred in convicting the defendant of both offenses when the solicitation constituted acts in preparation of the criminal mischief. Because the conviction and the error did not arise until after the District Court rendered a final judgment of conviction on both counts of the information, the failure of the defendant to object to the submission of both counts to the jury does not preclude the defendant from raising the issue on appeal. St. v. Mitchell, 192 M 16, 625 P2d 1155, 38 St. Rep. 487 (1981).

Constitutionality: A mental state of "knowingly" for a conviction of criminal mischief does not offend due process as either unconstitutionally vague or overly broad. St. v. Seitzinger, 180 M 136, 589 P2d 655 (1979).

Double Jeopardy: The offenses of criminal mischief and escape have no common elements, are separate and distinct criminal offenses, and are designed for the protection of completely different interests. There was no error and no violation of defendant's constitutional right against double jeopardy in permitting defendant to be charged with and convicted on both criminal mischief and attempted escape, even though both charges were based on a single physical act, digging a hole in a county jail wall. St. v. Davis, 176 M 196, 577 P2d 375 (1978).

Lesser Included Offenses:
Misdemeanor criminal mischief is a lesser included offense in felony criminal mischief. Where the charge is felony criminal mischief, the jury must be instructed on the lesser charge if it is to be considered. St. v. Davis, 176 M 196, 577 P2d 375 (1978).

The malicious destruction of property was not included in the crime of willful and malicious burning of property, as defined by 94-3303, R.C.M. 1947 (since repealed). St. v. Sieff, 54 M 165, 168 P 524 (1917).

Value: Proof of value is not an element of the offense of criminal mischief but is rather to be considered by trial judge in the exercise of his sentencing discretion, and whether a defendant is sentenced for the offense of criminal mischief as a felon or a misdemeanant is directly contingent upon whether the value of the damage or destruction is shown to be greater or less than $150. St. v. Davis, 176 M 196, 577 P2d 375 (1978). [See also annotations under 45-2-101 (value).]

Burning of Jail: Prisoner who started fire in jail portion of the courthouse which spread and consumed the entire building was properly charged with second-degree arson rather than with destroying a jail. Petition of Weiss, 162 M 532, 511 P2d 1319 (1973).

Maiming of Animal: To constitute the act of "maiming" an animal, a felony within the meaning of 94-1208, R.C.M. 1947 (now in 45-8-211), permanent injury must have been inflicted. St. v. Benson, 91 M 21, 5 P2d 223 (1931).

45-6-102. Negligent arson.

Criminal Law Commission Comments

Source: M.P.C. 1062, § 220.1(2).

Section 94-6-103 [now MCA, 45-6-102] differs substantially from the current Model Arson Law. First, it eliminates the grading of arson into degrees by reference to the class of property destroyed. Second, it prohibits negligent uses of fire or explosives which endanger persons or property unaccompanied by injury or damage, and third, it includes the burning of one's own property in circumstances where there is a high risk that the fire will spread to property of others or where the burning of lesser forms of property is accomplished in close proximity to occupied structures.

The provisions of subsection (1) are to be construed as pertaining to affirmative knowing and purposeful acts and are not intended to include omissions to report, control or combat a fire which has placed a person in danger of bodily injury or death, or an occupied structure in danger of damage or destruction. If a person starts a fire negligently or fails to control a fire thus placing persons or property in danger the act is made punishable by R.C.M. 1947, section 28-115 [now MCA, 76-13-123].

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1985 Amendment: At end of (1)(a) inserted "including a firefighter responding to or at the scene of a fire or explosion".

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section on Negligent Arson and the complementary section on Arson (MCA, 45-6-103) replace the former Model Arson Law. Under the new code, arson is classified by the mental state of the actor rather than by the class of property destroyed as under the old code. Negligent Arson requires three elements: (1) the offender must purposely or knowingly start a fire or cause an explosion; (2) this conduct must then be followed by a negligent act or omission, which (3) places either a person or some property in danger of injury. The action has two important features. First, it prohibits the use of fire or explosives which endanger persons or property whether or not injury or damage result. Second, it prohibits the burning of one's own property where there is high probability that adjoining property will be damaged. This section required an initial affirmative intentional act and does not cover failures to report or control fires not started by the actor. If a person starts a fire negligently he is not guilty under this provision. Similarly, if a person purposely allows a fire to spread to adjoining property he may be guilty of either Criminal Mischief or Arson, but not Negligent Arson. Damage which results from misuse of campfires is dealt with in MCA, 76-13-123 rather than with this provision. Similarly, damage from fires negligently started is punished under MCA, 50-63-102. The wording for this section on Negligent Arson has been adapted from the Model Penal Code provision on reckless arson.

Case Notes

Instruction — Lesser Included Offense: At trial on arson charge, evidence was introduced that also supported negligent arson. At the conclusion of the defense, State requested a negligent arson instruction and it was given. Defendant was found guilty of negligent arson. On appeal, he alleged it was error to give the instruction as he only presented a defense to arson and he was unfairly surprised. The instruction was properly given. Defendant could not have been surprised as he himself presented evidence supporting negligent arson. Montana case and statutory law provides that one can be found guilty of a lesser included offense, and an instruction on that offense must be given if there is some evidence introduced to support the offense. St. v. Gray, 202 M 445, 659 P2d 255, 40 St. Rep. 199 (1983).

Mental State — Inadmissible Evidence — Handwriting Analysis: At issue was the state of mind of arson defendant on the night he allegedly set the fire. Handwriting analyst did not testify as to his mental state that night or to an analysis of a writing he made that night. Her testimony as to analysis of writings made before and after that night was not relevant and was properly excluded. St. v. Gray, 202 M 445, 659 P2d 255, 40 St. Rep. 199 (1983).

Note Indicating Mental State Not Overly Inflammatory: Admission in trial for arson of defendant's note to his estranged wife, written the night he allegedly set a fire in her garage while staying the night at her house, stating "Please get ready for bed and come to the basement where I am at and be with me tonight. Tonight I need you with me for the last time ever", was not so inflammatory as to prejudice the jury and deprive defendant of a fair trial. The note could not have reasonably contributed to the verdict. St. v. Gray, 202 M 445, 659 P2d 255, 40 St. Rep. 199 (1983).

Sentence — Discretion Not Abused: Sentence of 6 months in the county jail and a $500 fine was not an abuse of discretion when it was within the limit set by this section. St. v. Gray, 202 M 445, 659 P2d 255, 40 St. Rep. 199 (1983).

Sentence — Improper Vindictiveness Claim on Appeal: Defendant was convicted of negligent arson and given the maximum sentence. On appeal, counsel argued that since defendant was a 38-year-old man employed as a teacher, was a captain in the army reserve, and had no criminal record, the maximum sentence indicated judicial vindictiveness. In the absence of any evidence indicating vindictiveness on the part of the judge, it was improper to suggest its presence and the issue was summarily dismissed. St. v. Gray, 202 M 445, 659 P2d 255, 40 St. Rep. 199 (1983).

Attempted Negligent Arson Nonexistent Crime: Hembd was convicted of "attempted misdemeanor negligent arson". The attempt statute requires "a purpose" to commit an offense. To purposely attempt to be negligent is a contradiction in terms. The Supreme Court concluded that attempted negligent arson is a nonexistent crime. Hembd's conviction was reversed with instructions to dismiss the case. St. v. Hembd, 197 M 438, 643 P2d 567, 39 St. Rep. 653 (1982).

Attorney General's Opinions

Injuries to or Death of Firefighters Covered by Arson Statute: A person who negligently places a firefighter responding to a fire in danger of death or bodily injury by purposely or knowingly starting a fire or causing an explosion commits the offense of negligent arson under 45-6-102. 39 A.G. Op. 10 (1981). (A 1985 amendment codified this opinion's holding.)

45-6-103. Arson.

Criminal Law Commission Comments

Source: New.

This section, together with section 94-6-103 [now MCA, 45-6-102], Negligent Arson, is intended to completely replace the old Model Arson Law which classifies offenses in an illogical and arbitrary fashion. The burning of an empty isolated dwelling could result in a twenty (20) year sentence under R.C.M. 1947, section 94-502, while setting fire to a crowded church or theater or jail could yield only a maximum sentence of ten (10) years under R.C.M. 1947, section 94-503. Moreover, it makes little sense to treat the burning of miscellaneous personal property, whether out of malice or to defraud insurers a special category of crime apart from the risks associated from burning. To destroy a valuable painting or manuscript by burning it in a hearth or furnace cannot be distinguished criminologically from any other method of destruction.

Compiler's Comments

2009 Amendment: Chapter 473 in (1)(a) increased amount of property value from $1,000 to $1,500. Amendment effective October 1, 2009.

1999 Amendment: Chapter 397 in (1)(a) increased minimum value of property from more than $500 to more than $1,000. Amendment effective October 1, 1999.

1995 Amendment — Code Commissioner Clarification: Chapter 124 in (1)(a) substituted "a structure" for "an occupied structure" and inserted "vehicle, personal property (other than a vehicle) that exceeds $500 in value, crop, pasture, forest, or other real property"; inserted (1)(b) referring to the damage or destruction of one's own property; and made minor changes in style.

Chapter 482 in (2), at beginning, inserted "Except as provided in 46-18-219"; and made minor changes in style. Section 20, Ch. 482, L. 1995, provided: "If House Bill No. 46 is passed and approved, then the crime of arson, 45-6-103, is deleted from the crimes listed in [subsection (1)(b) of section 1 of this act]." House Bill No. 46 was approved March 13, 1995, as Ch. 124, L. 1995. Therefore, the reference to the crime of arson has been deleted from 46-18-219(1)(b) and this section should have been voided. The inserted reference to 46-18-219 is erroneous, so pursuant to the authority in sec. 73, Ch. 18, L. 1995, the amendment has been deleted.

1985 Amendment: At end of (1)(b) inserted "including a firefighter responding to or at the scene of a fire or explosion".

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section on Arson is the highest offense in the hierarchy of crimes involving the destruction of property. Together with the section on Negligent Arson, this provision replaces the Model Arson Law which classified offenses according to the class of property destroyed rather than by the criminality of the offender's conduct. Under this section the prosecution must show: (1) that the offender knowingly or purposely started a fire or explosion (2) which either damaged an occupied structure or placed a person other than the actor in danger of being injured. Under the definition of occupied structure (MCA, 45-2-101), the property need not be inhabited; it need only be capable of habitation. Thus, the purposeful burning of any building in which a person conceivably could lodge would be sufficient for conviction. Since the definitions of knowingly and purposely (MCA, 45-2-101, 45-2-101) do not require initial knowledge of the final result, actual knowledge that the person injured was present in the building is not necessary. This section also covers burning of any occupied structure to defraud an insurer. Burning of an unoccupied structure with intent to defraud an insurer is punishable under MCA, 45-6-101, Criminal Mischief. Since the burning of the property must be without consent, it would be the burden of the defense to bring forth evidence raising an affirmative defense of authority to act. Together with the section on Causal Relationship Between Conduct and Result (MCA, 45-2-201), this section would be applicable to a person who purposely starts a fire on his own property in order to destroy the property of his neighbor. Attention is directed to the other arson related offenses in this part of chapter 6 which may provide alternative or lesser included offenses for Arson.

The 1975 amendment inserted "which is property" after "structure" in subdivision (1)(a).

Case Notes

Threshold of $1,000 Not Applicable to Vehicles: After an arson conviction for damaging a vehicle that had a market value of $500, the defendant appealed, arguing that the District Court erroneously found that this section stated that the $1,000 threshold applied only to personal property, rather than all preceding categories of property listed in the statute. The Supreme Court held that the statute clearly did not apply the $1,000 property crime threshold to vehicles. Ellison v. St., 2013 MT 376, 373 Mont. 159, 315 P.3d 950.

Circumstantial Evidence Held Sufficient to Convict on Charges of Arson and Deliberate Homicide: Enright was convicted in District Court of arson and deliberate homicide of Leonard. The Supreme Court held that circumstantial evidence could be the entire evidentiary basis for the conviction and that there was sufficient circumstantial evidence introduced to convict Enright. That evidence consisted of the following: (1) Enright purchased six life insurance policies on Leonard and then denied the existence of those policies to investigators; (2) Enright and her family and friends moved furniture out of the trailer home prior to the fire and then claimed the loss of those pieces of furniture in the fire to the insurance company; (3) Leonard's body showed evidence of sedative drugs; (4) the smoke alarm nearest to Leonard's body was missing the battery required for its use; (5) the only other alarm in the trailer was at the other end of the trailer; (6) there were no signs of clean laundry in the living room where Enright claimed to have left it; (7) despite Enright's claim of having been exposed to the smoke of the fire numerous times, investigators did not smell smoke on her clothing; and (8) there was expert testimony that the fire was intentionally set. St. v. Enright, 1998 MT 322, 292 M 204, 974 P2d 1118, 55 St. Rep. 1308 (1998), followed, on the basis of identical facts, in St. v. Link, 1999 MT 4, 293 M 23, 974 P2d 1124, 56 St. Rep. 13 (1999).

Substantial Evidence That Fire Intentionally Set: The following evidence was found to conclusively support the trial court's finding that a fire was intentionally set: (1) evidence that the fire was incendiary in nature was overwhelming and essentially uncontested; (2) there was a financial motive for setting the fire due to cash flow problems; and (3) substantial circumstantial evidence was offered, including facts that: (a) the fire occurred at night after dark; (b) insureds were away from the premises at the time of the fire; (c) an accelerant was used; (d) the accelerant was made available on the premises by the insureds; (e) the property had been for sale without success; (f) valuable and sentimental property was removed from the premises prior to the fire; and (g) insureds were experiencing financial difficulty and payments on the mortgage were a significant expense to the insureds. Emasco Ins. Co. v. Waymire, 242 M 131, 788 P2d 1357, 47 St. Rep. 636 (1990).

Jury Instruction on Presumption of Accidental Fire Inappropriate — Evidence of Arson: Defendant's proposed jury instruction that ". . . ordinarily, it will be presumed that an unexplained fire was caused by an accident or natural causes or, at least, that it was not of criminal origin" was properly refused when suspicious facts strongly indicating arson accompanied the fire. St. v. Atlas, 224 M 92, 728 P2d 421, 43 St. Rep. 2042 (1986).

Sufficient Evidence to Support Conviction — Arson: The Supreme Court found abundant evidence to support defendant's conviction for arson when fire marshals concluded that: heat of the fire far exceeded the temperature of a normal house fire; the 1-hour fire wall between floors burned through in much less than 1 hour; the burn patterns along baseboards and even burn indicated use of accelerants; a heating pad, the wood stove, an electrical short, and acts of God were eliminated as causes of the fire; and defendant's own fire expert admitted that "alligator patterns" on the charred wood were compatible with the use of flammable liquids. St. v. Atlas, 224 M 92, 728 P2d 421, 43 St. Rep. 2042 (1986).

Denial of Evidence Relating to Prior Fires — No Error: The Supreme Court found no error in the denial by the District Court Judge of evidence or testimony relating to prior fires from which the insured may have received insurance proceeds. The court held that the proffered evidence did not naturally and logically tend to establish a fact in issue and did not meet the test of relevancy, in that it did not make probable that the insured had committed arson either from the viewpoint of motive, intent, or the deed itself. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Standard of Lawful Basis for Declining Payment of Claim — Standard Not Met by Reliance on Inadmissible Evidence: An insurer must meet the standard of a lawful basis for refusal to decline payment of an insured's claim for an insured's loss. Reliance by the insurer on inadmissible evidence of arson by the insured in declining payment of an insured's loss does not meet the standard of a lawful basis for refusal of the insured's claim. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Meaning of "Property of Another" — Quitclaim With Reverter: Property which defendant had conveyed to his son by quitclaim deed with the conditions that the property would revert to the defendant if the son died before him and that the property could not be sold by the son during the defendant's lifetime is "property of another" for the purposes of a criminal prosecution under 45-6-103. St. v. Berklund, 217 M 218, 704 P2d 59, 42 St. Rep. 1147 (1985).

Threats to Burn Cabin Son Sold Coupled With Other Circumstantial Evidence: Sufficient evidence supported appellant's arson conviction when evidence presented at trial indicated that appellant: (1) had been angered by his son's conveyance of the cabin; (2) had twice threatened to burn down the cabin; (3) had been seen driving from the direction of the cabin by a deputy sheriff soon after the fire was reported; (4) when followed by the deputy sheriff, drove in excess of 85 miles an hour until the deputy was able to stop him; and (5) had tires on his vehicle that matched tire tracks left at the cabin. St. v. Berklund, 217 M 218, 704 P2d 59, 42 St. Rep. 1147 (1985).

Elements of Arson — Presence — Identity of Arsonist: Presence at a fire at the time it was set is not a requisite to finding someone responsible for the fire, nor is the identity of the person who set the fire. Each is a factor to be weighed by the jury. The identity of the person who set the fire is also not a requisite to proving an agreement or conspiracy to set the fire. The jury need only find that a person agreed with another that the fire be set. Mtn. W. Farm Bureau Mut. Ins. Co. v. Girton, 215 M 408, 697 P2d 1362, 42 St. Rep. 500 (1985).

Prior Statement of Defendant — Arson Suggestion: Insurer of house sought declaratory judgment that owners of house were responsible for fire that damaged it. The District Court allowed a witness to testify that several years before the fire one of the owners was interested in purchasing a building but the building's owner wanted a high price. The house owner stated in a laughing manner, "Why not torch it, maybe we could get a better price". The witness testified that he took the statement in jest. The testimony had little bearing on the past or present motive of the house owner, but admitting the testimony was within the court's discretion. Mtn. W. Farm Bureau Mut. Ins. Co. v. Girton, 215 M 408, 697 P2d 1362, 42 St. Rep. 500 (1985).

Removing Valuables, Storing Suspect Items, and Other Suspicious Circumstances: In insurer's action for declaratory judgment that owners of house were responsible for setting it afire, jury verdict for insurer was supported by substantial evidence and was affirmed. The record on appeal showed that several months before the fire the owners moved valuable uninsured coin and stamp collections from the house; that they stored in the house valuable insured business inventory and equipment; that the house payments were a significant expense; that the house was at one time up for sale and did not sell; that the house was heavily insured; that an unusually large amount of gasoline, some in containers compatible with the arson scheme, was stored on the premises; that some of the arson paraphernalia belonged to the insureds; and that the scheme fit the insurance arsonist profile and was incompatible with other arson profiles. Mtn. W. Farm Bureau Mut. Ins. Co. v. Girton, 215 M 408, 697 P2d 1362, 42 St. Rep. 500 (1985). See also Emasco Ins. Co. v. Waymire, 242 M 131, 788 P2d 1357, 47 St. Rep. 636 (1990).

Instruction — Lesser Included Offense: At trial on arson charge, evidence was introduced that also supported negligent arson. At the conclusion of the defense, State requested a negligent arson instruction and it was given. Defendant was found guilty of negligent arson. On appeal, he alleged it was error to give the instruction as he only presented a defense to arson and he was unfairly surprised. The instruction was properly given. Defendant could not have been surprised as he himself presented evidence supporting negligent arson. Montana case and statutory law provides that one can be found guilty of a lesser included offense, and an instruction on that offense must be given if there is some evidence introduced to support the offense. St. v. Gray, 202 M 445, 659 P2d 255, 40 St. Rep. 199 (1983).

Mental State — Inadmissible Evidence — Handwriting Analysis: At issue was the state of mind of arson defendant on the night he allegedly set the fire. Handwriting analyst did not testify as to his mental state that night or to an analysis of a writing he made that night. Her testimony as to analysis of writings made before and after that night was not relevant and was properly excluded. St. v. Gray, 202 M 445, 659 P2d 255, 40 St. Rep. 199 (1983).

Note Indicating Mental State Not Overly Inflammatory: Admission in trial for arson of defendant's note to his estranged wife, written the night he allegedly set a fire in her garage while staying the night at her house, stating "Please get ready for bed and come to the basement where I am at and be with me tonight. Tonight I need you with me for the last time ever", was not so inflammatory as to prejudice the jury and deprive defendant of a fair trial. The note could not have reasonably contributed to the verdict. St. v. Gray, 202 M 445, 659 P2d 255, 40 St. Rep. 199 (1983).

Burning One's Own Store — Sufficiency of Evidence: Evidence was sufficient to support verdicts of guilty of criminal mischief and arson in relation to burning of appellant's store where he controlled keys to the premises; there were no signs of forced entry (the store was burned after business hours); flammable materials had been placed on the floor at three different places and two empty Coleman fuel cans were in the store; appellant had doubled his fire insurance and reduced his inventory 6 months before the fire; he was heavily in debt and his business had severe financial stress; he was seen at the store shortly before the fire; he told a number of untruths to investigating officers; and he had motive and opportunity to the exclusion of anyone else. St. v. Johnson, 197 M 122, 641 P2d 462, 39 St. Rep. 419 (1982).

Substantive Amendment of Information: Amendment of an arson count on opening day of trial to charge defendant under subsection (1)(b) rather than subsection (1)(a) of 45-6-103 was substantive and therefore not allowable. St. v. Hallam, 175 M 492, 575 P2d 55 (1978).

Sufficiency of Affidavit: The Supreme Court held that an affidavit revealing an admission to setting a fire was sufficient, along with an indication that the fire was intentionally set, to warrant granting leave to file an information. St. v. Hallam, 175 M 492, 575 P2d 55 (1978).

Attorney General's Opinions

Injuries to or Death of Firefighters Covered by Arson Statute: A person who negligently places a firefighter responding to a fire in danger of death or bodily injury by purposely or knowingly starting a fire or causing an explosion commits the offense of negligent arson under 45-6-102. 39 A.G. Op. 10 (1981). (A 1985 amendment to 45-6-102 codified this opinion's holding.)

45-6-104. Desecration of capitol, place of worship, cemetery, or public memorial.

Compiler's Comments

2009 Amendment: Chapter 473 in (3)(a) and (3)(b) increased damage amount from $1,000 to $1,500. Amendment effective October 1, 2009.

1999 Amendment: Chapter 141 in (2) and (3) after "desecration" deleted "of the capitol"; in (2) after "purposely" deleted "or knowingly"; in (2)(a), in two places in (2)(b), and in (2)(c) inserted references to place of worship, cemetery, or public memorial; inserted (3)(a) concerning penalty for damage not exceeding $1,000; in (3)(b) reduced term of imprisonment from 20 years to 10 years, reduced fine from $100,000 to $50,000, and at end inserted "if there is $1,000 or more of damage"; at beginning of (4) inserted "With regard to the capitol"; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Section 3, Ch. 533, L. 1995, provided: "[This act] is effective on passage and approval." Approved April 25, 1995.

45-6-105. Criminal destruction of or tampering with communication device.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

45-6-106. Criminal mischief damage to rental property.

Compiler's Comments

2011 Amendment: Chapter 220 in (1), (2), and (3) inserted "criminal mischief"; in (1) near end substituted "or permits any person to do so" for "over the amount of any damage deposit or, if no damage deposit was paid, a value of at least $1,000"; and inserted (5) exempting person convicted under section from provisions of 45-6-101. Amendment effective April 18, 2011.

Effective Date: Section 3, Ch. 466, L. 2009, provided that this section is effective on passage and approval. Approved May 6, 2009.

Applicability: Section 4, Ch. 466, L. 2009, provided: "[This act] applies to criminal acts committed on or after [the effective date of this act]." Effective May 6, 2009.

Part 2
Criminal Trespass and Burglary

45-6-201. Definition of enter or remain unlawfully.

Criminal Law Commission Comments

Source: New.

The core of the common-law concept of burglary was breaking and entering a dwelling house at night with intent to commit a felony therein. The scope of the offense has enlarged until, under prevailing law, the offense may be committed by entry alone, in daytime as well as by night, in any building, structure, or "vehicle."

In this code "occupied structure" is narrowly defined to include buildings where people are living or working and where intrusions are most alarming and dangerous. For example, the definition does not include barns, or derelict and abandoned buildings unsuited for human occupancy. In the case of a mine or ship, for example, occupancy would have to be proved. "Entering or remaining unlawfully" is a concept which takes a middle ground between prevailing law requiring breaking and its complete elimination in some modern legislation.

[CAVEAT: It may no longer be true that the definition of "occupied structure" does not include a barn in Montana. St. v. Shannon, 171 M 25, 554 P2d 743 (1976) held that a semi-trailer is a vehicle suitable for carrying on business and thus within the definition of "occupied structure" (45-2-101). A barn, which is actually in use as part of a farming or ranching business, or is capable of such use although currently unused, would seem to qualify under the same definition. A question of fact is at least presented which would have to be decided in each case. The classifications of "barns" along with "derelict or abandoned buildings" seems factually incorrect and, in light of Shannon, probably legally incorrect as well.]

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: At beginning of (2) substituted "To provide for effective posting of private land through which the public has no right-of-way" for "To be effective under this section"; inserted (3) describing requirements for effective posting of private land; in (4) inserted reference to subsection (3); in (5) inserted last sentence relating to Department posting signs; and made minor changes in style.

Preamble: The preamble attached to Ch. 268, L. 1991, provided: "WHEREAS, the Attorney General in 42 A.G. Op. 96 (1988), held that unfenced private property along public roadways may not be closed to public access through the use of orange markings placed on posts located where the road enters the private property; and

WHEREAS, the Legislature desires to address the problem of adequate posting of private land while ensuring proper public access to public roads and the proper inclusion of county road mileage for gas tax purposes."

1985 Amendment: In (1) deleted former second sentence that read: "A person who enters or remains upon land does so with privilege unless notice is personally communicated to him by an authorized person or unless such notice is given by posting in a conspicuous manner" and inserted second and third sentences relating to privilege and revocation of privilege to allow person to enter or remain upon privately owned property; and inserted (2) through (5) establishing notice requirements to close private property to public access.

Annotator's Note: The purpose of this section is to provide a definition for the term "enter or remain unlawfully" which is an essential element of the offenses of criminal trespass to property and burglary contained in this part of chapter 6. Essentially this section makes any entry in or upon any vehicle, occupied structure or premises without license, invitation or other privilege, unlawful. There is, however, an exception relating to land which creates a privilege to enter or remain if explicit permission is given or notice to the contrary is not posted.

Unlawfully entering or remaining either in an occupied structure or in or upon the premises of another constitutes criminal trespass to property under the provisions of MCA, 45-6-203. This represents a substantial departure from prior law since it makes mere unprivileged entry an offense while under prior law in addition to an unauthorized entry the intruder had to perform some specifically forbidden act before the offense was complete.

Conversely the application of this definition of unlawful entry to the offense of burglary will result in little change since Montana has already indicated that to constitute an element of the offense of burglary the entry must be unprivileged. (See St. v. Starkweather, 89 M 381, 385-386, 297 P 497 (1931).)

The 1977 amendment substituted "section" for "action" at the end of subsection (2) and made minor changes in style, phraseology and punctuation.

Case Notes

Residential Backyard Not Subject to Posting Requirement for Private Land: The defendant entered a fenced backyard. The occupant called the police, stating the defendant did not have permission to be in the backyard. The defendant was charged and convicted of criminal trespass to property in violation of 45-6-203. On appeal, the defendant argued that because the yard was not posted with a "no trespassing" sign under 45-6-201(2), there was no probable cause. The Supreme Court affirmed, holding that the legislative history of 45-6-201(2) indicated that it was intended to refer to landowners desiring to post their private bare land against hunting and recreational use, not to property owners in residential neighborhoods. Bozeman v. Lehrer, 2020 MT 55, 399 Mont. 166, 459 P.3d 850.

Insufficient Evidence to Convict — Trespass: Although a fire district's board of trustees sent a letter to the defendants stating that the defendants had been suspended and that they did not have authority to enter the fire hall, the state presented insufficient evidence that the defendants subsequently unlawfully entered the fire hall because the fire district's bylaws did not grant the board the right to remove or suspend members. St. v. Robertson, 2014 MT 279, 376 Mont. 471, 336 P.3d 367.

Youth Pleading True to Trespass — Motion to Dismiss for Lack of Probable Cause Properly Denied: K.J. received several citations for trespassing on housing authority property after receiving notice that he was not allowed on the property. K.J. argued in Youth Court that the notice should be voided because it was insufficient to alert K.J. of the potentially criminal nature of his conduct and that there was thus insufficient probable cause for conviction of the trespass charges. K.J. subsequently pleaded true to the charges and appealed. The Supreme Court initially declined to address K.J.'s constitutional due process argument because the issue was not raised in the Youth Court. The court then noted that K.J. read and signed the notice and later admitted through a plea agreement that he had trespassed and knew that he was barred from entering the property. The Youth Court correctly determined that probable cause existed to present a question of fact for the jury as to whether K.J. knowingly entered the property at a time when he could be arrested for unlawful entry, and because K.J. chose to plead true to the charges rather than present evidence to a jury, the Youth Court properly denied K.J.'s motion to dismiss for lack of probable cause. In re K.J., 2010 MT 41, 355 Mont. 257, 231 P.3d 75.

Private Land in Substantial Compliance With Posting Requirements — Trespass With Four-Wheeler Affirmed: Trujillo asked permission to hunt from a landowner and was told that he could also hunt on another neighbor's property and on adjacent Plum Creek Timber property, but Trujillo was instructed to not take his four-wheeler through any gates. None of the roads leading from the landowner's property onto Plum Creek property were gated or posted. However, two main roads leading onto Plum Creek property from the opposite direction were gated, and at least one had a sign forbidding the use of all-terrain vehicles year round. Plum Creek's open lands policy allowed public recreation and access by foot, but permitted four-wheelers only on open roads. Trujillo drove up a road onto Plum Creek property and parked the four-wheeler off the road where it was discovered and photographed. Trujillo was subsequently charged with misdemeanor criminal trespass and convicted in both Justice's Court and District Court. Trujillo appealed on grounds that there was insufficient evidence to support the conviction. Although Trujillo was unaware that the main access points to Plum Creek property effectively posted notice against the use of four-wheelers, he was nevertheless responsible for knowing about those postings and was on legal notice of their existence. Trujillo's reliance on the landowner's erroneous instruction to not pass through any gates did not excuse the fact that Trujillo was trespassing. There was sufficient credible evidence that Trujillo violated the posting requirements and the open lands policy, and the trespassing conviction was affirmed. St. v. Trujillo, 2008 MT 101, 342 M 319, 180 P3d 1153 (2008), following St. v. Blalock, 232 M 223, 756 P2d 454 (1988).

Authority of Property Manager to Request Person to Leave Property — Written Authority of Property Owner Not Required: Allum caused a disturbance in a grocery store and was asked by the manager to leave. When Allum refused, he was arrested for trespass. Allum contended that the manager did not have the authority to ask Allum to leave without written authority from the property owner. The Supreme Court disagreed. The manager was authorized to make decisions regarding the property and did not need explicit written authorization from the owner in order to exercise the power of asking Allum to leave the property. St. v. Allum, 2005 MT 150, 327 M 363, 114 P3d 233 (2005).

Criminal Trespass Statute Not Vague and Overbroad: Allum caused a disturbance in a grocery store and was asked by the manager to leave. When Allum refused, he was arrested for trespass. Allum contended that the manager did not have the authority to ask Allum to leave without written authority from the property owner. Allum asserted that the trespass statute violated free speech and due process and was vague and overbroad unless the phrase "authorized person" in subsection (1) of this section was narrowly construed to mean someone who has explicit written authority from the landowner. The Supreme Court noted that a statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that the statute does not permit a contemplated conduct. This section gives fair notice and is not vague. St. v. Allum, 2005 MT 150, 327 M 363, 114 P3d 233 (2005), following the overbreadth test in St. v. Lilburn, 265 M 258, 875 P2d 1036 (1994).

Locating Authority With Control Over Property to Resolve Dispute — No Entrapment: Allum attempted to cash a check at a bank branch located in a grocery store but became angry when told by a teller that, according to bank policy, he would have to stamp his thumbprint on the check in order to cash it. The bank manager affirmed the policy, and when Allum continued to object, the manager asked Allum to leave the bank. The conversation moved to the grocery store, and officers arrived. One officer summoned the store manager, who asked Allum to leave. After repeatedly refusing to leave the store, Allum was arrested for trespass. At trial, Allum requested an entrapment instruction, contending that the officers incited or induced him into committing trespass by summoning the store manager. The instruction was refused, and on appeal, the Supreme Court affirmed. Locating a person with authority over property in order to peacefully resolve a dispute does not constitute action inciting or inducing a crime. St. v. Allum, 2005 MT 150, 327 M 363, 114 P3d 233 (2005).

Criminal Trespass — Testimony Sufficient to Support Conviction — Testimony of One Witness Sufficient: Gladue was charged with criminal trespass after he was found to be in a home in which he had previously lived with Joyce Nanini but was no longer welcome. The only prosecution witness to testify at trial on the issue of the trespass was Nanini, who testified that Gladue had lived there previously but was not living there at the time that the trespass occurred, that Gladue was unwelcome in her home at the time that the trespass occurred, that she had asked the County Attorney to keep Gladue away from her, that she did not give Gladue permission to be in her home, and that she did not know how Gladue gained entrance to the home. The Supreme Court, citing St. v. Flack, 260 M 181, 860 P2d 89 (1993), and 26-1-301, held that the testimony of Nanini alone was sufficient for the purposes of the conviction, even though Gladue had testified in a manner somewhat contrary to the testimony of Nanini and testified that Nanini had given him a key to the home. Because the testimony indicated that Gladue did not have permission from Nanini to enter the home and the statute prohibits both unlawful entry and remaining unlawfully, the Supreme Court declined to consider whether the evidence showed that Gladue remained unlawfully in the home. St. v. Gladue, 1999 MT 1, 293 M 1, 972 P2d 827, 56 St. Rep. 1 (1999).

Unlawful Entry — Ignorance of Law No Denial of Defense to Element of "Knowingly": Defendant convicted of criminal trespass had no knowledge that the posting of a 12- by 5-inch fluorescent orange sign indicated no trespassing and, therefore, claimed that he could not have knowingly entered unlawfully onto the posted land. However, one need not form the intent to commit a specific crime or intend the result that occurs to be found guilty of knowingly committing a crime. Further, because no argument was made that the sign was not in accordance with the posting statute, defendant was assumed to have had legal notice. Ignorance of the law has never been a defense in Montana. St. v. Blalock, 232 M 223, 756 P2d 454, 45 St. Rep. 1008 (1988).

Jury Instruction: A jury instruction defining unlawful entry did not constitute error by failing to contain a definition of illegal trespass upon land as defined in this section since defendant was not charged with illegal trespass upon land. St. v. Radi, 176 M 451, 578 P2d 1169 (1978).

Unenclosed Rangeland: The proviso to 94-35-237, R.C.M. 1947 (since repealed), requiring the marking of boundaries as a prerequisite to criminal liability for driving herds onto private land, did not change the rule relating to civil liability that a herder must determine the boundaries of private land at his peril. Herrin v. Sieben, 46 M 226, 127 P 323 (1912), overruled on other grounds in Simonson v. McDonald, 131 M 494, 311 P2d 982 (1957).

Attorney General's Opinions

Unfenced Private Property Along Public Roads — Orange Markings Inadequate: Private property that is unfenced along public roadways may not be closed to public access through the use of orange markings placed on posts located where the road enters private property. The Attorney General did, however, examine other possible methods of marking that may constitute sufficient notice of trespassing. 42 A.G. Op. 96 (1988).

Hunting Trespass Not Repealed: Montana's criminal trespass statutes, 45-6-201 and 45-6-203, do not repeal or affect 87-3-304 (now repealed, but see 87-6-415), which makes it unlawful to hunt big game animals on private property without permission, because the statutes do not relate to the same conduct. 37 A.G. Op. 144 (1978).

45-6-202. Criminal trespass to vehicles.

Criminal Law Commission Comments

Source: Ill. C.C. 1961, Chapter 38, § 21-2.

The section is intended to cover a troublesome area of criminal activity which is easily identifiable and well-known to the police. The section covers only trespass to vehicles, aircraft or watercraft. If the trespass involves damage to a vehicle, the separate offense of criminal mischief (94-6-102) [now MCA, 45-6-101] is committed.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: There was no prior provision covering criminal trespass to vehicles. This section is intended to deal with that troublesome area of criminal activity. The conduct forbidden by this section is limited to trespass to vehicles, which are defined by § 45-2-101 as including aircraft and watercraft as well as conventional vehicles. If the trespass involves damage to a vehicle, the separate offense of Criminal Mischief (§ 45-6-101) is committed. Similarly, if the trespasser takes possession of the vehicle or steals from it he will have committed either the separate offense of unauthorized use of a motor vehicle (§ 45-6-308) or the separate offense of theft (§ 45-6-301). This section is designed to deal with the prowler or the persons who knowingly accompany an unauthorized user.

Case Notes

Conviction of Criminal Trespass to Vehicles and Attempted Theft — Not Conviction Under Same Transaction: Defendant contended that he was improperly convicted of criminal trespass to vehicles and attempted theft in violation of 46-11-410. The Supreme Court applied the test set out in Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932), in deciding whether there were two offenses or only one. Each provision required proof of a fact that the other did not. Because each crime involved separate and distinct elements, defendant's conviction did not violate 46-11-410. St. v. Johnstone, 244 M 450, 798 P2d 978, 47 St. Rep. 1715 (1990).

Evidence Sufficient to Affirm Conviction: The following was considered sufficient credible evidence upon which to base a conviction under this section: (1) victim left his vehicle locked with windows intact in a parking area; (2) victim saw a vehicle identified as defendant's being driven away from the area by a person later identified as defendant; (3) upon returning to the vehicle, victim found a vent window broken and the driver's window rolled down; and (4) when defendant was arrested, his pants and shirt pockets contained glass, and glass imbedded in gloves and on a wrecking bar in his vehicle was identified by an expert as tempered auto glass that resulted from a blow to the glass rather than an accident and that was probably the same glass found in victim's vehicle. St. v. Johnstone, 244 M 450, 798 P2d 978, 47 St. Rep. 1715 (1990).

In General:

The Illinois courts have ruled that identity of the property and criminal knowledge are two material elements of the offense of criminal trespass to vehicles. See People v. Acevedo, 5 Ill. App.3d 968, 284 N.E.2d 488 (1972); People v. Owes, 5 Ill. App.3d 936, 284 N.E.2d 465 (1972). Criminal trespass to vehicles is not a lesser included offense of theft. People v. Rainbolt, 52 Ill. App.3d 374, 367 N.E.2d 293 (1977).

Entry into the trailer portion of a tractor-trailer combination with intent to commit a theft was burglary under section 94-6-204(1), R.C.M. 1947 (now 45-6-204), rather than trespass to a vehicle as defined in this section. St. v. Shannon, 171 M 25, 554 P2d 743 (1976).

Indictment and Information: The following two cases ruled on specific language in indictment for criminal trespass to vehicles: People v. Pantoja, 7 Ill. App.3d 847, 288 N.E.2d 687 (1972); People v. Harvey, 132 Ill. App.2d 761, 270 N.E.2d 80 (1971).

Sufficiency of Evidence: Because criminal knowledge is an important element of the offense of criminal trespass to vehicles, the Illinois courts have overturned three verdicts which were based upon inferences that the defendant knew that the automobile he was driving was stolen. See People v. Acevedo, 5 Ill. App.3d 968, 284 N.E.2d 488 (1972); People v. Kelly, 84 Ill. App.2d 431, 228 N.E.2d 561 (1967); People v. Chandler, 84 Ill. App.2d 231, 228 N.E.2d 588 (1967).

Verdict and Sentence: Only one sentence for the greater offense of automobile theft may be imposed in prosecution for automobile theft and criminal trespass to vehicles when the prosecution is based upon a single act. People v. Torello, 109 Ill. App.2d 433, 248 N.E.2d 725 (1969). But because these two offenses are separate and distinct there is no inconsistency in a jury returning a verdict which convicts a defendant of criminal trespass to vehicles and acquits him of theft. People v. Johnson, 102 Ill. App.2d 443, 243 N.E.2d 310 (1968). See also People v. Webb, 131 Ill. App.2d 206, 268 N.E.2d 161 (1971).

45-6-203. Criminal trespass to property.

Criminal Law Commission Comments

Source: Ill. C.C. 1961, Chapter 38, § 21-3.

This section covers criminal trespass to land without regard to the nature, use or location of the land. Criminal trespass is committed only if the offender, immediately prior to entry, receives oral or written notice that such entry is forbidden, or he remains upon the land after being notified to leave. The section differs substantially from R.C.M 1947, section 94-3308, "Malicious injuries to freehold," in that no specific act causing damage need be alleged, only the unlawful presence of the offender. Should damage occur during the trespass, the offender could be prosecuted under section 94-6-102 [R.C.M. 1947], Criminal Mischief [now MCA, 45-6-101].

Compiler's Comments

2021 Amendment: Chapter 527 in (1) near beginning in exception clause inserted reference to subsection (4); inserted (4) excepting failure to wear a specific medical device or provide proof of vaccination from definition of criminal trespass; and made minor changes in style. Amendment effective May 14, 2021.

2011 Amendment: Chapter 258 in (3) after "fishing, or trapping" substituted remainder of sentence for "is subject to an additional penalty as provided in 87-1-102(2)(f)". Amendment effective October 1, 2011.

Preamble: The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

Saving Clause: Section 131, Ch. 258, L. 2011, was a saving clause.

Severability: Section 132, Ch. 258, L. 2011, was a severability clause.

2009 Amendment: Chapter 121 inserted (3) adding an additional penalty for criminal trespass to property owned or administered by the department of fish, wildlife, and parks. Amendment effective October 1, 2009.

2007 Amendment: Chapter 336 in (1) inserted reference to 76-13-116; and made minor changes in style. Amendment effective June 1, 2007.

2003 Amendment: Chapter 5 near beginning of (1) inserted reference to 15-7-139; and made minor changes in style. Amendment effective February 6, 2003.

1993 Amendment: Chapter 604 at beginning of (1) inserted exception clause; and made minor changes in style.

Annotator's Note: This section substantially expands prior law by making individuals criminally liable for knowing trespass. Under former law trespass was not criminal unless the trespasser did some prohibited act, such as hunting, building fires or injuring the realty, and it was these acts, not the trespass itself, which constituted the criminal conduct.

A consideration of the combined effect of MCA, 45-3-104 (Use of Force in Defense of Property), § 45-6-201 (Definition of "Enter or Remain Unlawfully") and this section indicates that a landowner has no right to use force against an individual who innocently and unknowingly trespasses, since until he is given notice he has committed no offense. MCA, 45-3-104 does give the landowner the right to use force to remove a trespasser who has been given notice. It is, however, hoped that the effect of this group of statutes will be to encourage the landowner to call in peace officers. Previously, since mere trespass was not an offense, a landowner could not call in peace officers and was, as a result, often placed in a situation in which his only remedy was self-help. It should also be noted that the landowner is limited in any event to the use of reasonable force and can use deadly force or force likely to cause serious bodily injury only to prevent the commission of a forcible felony.

Case Notes

Residential Backyard Not Subject to Posting Requirement for Private Land: The defendant entered a fenced backyard. The occupant called the police, stating the defendant did not have permission to be in the backyard. The defendant was charged and convicted of criminal trespass to property in violation of 45-6-203. On appeal, the defendant argued that because the yard was not posted with a "no trespassing" sign under 45-6-201(2), there was no probable cause. The Supreme Court affirmed, holding that the legislative history of 45-6-201(2) indicated that it was intended to refer to landowners desiring to post their private bare land against hunting and recreational use, not to property owners in residential neighborhoods. Bozeman v. Lehrer, 2020 MT 55, 399 Mont. 166, 459 P.3d 850.

Insufficient Evidence to Charge Criminal Trespass: The defendant was charged with and convicted of criminal trespass. On appeal, the Supreme Court reversed the defendant's conviction because the state had not presented any evidence that the defendant had remained unlawfully on the premises after he was directed to leave. St. v. Spottedbear, 2016 MT 243, 385 Mont. 68, 380 P.3d 810.

Insufficient Evidence to Convict — Trespass: Although a fire district's board of trustees sent a letter to the defendants stating that the defendants had been suspended and that they did not have authority to enter the fire hall, the state presented insufficient evidence that the defendants subsequently unlawfully entered the fire hall because the fire district's bylaws did not grant the board the right to remove or suspend members. St. v. Robertson, 2014 MT 279, 376 Mont. 471, 336 P.3d 367.

Youth Pleading True to Trespass — Motion to Dismiss for Lack of Probable Cause Properly Denied: K.J. received several citations for trespassing on housing authority property after receiving notice that he was not allowed on the property. K.J. argued in Youth Court that the notice should be voided because it was insufficient to alert K.J. of the potentially criminal nature of his conduct and that there was thus insufficient probable cause for conviction of the trespass charges. K.J. subsequently pleaded true to the charges and appealed. The Supreme Court initially declined to address K.J.'s constitutional due process argument because the issue was not raised in the Youth Court. The court then noted that K.J. read and signed the notice and later admitted through a plea agreement that he had trespassed and knew that he was barred from entering the property. The Youth Court correctly determined that probable cause existed to present a question of fact for the jury as to whether K.J. knowingly entered the property at a time when he could be arrested for unlawful entry, and because K.J. chose to plead true to the charges rather than present evidence to a jury, the Youth Court properly denied K.J.'s motion to dismiss for lack of probable cause. In re K.J., 2010 MT 41, 355 Mont. 257, 231 P.3d 75.

Private Land in Substantial Compliance With Posting Requirements — Trespass With Four-Wheeler Affirmed: Trujillo asked permission to hunt from a landowner and was told that he could also hunt on another neighbor's property and on adjacent Plum Creek Timber property, but Trujillo was instructed to not take his four-wheeler through any gates. None of the roads leading from the landowner's property onto Plum Creek property were gated or posted. However, two main roads leading onto Plum Creek property from the opposite direction were gated, and at least one had a sign forbidding the use of all-terrain vehicles year round. Plum Creek's open lands policy allowed public recreation and access by foot, but permitted four-wheelers only on open roads. Trujillo drove up a road onto Plum Creek property and parked the four-wheeler off the road where it was discovered and photographed. Trujillo was subsequently charged with misdemeanor criminal trespass and convicted in both Justice's Court and District Court. Trujillo appealed on grounds that there was insufficient evidence to support the conviction. Although Trujillo was unaware that the main access points to Plum Creek property effectively posted notice against the use of four-wheelers, he was nevertheless responsible for knowing about those postings and was on legal notice of their existence. Trujillo's reliance on the landowner's erroneous instruction to not pass through any gates did not excuse the fact that Trujillo was trespassing. There was sufficient credible evidence that Trujillo violated the posting requirements and the open lands policy, and the trespassing conviction was affirmed. St. v. Trujillo, 2008 MT 101, 342 M 319, 180 P3d 1153 (2008), following St. v. Blalock, 232 M 223, 756 P2d 454 (1988).

Trespass Charge Properly in Justice's Court — Motion to Dismiss and Writ for Review Denied: Shiplet was charged in Justice's Court with criminal misdemeanor trespass. He moved to dismiss for lack of jurisdiction, claiming that subsequent to the filing of the charge, he filed a civil action in District Court seeking to enjoin the people claiming trespass from interfering with his purported ditch easement. Shiplet argued that the District Court, as opposed to the Justice's Court, was a better forum to determine whether he was legally exercising his ditch rights because it had jurisdiction over his civil suit and concurrent jurisdiction over the trespass charge. Shiplet's motion was denied, and his District Court petition for writ of review was denied. The Supreme Court stated that a writ of review can be granted only if the petitioner establishes both that: (1) the Justice's Court exceeded its jurisdiction; and (2) there is no appeal or there is no plain, speedy, and adequate remedy. The Supreme Court held that Shiplet could not meet the two-pronged test because a Justice's Court clearly has jurisdiction over a misdemeanor trespass charge and that he had the right to appeal a Justice's Court decision. The Supreme Court also stated that the District Court did not have concurrent jurisdiction over the criminal charge under the requirements for concurrent jurisdiction delineated in 3-5-302. Shiplet v. Egeland, 2001 MT 21, 304 M 141, 18 P3d 1001 (2001).

Criminal Trespass — Testimony Sufficient to Support Conviction — Testimony of One Witness Sufficient: Gladue was charged with criminal trespass after he was found to be in a home in which he had previously lived with Joyce Nanini but was no longer welcome. The only prosecution witness to testify at trial on the issue of the trespass was Nanini, who testified that Gladue had lived there previously but was not living there at the time that the trespass occurred, that Gladue was unwelcome in her home at the time that the trespass occurred, that she had asked the County Attorney to keep Gladue away from her, that she did not give Gladue permission to be in her home, and that she did not know how Gladue gained entrance to the home. The Supreme Court, citing St. v. Flack, 260 M 181, 860 P2d 89 (1993), and 26-1-301, held that the testimony of Nanini alone was sufficient for the purposes of the conviction, even though Gladue had testified in a manner somewhat contrary to the testimony of Nanini and testified that Nanini had given him a key to the home. Because the testimony indicated that Gladue did not have permission from Nanini to enter the home and the statute prohibits both unlawful entry and remaining unlawfully, the Supreme Court declined to consider whether the evidence showed that Gladue remained unlawfully in the home. St. v. Gladue, 1999 MT 1, 293 M 1, 972 P2d 827, 56 St. Rep. 1 (1999).

Elements: The Supreme Court has adopted the elements of the tort of intentional trespass to real property set forth in Restatement (Second) of Torts 158. Under that section, a person is subject to liability to another for trespass, irrespective of whether the person thereby causes harm to any legally protected interest of the other, if the person intentionally: (1) enters land in possession of the other or causes a thing or third person to do so; (2) remains on the land; or (3) fails to remove from the land a thing that the person is under a duty to remove. However, under Restatement (Second) of Torts 188, conduct that would otherwise constitute intentional trespass is not unlawful if it is privileged conduct pursuant to an easement. Ducham v. Tuma, 265 M 436, 877 P2d 1002, 51 St. Rep. 595 (1994), followed in Lee v. Musselshell County, 2004 MT 64, 320 M 294, 87 P3d 423 (2004).

Knowingly Remaining on Premises: The defendants argued that they did not intend to break the law and therefore did not possess a criminal intent. The Supreme Court held that their defense bordered on the frivolous and that the defendants' concepts of criminal mental states had been replaced by the requirement of showing that the defendants had knowingly remained on the premises. Helena v. Lewis, 260 M 421, 860 P2d 698, 50 St. Rep. 1103 (1993).

Free Speech — Private Property: Article II, sec. 7, Mont. Const., does not provide a right to the use of private property by strangers that entitled defendant to access to clinic property for purposes of conveying a message to the clinic's invitees. Helena v. Krautter, 258 M 361, 852 P2d 636, 50 St. Rep. 566 (1993).

Trespasser Status Not Achieved: Two men arrived at an inn at a late hour to help their friend, an inn employee, move her belongings. The inn owner, believing the men were trespassers, confronted them with a revolver and threatened them with bodily injury, but then allowed them 30 minutes to load the employee's belongings and vacate the premises. The men never achieved the status of trespassers, either through their initial entry, because the inn was open for business at the time of their arrival, or by remaining on the property beyond the time allowed them to vacate the premises. St. v. Crabb, 232 M 170, 756 P2d 1120, 45 St. Rep. 966 (1988).

No Notice of Drainage System in Warranty Deed — No Trespass: Plaintiffs who were rightfully excavating ground they owned pursuant to a warranty deed that gave no notice of a drainage system belonging to a nearby supper club could not be found guilty of trespass in the absence of evidence of intentional intrusion on supper club property. Branstetter v. Beaumont Supper Club, Inc., 224 M 20, 727 P2d 933, 43 St. Rep. 1981 (1986).

Lesser Included Offense — Jury Instruction:

Although criminal trespass is by definition a lesser included offense of burglary, the evidence in the record is determinative of whether a lesser included offense instruction should be given. The trial court's instructions must cover every theory having support in the evidence. St. v. Harvey, 219 M 402, 713 P2d 517, 43 St. Rep. 46 (1986).

The essence of defendant's contention that the court erred in refusing a lesser included offense instruction in a burglary trial is that under a criminal trespass instruction he would be entitled to argue that even if the jury found he was in the lumber company building, it could conclude he had merely committed a trespass because he had no purpose to commit theft. However, there was no evidence in the record from which such argument could be made. St. v. Radi, 176 M 451, 578 P2d 1169 (1978).

Admission of Confession — Harmless or Prejudicial Error: When error is federal constitutional error, as with the improper admission of a confession, the error cannot be considered harmless unless the court finds it harmless beyond a reasonable doubt. Admission of a confession taken without adequate Miranda warnings constituted prejudicial error, resulting in overturn of conviction on two charges. Nonetheless, because admission of that portion of the confession that related to another charge (criminal trespass) against the defendant was held harmless error, conviction on that other charge was sustained. St. v. Dess, 184 M 116, 602 P2d 142 (1979).

Fish and Game Property: Entering and remaining on Fish and Game property was held not to violate this section where defendant was a member of the public and the property was concededly open to the public. This section applies only to "persons", not to trespassing cattle; this section is not as broad as the former statute which made herding of cattle onto another's land a criminal trespass. The landowner's remedies for trespassing cattle are: (1) a civil suit for damages under

81-4-215; or (2) a criminal action for criminal mischief under 45-6-101 (where a person herds cattle onto another's land and causes damage). St. v. Blakely, 181 M 118, 592 P2d 501 (1979).

In General: This section creates two distinct offenses: first, to enter on land of another despite warning that entry is forbidden, and second, to remain on land of another after being notified to depart. People v. Spencer, 131 Ill. App.2d 551, 268 N.E.2d 192 (1971). The purpose of this section, which makes certain acts of trespass illegal, is to deter violence and threats of violence. People v. Hoskins, 5 Ill. App.3d 831, 284 N.E.2d 60 (1972). Thus, convictions under this section have been upheld where a teacher failed to comply with an order of dismissal and where a defendant distributed leaflets in a completely enclosed private shopping mall. People v. Spencer, supra; People v. Sterling, 52 Ill.2d 287, 287 N.E.2d 711 (1972). However, a conviction based on this section was overturned where the defendant was not given sufficient time to leave the premises after being informed that his presence thereon was unlawful. People v. Mims, 8 Ill. App.3d 32, 288 N.E.2d 891 (1972). See also City of Chicago v. Rosser, 47 Ill.2d 10, 264 N.E.2d 158 (1970), in which the court discussed in general terms the rights of an owner of private property to operate and maintain his premises. See also People v. Vazquez, 132 Ill. App.2d 291, 270 N.E.2d 229 (1971); People v. Hoskins, 5 Ill. App.3d 831, 284 N.E.2d 60 (1972); People v. Spencer, 131 Ill. App.2d 551, 268 N.E.2d 192 (1971).

Constitutionality: This section has been ruled not to violate amendments 1 and 14 of the United States Constitution. People v. Jackson, 133 Ill. App.2d 279, 271 N.E.2d 672 (1971).

Hunting on Posted Land: A person who hunted on inclosed land without the consent of one entitled to its possession was a trespasser and, where the land was posted warning against hunting, was in violation of 94-3309, R.C.M. 1947 (since repealed). Herrin v. Sutherland, 74 M 587, 241 P 328 (1925).

Attorney General's Opinions

Right to Trap on Streams Not Governed by Stream Access Law: The right to trap fur-bearing animals between the ordinary high-water marks of a stream is not governed by Title 23, ch. 2, part 3, but rather is dependent upon whether the trapper has license, invitation, or privilege to enter or remain upon land and whether the trapper has secured a license to trap. 41 A.G. Op. 36 (1985).

Hunting Trespass Not Repealed: Montana's criminal trespass statutes, 45-6-201(1) and 45-6-203, do not repeal or affect 87-3-304 (now repealed, but see 87-6-415), which makes it unlawful to hunt big game animals on private property without permission, because the statutes do not relate to the same conduct. 37 A.G. Op. 144 (1978).

45-6-204. Burglary.

Criminal Law Commission Comments

Source: New and M.P.C. 1962, § 221.1.

The definition of a burglarious entry, i.e., "unprivileged entry" takes a middle ground between the common-law requirement of "breaking" and the complete elimination of that requirement in some modern statutes. The basic concept of "breaking" seems to be an unlawful intrusion, or as defined in section 94-6-201, "entering or remaining unlawfully." This definition is meant to exclude from burglary the servant who enters his employer's house meaning to steal silver; the shoplifter who enters a store during business hours to steal from the counter; the fireman who forms the intent, as he breaks down the door of a burning house, to steal some of the householder's belongings and similar acts in which the defendant is lawfully on the premises.

Where breaking is not required there has been a tendency to hold that guilt may be established by proof that the proscribed intent was secretly entertained in the mind of the entrant although apart from this secret intent the entrance at that time and place would have been authorized. For example, in People v. Brittain, 142 Cal 8, 75 P 314, it was held one could be convicted of burglary for entering a store with larcenous intent. The commission rejects this view and approves of the decision of State v. Starkweather, 89 M 381, 297 P 497 (1931), as a more practical result.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 263 inserted (1)(b) stating the person knowingly or purposely committed any other offense within the structure; inserted (2)(a)(ii) stating the person knowingly or purposely committed any other offense within the structure; deleted former (2)(b) that read: "in effecting entry or in the course of committing the offense or in immediate flight thereafter"; and made minor changes in style. Amendment effective October 1, 2009.

1987 Amendment: In (2), near end, substituted "an offense" for "a felony"; and in (3) increased maximum term from 10 years to 20 years.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section substantially changes prior law. The common-law offense of burglary required the breaking and entering of the dwelling house of another in the nighttime with the purpose of committing a felony. Under prior law burglary required only entry into a structure or vehicle with the purpose of committing petit larceny or any felony. The new code has adopted a position between these two views.

While the new code eliminates the need for a "breaking" in any physical sense, it retains explicitly in the definition of "enter or remain unlawfully" (§ 45-6-201) the requirement that the entry be unprivileged. A literal reading of the prior statute would seem to require mere entry with intent and other courts in interpreting identical statutes have reached that conclusion. The Montana Court has, however expressly rejected that view in St. v. Starkweather, 89 M 381, 297 P 497 (1931), and indicated that, to constitute burglary, the entry must be unprivileged. Prior to the 1975 amendment, the requirement of unprivileged entry was deleted from the offense of aggravated burglary as set forth in subsection (2). The 1975 addition of "unlawfully" after "remains" in that subsection corrected the oversight.

Perhaps the most significant of the changes introduced by the new code is the retreat from the prior view that any building or vehicle could be the object of burglary to the view that to constitute burglary the acts must be directed against an occupied structure. This change reflects a return to the common-law view that the gravamen of burglary was the threat to person resulting from the wrongful intrusion. While the new code is not as technically restrictive it does require that the structure entered be either actually occupied or "suited for human occupancy or night lodging of persons or for carrying on business" (See § 45-2-101(47)). In effect this limits burglary to those situations in which the intrusion is most alarming and the threat to human life the greatest.

The new code rejects both the common-law's requirement that the act occur in the nighttime and the prior law's division of burglary into first- and second-degree burglary based on the time of the act. It has also rejected the felony or petit larceny requirements of the common and prior laws. The new code retains the prior law in that burglary can occur at any time, day or night, but classifies the offense as either burglary or aggravated burglary by referring solely to the defendant's conduct. Simple burglary is made more inclusive by requiring only the purpose to commit any offense instead of the intent to commit any felony or petit larceny requirement of the old law. Aggravated burglary requires both the purpose to commit a felony and either the infliction of bodily injury or the carrying of explosives or a weapon.

The penalties under the new code have also been modified so that it is possible to more accurately match punishment to conduct.

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GENERALLY

Theft Conviction Vacated When Charged as Predicate Offense to Burglary: Because the defendant's conviction for theft was charged as a predicate offense to burglary under 45-6-204(1)(b), the defendant's conviction for both crimes constituted a direct violation of the statutory restriction on multiple charges under 46-11-410, and the conviction for theft should have been vacated. St. v. Tellegen, 2013 MT 337, 372 Mont. 454, 314 P.3d 902.

Evidence to Support Theft Conviction Despite Acquittal of Burglary and Criminal Mischief Charges: Kelley was convicted of theft, but acquitted of criminal mischief and burglary charges in connection with a break-in at a pet store. On appeal, Kelley asserted that the acquittals demonstrated the insufficiency of the evidence underlying the theft conviction. The Supreme Court disagreed. Each of the crimes charged consisted of distinct elements, and the theft charge was not inseparable from the criminal mischief and burglary charges. When each act is a separate offense, an acquittal or conviction of one or more counts does not affect the other counts, and it is permissible for a jury to convict on one count and acquit on another when it is within the province of the jury to convict on both counts on the same evidence. Thus, Kelley's contention that acquittal of criminal mischief and burglary had the effect of negating his participation in a theft was rejected, and the theft conviction was affirmed. St. v. Kelley, 2005 MT 200, 328 M 187, 119 P3d 67 (2005), followed in St. v. Borsberry, 2006 MT 126, 332 M 271, 136 P3d 993 (2006), with regard to the ability of a jury to convict on one count and acquit on another when it is within the jury's province to convict on both counts on the same evidence and the fact that an acquittal resulting from the state's failure to prove an element of a crime cannot be considered tantamount to an affirmative proposition that a defendant did or did not engage in a particular act. See also St. v. Daly, 77 M 387, 250 P 976 (1926), St. v. Azure, 2002 MT 22, 308 M 201, 41 P3d 899 (2002), and St. v. Bailey, 2003 MT 150, 316 M 211, 70 P3d 1231 (2003).

Consent Justification for Warrantless Entry Into House — Motion to Suppress Properly Denied: Officers in pursuit of DeWitt following an aggravated burglary knew that DeWitt was staying with Bill Robinson. After arriving at Robinson's house, Robinson said that he has just arrived and did not know if DeWitt was there but granted the officers permission to search the house. The officers found DeWitt sitting in the dimly lit basement drinking a beer. DeWitt argued that the search was unlawful and that evidence obtained from the search should be suppressed because Robinson did not have the right to consent to a search of the part of the house that DeWitt was renting. The Supreme Court disagreed. The officers' entry into the house was consensual, and warrantless entry was justified, so denial of the motion to suppress was proper. St. v. DeWitt, 2004 MT 317, 324 M 39, 101 P3d 277 (2004).

Evidence of Motorcycle in Plain View Admissible: Officers in pursuit of DeWitt following an aggravated burglary found DeWitt's truck in another person's driveway, noticed a light on in the garage, and knocked on the door, which opened on impact. As soon as the door opened, officers noticed the smoke and odor of a two-stroke engine recently being started and surmised that DeWitt had been at the home and left on a motorcycle shortly before their arrival. DeWitt contended that the search of the garage was unlawful and that evidence obtained from the search should be suppressed. The Supreme Court disagreed. Evidence regarding the motorcycle was in plain view and fell within the plain view exception to the right against unreasonable search and seizure. St. v. DeWitt, 2004 MT 317, 324 M 39, 101 P3d 277 (2004).

Federal Crime Defined by State Law Considered Federal Offense — Incorporation of State Law Definition: An Indian juvenile was charged with burglary under the federal Indian Major Crimes Act, 18 U.S.C. 1153, by reference to Montana's burglary statute only for the purpose of definition. The Act creates federal jurisdiction over 14 major offenses, including burglary, committed by Indians against Indians or any other person in Indian country, but does not define residential burglary. However, under the Act, if an enumerated crime is not defined and punished in accordance with federal law, the offense is defined and punished in accordance with the laws of the state in which the crime occurred. The juvenile argued that because the burglary was determined by reference to substantive state law, the violation of 18 U.S.C. 1153 did not constitute a violation of federal law. The Ninth Circuit Court disagreed. The fact that no federal residential burglary statute exists, requiring incorporation of Montana's definition of burglary, does not strip the commission of burglary on an Indian reservation of its federal character. Therefore, offenses defined by state law are nevertheless treated as federal offenses under the federal Act. U.S. v. Male Juvenile, 280 F3d 1008 (9th Cir. 2002).

INTENT

Prior Inconsistent Statements and Other Evidence Sufficient for Proof of Burglary: A victim's statements just after the incident and independent, reliable evidence corroborating those statements were sufficient to establish burglary and the underlying offense, unlawful restraint, even though the victim later retracted those statements. St. v. Torres, 2013 MT 101, 369 Mont. 516, 299 P.3d 804.

Federal Crime Defined by State Law Considered Federal Offense — Incorporation of State Law Definition: An Indian juvenile was charged with burglary under the federal Indian Major Crimes Act, 18 U.S.C. 1153, by reference to Montana's burglary statute only for the purpose of definition. The Act creates federal jurisdiction over 14 major offenses, including burglary, committed by Indians against Indians or any other person in Indian country, but does not define residential burglary. However, under the Act, if an enumerated crime is not defined and punished in accordance with federal law, the offense is defined and punished in accordance with

the laws of the state in which the crime occurred. The juvenile argued that because the burglary was determined by reference to substantive state law, the violation of 18 U.S.C. 1153 did not constitute a violation of federal law. The Ninth Circuit Court disagreed. The fact that no federal residential burglary statute exists, requiring incorporation of Montana's definition of burglary, does not strip the commission of burglary on an Indian reservation of its federal character. Therefore, offenses defined by state law are nevertheless treated as federal offenses under the federal Act. U.S. v. Male Juvenile, 280 F3d 1008 (9th Cir. 2002).

Knowing, Purposeful Act Not Precluded by Psychotic State: Charges of attempted deliberate homicide and aggravated burglary both require proof of conduct committed purposely and knowingly. Cowan conceded that the alleged conduct occurred but contended that he did not have the requisite state of mind during the conduct because he had suffered for years from a serious mental disorder. However, the issue before the trial court was not whether Cowan was in a psychotic state, but whether he acted purposely and knowingly. The existence of a mental disease or defect does not necessarily preclude a person from acting purposely and knowingly. Although the testimony of all medical experts was consistent as to the presence of a mental defect, there was not a consensus that Cowan was suffering from an acute psychotic episode at the time of the incident. A rational trier of fact could have found beyond a reasonable doubt that Cowan possessed the requisite mental state to be convicted of the crimes. St. v. Cowan, 260 M 510, 861 P2d 884, 50 St. Rep. 1153 (1993).

Purpose to Commit Assault — Statutory Intent Proving Burglary Met: Where defendant witnessed the door being torn off its hinges, entered soon after, remained inside after being told to leave, and assaulted at least four persons while inside, a rational juror could have concluded that the state satisfied the elements of burglary by establishing that the defendant remained unlawfully in the occupied structure with the purpose to commit an assault. St. v. McDonald, 226 M 208, 734 P2d 1216, 44 St. Rep. 593 (1987).

Intoxication Affecting Intent to Commit Offense: The intent to commit an offense required to prove a charge of burglary may be shown by circumstantial evidence. When the defendant, who claimed that he was too intoxicated to form the required intent, broke into a store, was confronted by police within minutes and attempted to flee, struggled with officers, and was able to recount in detail all the events prior, during, and subsequent to his entry except for the reason he had entered the store, there was substantial evidence to support a conviction of burglary. St. v. Hardy, 185 M 130, 604 P2d 315 (1980).

UNLAWFUL ENTRY

Sufficient Evidence of Unlawful Entry to Sustain Aggravated Burglary Charge: Despite a court no-contact order, Highpine maintained an ongoing intimate relationship with Azure, which included Highpine commonly spending the night at Azure's apartment and maintaining a suitcase there. Also, Azure was pregnant with Highpine's child. On the day of the alleged burglary, Azure and Highpine argued, and Highpine left the apartment. Azure left the only apartment key with her cousin, asking him to watch the apartment, and then left town. Later that evening, Highpine lured a minor to the apartment. Finding it locked, Highpine broke a window, entered the apartment with the minor, and then raped the minor. Highpine was convicted of aggravated burglary, but appealed on grounds that there was insufficient evidence to find that he had unlawfully entered the apartment. Although the jury was presented with conflicting evidence concerning whether Azure would have welcomed Highpine's return, even if Azure's permission was granted, Highpine knew that his entry was unlawful because it was in violation of a court order prohibiting contact with Azure. The jury also apparently believed that Highpine was not privileged to enter the apartment because Azure did not give the key to Highpine when she left town. Finally, the jury could have decided that Highpine's entry was unlawful based on the fact that he broke a window to gain entry. The Supreme Court held that this was sufficient evidence upon which any rational trier of fact could have found that Highpine knowingly and unlawfully entered Azure's apartment. Highpine's aggravated burglary conviction was affirmed. St. v. Highpine, 2003 MT 88, 315 M 129, 68 P3d 669 (2003).

Failure to Show Unlawful Entry — Insufficient Circumstantial Evidence to Prove Burglary: More than 24 hours after a burglary, Benson was found in possession of lottery tickets stolen from the Melstone Bar and Cafe, but in his uncontroverted testimony, he disclaimed knowledge of their origin. Benson was found in possession of other items consistent with, but not identified as, those stolen during the burglary. Benson and two other persons testified that they were driving around Melstone during the approximate time of the burglary. Given the size of Melstone, they were near the scene of the burglary, but no false or unreasonable explanation necessary to sustain the conviction existed. Absent any direct evidence that Benson unlawfully entered the Melstone Bar and Cafe with the purpose to commit an offense, coupled with the insufficient circumstantial evidence, the Supreme Court concluded that no rational trier of fact could have found all of the elements of burglary beyond a reasonable doubt. Benson's motion for a directed verdict to dismiss should have been granted; thus, the case was reversed and remanded. St. v. Benson, 266 M 415, 880 P2d 1338, 51 St. Rep. 892 (1994).

No Burglary if Person Entering Has Right to Do So: In reversing a burglary conviction, the Supreme Court followed the holding in St. v. Starkweather, 89 M 381, 297 P 497 (1931), that an entry made by one who is licensed or privileged to be on the premises is not unlawful under this section. To constitute a burglary, the nature of the entry must itself be a trespass. When defendant had permission to enter his place of employment with keys provided by his employer, no burglary could occur. St. v. Feldt, 239 M 398, 781 P2d 255, 46 St. Rep. 1780 (1989), distinguishing St. v. Courville, 236 M 253, 769 P2d 44, 46 St. Rep. 338 (1989).

Entry Obtained by Deceit as Unlawful Entry: The Supreme Court followed St. v. Maxwell, 672 P2d 590 (Kan. 1983), in holding that entry into a dwelling by fraud, deceit, or pretense is an unauthorized entry for the purposes of burglary. St. v. Christofferson, 238 M 9, 775 P2d 690, 46 St. Rep. 1049 (1989).

"Apartment Manager" Defense to Burglary Inadequate: Defendant who forcefully entered an apartment at night without consent and removed a rifle and ammunition claimed he entered the apartment in his capacity as apartment manager and, as part of the process of evicting tenant, removed the rifle as a "protective measure". However, defendant acted far beyond his capacity as agent of the landlord, having used destructive means to gain entry and having entered at night without tenant's consent and without notice. Defendant's "apartment manager" defense to burglary was found inadequate. St. v. McKimmie, 232 M 227, 756 P2d 1135, 45 St. Rep. 1011 (1988).

Business Invitee: Defendant who exceeded invitation given as a business invitee and stayed in pharmacy after business was closed became a trespasser; subsequent theft of goods from pharmacy constituted a burglary. St. v. Watkins, 163 M 491, 518 P2d 259 (1974).

Breaking: Section 94-901, R.C.M. 1947 (now in 45-6-204) and this section do not require a breaking of the enclosure but only an unlawful entry, and the word "break" in an information is surplusage. St. v. Dixson, 80 M 181, 260 P 138 (1927).

OCCUPIED STRUCTURE

Prison Cellblock as Occupied Structure Within Context of Burglary Charge: Gollehon was charged with burglary because of his involvement in a prison riot in which he and several other inmates took over the maximum security unit, entered one of the cell blocks, and killed five protective custody inmates. He contended that the trial court should have dismissed the burglary charge, and thus the extenuating deliberate homicide charges, because the definition of occupied structure was inapplicable to his entry into the cell block. However, the definition of occupied structure in 45-2-101 clearly states that each unit of a building that consists of two or more separately secured units is a separate occupied structure. Notwithstanding Gollehon's arguments that the definition does not enumerate specific structures or types of buildings to which it applies, that the prison handbook fails to mention that the presence of an inmate in an unauthorized area of the prison could result in a burglary charge, and that the definition does not take into account the unique circumstances of a prison environment, Gollehon's unauthorized conduct in entering into a cellblock intended for human habitation, with the intent to commit a crime, fits squarely within the burglary statute. St. v. Gollehon, 262 M 293, 864 P2d 1257, 50 St. Rep. 1564 (1993), followed in St. v. Turner, 265 M 337, 877 P2d 978, 51 St. Rep. 467 (1994).

Unused Bunkhouse With No Utilities Regularly Used for Storage: No one had lived or stayed overnight in a farmhouse or bunkhouse since 1964. Neither structure had electricity, heat, or running water. The house smelled strongly of wild animals and had a leaky roof. The bunkhouse was tight and of sound construction. Each had a door with a padlock that defendants broke. The owner and lessee each lived a quarter mile away. The owner used both structures to store furniture and appliances, the lessee used the bunkhouse to store fenceposts for his farming business, and each visited the structures regularly for those purposes. The bunkhouse was a building suitable for carrying on a business and used regularly for that purpose and was an "occupied structure" as that term is used in this section. St. v. Pierce, 255 M 378, 842 P2d 344, 49 St. Rep. 992 (1992).

Interpretation of "Occupied Structure" Definition: In appealing his conviction for burglary and theft, defendant argued that he was entitled to a directed verdict on the burglary count because the furnished mobile home located on the sales lot of a dealer was not an "occupied structure" for purposes of 45-6-204. The Supreme Court found that the mobile home satisfied the definition set forth in 45-2-101. The court noted that the furnished mobile home was an integral part of the business, was a structure suitable for carrying on business, and was so used. Because the trial judge properly determined that the mobile home was an "occupied structure", he correctly denied the defendant's motion for a directed verdict on the burglary charge. St. v. Kyle, 192 M 374, 628 P2d 260, 37 St. Rep. 1447 (1980).

"Occupied Structure" as Integral Part of Business: Defendant maintained that the State failed to prove that he committed a burglary since the tack shed from which he took saddles and riding gear was not an "occupied structure" as required by 45-6-204. The legislative intent of the burglary statute was to prohibit wrongful intrusions into those places where the threat to people was most alarming. The definition of "occupied structure" includes a place suitable for "carrying on a business". The deceased used the tack shed as an integral part of the horse rental business, and as such it came within the definition of "occupied structure". St. v. Sunday, 187 M 292, 609 P2d 1188 (1980).

Semi-Trailer: Semi-trailer attached to a sleeper cab tractor was a "vehicle" and an "occupied structure" within the meaning of this section, and therefore defendant who entered it and removed a number of cases of beer was properly convicted of burglary. St. v. Shannon, 171 M 25, 554 P2d 743 (1976).

Sheep Wagon: A sheep wagon covered, enclosed by four walls, and used as a dwelling by a sheepherder was a "building" within the meaning of 94-901 (and most likely an "occupied structure" under this section), even though it was on wheels rather than affixed to the ground, and it could be the object of a burglary. St. v. Ebel, 92 M 413, 15 P2d 233 (1932).

FELONY-MURDER RULE

Murder During Burglary With Intent to Riot — Felony-Murder Rule Applicable: An inmate who knowingly entered a cell block at the state prison with the intent to participate in a riot committed the offense of burglary with intent to riot. Within the course of the riot, five protective custody inmates were murdered. Therefore, a causal connection existed between the commission of the underlying burglary offense and the murders, and it was proper for the trial court to deny dismissal of felony-murder charges against the inmate. St. v. Cox, 266 M 110, 879 P2d 662, 51 St. Rep. 680 (1994).

INFORMATION

Two Burglary Charges for Single Unlawful Entry Improper: DeWitt entered the Nicholls' home and assaulted both the husband and wife. The state charged DeWitt with two counts of aggravated burglary, and DeWitt was convicted on both counts. DeWitt contended that the information improperly charged him with two burglaries even though he unlawfully entered only one residence. The Supreme Court agreed. It is the unlawful entry with the intent to commit an offense that provides the gravamen of the offense of aggravated burglary, so even though two persons may have been injured in this case, there was only one unauthorized entry. The Supreme Court remanded with instructions to dismiss one count and for resentencing. St. v. DeWitt, 2004 MT 317, 324 M 39, 101 P3d 277 (2004), distinguishing St. v. Weigle, 285 M 341, 947 P2d 1053 (1997), and St. v. Hardaway, 2001 MT 252, 307 M 139, 36 P3d 900 (2001).

Inadequacy of Amended Information Charging Commission of Undefined Sexual Crime: Hardaway was initially charged with burglary, and the information was amended to charge that Hardaway knowingly entered or remained unlawfully in an unoccupied structure with intent to commit theft or a sexual crime. Hardaway contended that the amended information should have been dismissed because the term "sexual crime" was not sufficiently definite in its legal meaning to reasonably apprise him of the charge against him so that he could prepare a defense. The Supreme Court agreed. An information is sufficient if it properly charges an offense in the language of the statute defining the offense charged and if a person of common understanding would know what was charged. Here, the amended information failed to adequately put Hardaway on notice of the nature or character of the offense that he was accused of intending to commit. Numerous offenses of a sexual nature are defined in Montana law, but the purported offense of sexual crime is not, nor did the information provide any factual allegations to indicate which of the potential offenses of a sexual nature Hardaway was accused of intending to commit, so he had no way of determining which of the potential offenses, if any, was being charged. St. v. Hardaway, 2001 MT 252, 307 M 139, 36 P3d 900 (2001). See also St. v. Steffes, 269 M 214, 887 P2d 1196 (1994).

Permissive Joinder — Not Grant of Jurisdiction: Relator was charged with misdemeanor assault and burglary (a felony). Relator contends that the District Court had no jurisdiction to try him for a misdemeanor. Section 46-11-404 allows an information to charge two or more offenses connected in their commission. This section is a permissive joinder statute for offenses within the jurisdiction of a given court, not a grant of jurisdiction. Jurisdiction for the misdemeanor assault lies with the Justice's Court. State ex rel. Rasmussen v. District Court, 189 M 183, 615 P2d 231, 37 St. Rep. 1498 (1980).

Aider or Abettor: Defendant was properly convicted as an aider or abettor to a burglary under section 94-2-106, R.C.M. 1947 (now 45-2-301), and 94-2-107, R.C.M. 1947 (now 45-2-302), even though the information charged only burglary without making reference to aiding and abetting, where the form of the charge did not mislead or cause surprise to the defendant and he knew the State's theory throughout the trial. However, the Supreme Court does not condone this method of charging a defendant. Proper practice is to charge aiding and abetting from the outset. St. v. Murphy, 174 M 307, 570 P2d 1103 (1977).

Probable Cause for Information: Evidence that accused was arrested in the company of one in whose car stolen property was found several hours later was not sufficient proof to justify filing of an information for burglary under 94-901, R.C.M. 1947 (now 45-6-204). State ex rel. Wilson v. District Court, 159 M 439, 498 P2d 1217 (1972).

Description of Property: In information for burglary under 94-901, R.C.M. 1947 (now 45-6-204), charging entry with intent to commit larceny, then describing the property taken, the description was surplusage and there was no charge of the actual commission of larceny. St. v. Board, 135 M 139, 337 P2d 924 (1959).

Felony: Since 94-903, R.C.M. 1947 (now 45-6-204) provided for imprisonment in the state prison for burglary, it was a felony, and dismissal of the first information did not bar a subsequent prosecution on a second information. St. v. McGowan, 113 M 591, 131 P2d 262 (1942).

Variance Between Pleadings and Proof: Entry and intent were the gravamen of the offense under 94-901, R.C.M. 1947 (now 45-6-204), and it was immaterial that the information did not state the location of the building with exact particularity, that the property stolen actually belonged to a different person than named in the information, or that the proof related to a date 8 days later than that specified in the information. St. v. Rogers, 31 M 1, 77 P 293 (1904).

EVIDENCE

Sufficient Circumstantial Evidence to Show Essential Elements of Deliberate Homicide, Burglary, and Evidence Tampering to Warrant Jury Consideration: At the close of the state's case, Rosling moved for dismissal of deliberate homicide, burglary, and evidence tampering charges on grounds that the evidence was insufficient to send the case to the jury. The motion was denied, and on appeal, the Supreme Court affirmed. Rosling was with the victim the night of her death and was apparently the last person to see the victim alive. The victim was murdered at home, and a neighbor saw Rosling's car and a person matching Rosling's description at the home around the time of the murder. Footprints found at the home matched Rosling's shoes. The victim's father found the victim and discovered burning magazines beneath the victim, apparently left in an attempt to cover up the crime. A spot of the victim's blood was found on Rosling's coat, and other blood stains on the coat could not be ruled out as belonging to the victim. Rosling was unable to account for his whereabouts at the time of the murder and gave police inconsistent statements concerning his actions the night before and day of the murder. Although the evidence was circumstantial, it was sufficient the send the case to the jury, and the trial court did not err in denying Rosling's motion to dismiss on grounds of insufficient evidence. St. v. Rosling, 2008 MT 62, 342 M 1, 180 P3d 1102 (2008). See also St. v. Daniels, 2019 MT 214, 397 Mont. 204, 448 P.3d 511.

Sufficient Objective Police Data to Warrant Investigative Stop of Burglary Suspect — Motion to Suppress Evidence Properly Denied: Following a tip from a former parole officer and a background check, Eixenberger became a potential suspect in a string of burglaries in Kalispell area casinos. Eixenberger had received two citations while driving a red Thunderbird in the area and became a primary suspect when the car was seen about 200 yards from a casino about 9 minutes before the casino was burglarized. The car was subsequently spotted several times, with either Eixenberger or a friend driving, during early morning hours when the burglaries occurred. One early morning, a casino was burglarized. Police checked Eixenberger's friend's residence and found neither Eixenberger nor the car and then stopped Eixenberger in the car a short distance from and within minutes of another casino burglary. Police found rocks and tools consistent with the burglaries. Eixenberger moved to suppress the evidence on grounds that the police lacked a particularized suspicion to make the investigative stop, but the motion was denied. On appeal, the Supreme Court affirmed. Under the totality of circumstances in this case, the police had sufficient objective data to support a suspicion that Eixenberger was or had engaged in wrongdoing, so the investigative stop was appropriate. St. v. Eixenberger, 2004 MT 127, 321 M 298, 90 P3d 453 (2004), distinguishing St. v. Lafferty, 1998 MT 247, 291 M 157, 967 P2d 363 (1998).

Evidence of Other Theft and Property Damage and Threatening Note Admissible Under Transaction Rule: During defendant's trial for theft and burglary, the District Court allowed the introduction of evidence of a prior theft and property damage, as well as a threatening note, that defendant had been involved with earlier in the day. Defendant contended that the evidence related to other acts or crimes and should not have been admitted. However, the prior theft and property damage and the note were intertwined with the theft and burglary, and the jury was entitled to hear what had transgressed immediately prior to the commission of the crime charged, so the evidence was admissible under the transaction rule. St. v. Flowers, 2004 MT 37, 320 M 49, 86 P3d 3 (2004).

Theft of Loaded Firearm During Burglary Sufficient to Consider Person Armed With Weapon for Purposes of Charging Aggravated Burglary: Ray stole loaded and unloaded firearms during several burglaries, and because the firearms were then in Ray's possession, he was charged with aggravated burglary because he was armed with a weapon. Ray appealed on grounds that the stolen firearms did not qualify him as armed under this section. Examining case law from other jurisdictions, the Supreme Court held that when the state seeks to prove that a defendant was armed with a weapon under the aggravated burglary definition, the burden is met if it is proved that defendant stole a loaded weapon during a burglary, but not if an unloaded firearm was stolen unless it can also be proved that defendant intended to use the unloaded firearm as a weapon or loaded the firearm. Thus, stealing loaded firearms in the course of committing an otherwise unarmed burglary elevates the offense to aggravated burglary by virtue of the mere possession of the firearms. St. v. Ray, 2003 MT 171, 316 M 354, 71 P3d 1247 (2003).

Pretrial Motion to Dismiss Burglary and Stalking Charges Properly Denied as Premature: Tichenor was charged with three counts of felony burglary and two counts of stalking for entering his girlfriend's apartment. Following arraignment, Tichenor moved to dismiss the charges for lack of sufficient evidence, claiming that he lacked the necessary intent required for the stalking charges and that he had license to enter the apartment, so the burglary charges were unfounded. The motion was denied, and Tichenor appealed. The Supreme Court noted that the questions of Tichenor's requisite intent and whether he was unlawfully in the apartment were questions for the jury. It would have been improper for the court to step into the jury's place and resolve the issues before trial, so the motion to dismiss was premature and properly dismissed. St. v. Tichenor, 2002 MT 311, 313 M 95, 60 P3d 454 (2002), distinguishing St. v. David, 266 M 365, 880 P2d 1308 (1994), and followed in St. v. McWilliams, 2008 MT 59, 341 M 517, 178 P3d 121 (2008).

Case Remanded Because Jury Improperly Summoned — Sufficient Evidence to Support Convictions for Assault With a Weapon and Aggravated Burglary: Lopez was convicted of felony assault (now assault with a weapon) and aggravated burglary. On appeal, it was held that the District Court should not have denied Lopez's motion to strike the jury because under St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000), summoning a jury by telephone violates 3-15-505 and frustrates the random nature of the jury process. Lopez contended that the state did not meet its burden of proving the elements of either crime and that he should not be retried on those charges. The Supreme Court disagreed, finding that the state offered sufficient evidence to prove both offenses, and remanded for retrial. St. v. Lopez, 2001 MT 97, 305 M 218, 26 P3d 745 (2001).

Evidence of Escape Sufficient to Support Conviction for Aggravated Burglary: When attempting to flee from pursuing officers, Martin ducked into the back door of a bakery and then ran out the front door in a further attempt to get away. Martin was convicted of attempted burglary for entering the occupied structure armed with a weapon for the purpose of committing the offense of escape. On appeal, Martin argued that the evidence was insufficient to prove escape, so the evidence was also insufficient to prove aggravated burglary. The Supreme Court found sufficient evidence to support the escape charge, so the aggravated burglary charge was also affirmed. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Sufficient Corroborative Evidence of Burglary and Theft to Allow Testimony of Legally Accountable Witness: Before his trial for burglary and theft, Teske sought to exclude the testimony of a witness who was alleged to be legally accountable for Teske's crimes. Nevertheless, the District Court allowed the witness to testify. The testimony was corroborated by the testimony of another witness and by the physical evidence. Although the witness may have been more involved in the crimes than he was willing to admit, the question before the jury was whether Teske was guilty, and on that issue, there was sufficient evidence to convict. St. v. Teske, 1999 MT 227, 296 M 88, 987 P2d 368, 56 St. Rep. 894 (1999).

Circumstantial Evidence Establishing Defendant's Presence at Crime Scene When Victim Only Other Witness Sufficient for Conviction: Southern was charged with two counts of kidnapping, one count of burglary, one count of theft, and five counts of sexual intercourse without consent. Southern contended that the only evidence connecting him to the crimes, which included DNA and other physical evidence, was circumstantial and that even though the evidence placed him at the crime scene, it did not establish that he committed the crimes. The Supreme Court noted that under State ex rel. Murphy v. McKinnon, 171 M 120, 556 P2d 906 (1976), presence at a crime scene is insufficient, in itself, to prove criminal liability. However, this evidence not only placed Southern at the crime scene, but placed him there when the only people present were the victim and her attacker. Although the evidence was circumstantial, it was of sufficient quality and quantity that a reasonable jury could find Southern guilty. Judgment was affirmed. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999). The Southern standard that circumstantial evidence by itself was sufficient to sustain a conviction when the evidence was of sufficient quality and quantity that a reasonable jury could find defendant guilty was applied to a drug possession case in St. v. Hill, 2008 MT 260, 345 M 95, 189 P3d 1201 (2008).

Assaults as Basis of Burglary Charge — Evidence Sufficient to Uphold Conviction: Allen argued that this section requires both the purpose to commit an offense and the infliction of bodily injury, contending that because the state was relying on his assault of Evans and D.E. as the requisite offense for simple burglary, it needed to prove infliction of bodily injury upon someone other than Evans or D.E. in order to satisfy the burden of proving aggravated burglary. Without ruling on the validity of Allen's analysis of the requirements of aggravated burglary, the Supreme Court found that the state had presented sufficient evidence for the jury to find the elements of each crime; thus, Allen's motion for a directed verdict was properly denied. St. v. Allen, 278 M 326, 925 P2d 470, 53 St. Rep. 935 (1996).

Dissimilarity Between Misdemeanor Forgery and Felony Burglary — Evidence of Prior Crime Inadmissible: In a prosecution for accountability for felony burglary, the state sought to introduce evidence of Johnston's prior conviction for misdemeanor forgery. Under the modified Just rule, there was insufficient similarity between the two offenses to satisfy the requirement that the crimes be similar in nature before evidence of the prior crime may be allowed. St. v. Johnston, 267 M 474, 885 P2d 402, 51 St. Rep. 1078 (1994).

Evidence Sufficient for Conviction Based on Unlawful Entry and Rape: Defendant was charged with aggravated burglary and rape. Although he was not identified by his victim, evidence introduced at trial, including hair from the defendant and victim, serological evidence, and evidence of similar crimes committed by the defendant, indicated his participation. The Supreme Court affirmed the conviction, holding that there was sufficient evidence from which a jury could find beyond a reasonable doubt that the defendant committed the burglary and rape. St. v. Kordonowy, 251 M 44, 823 P2d 854, 48 St. Rep. 1148 (1991).

Evidence of Possession and Circumstances Sufficient to Support Burglary Conviction: The defendant moved for a directed verdict at the close of the state's case against him on burglary charges. The Supreme Court held that although evidence of possession alone was not sufficient to support a burglary conviction, there was sufficiently strong circumstantial evidence of guilt to justify submitting the case to the jury. St. v. Floyd, 243 M 269, 790 P2d 475, 47 St. Rep. 720 (1990).

Circumstantial Evidence Sufficient for Conviction in Face of Conflicting Testimony: Several members of the defendant's family testified that he was with them at the time the burglary was committed. The Supreme Court upheld the conviction, stating that although there was conflicting testimony concerning the defendant's whereabouts, there was sufficient circumstantial evidence to support the jury's guilty verdict. St. v. Moreno, 241 M 359, 787 P2d 334, 47 St. Rep. 351 (1990).

Entry Without Permission and Exceeding Limits of Privilege: The elements of burglary were satisfied upon a clear finding that: (1) defendant entered premises without permission; and (2) defendant's subsequent felony conduct exceeded any reasonable privilege, thereby transforming his presence into a trespass that could form the basis of a burglary charge. St. v. Courville, 236 M 253, 769 P2d 44, 46 St. Rep. 338 (1989), followed in St. v. Christofferson, 238 M 9, 775 P2d 690, 46 St. Rep. 1049 (1989).

Burglary, Theft, and Tampering Convictions Affirmed: Defendant forcefully entered a neighbor's apartment at night without consent and purposely removed a rifle and ammunition.

After shooting his wife with the rifle, defendant concealed it beside the road, impairing its availability as evidence and causing its condition to change. These circumstances, coupled with defendant's own admissions of the actions, justified convictions for burglary, theft, and tampering with evidence. St. v. McKimmie, 232 M 227, 756 P2d 1135, 45 St. Rep. 1011 (1988).

Sufficiency of Evidence:

An employee of a community center, located one block from a clubhouse where a vending machine was burglarized, testified that defendant was attempting to buy drinks in the center near the time of the break-in. He did not have enough money but left for about 30 minutes and returned with "a bunch of nickels and dimes". An employee of the golf course where the clubhouse was located saw a car matching the description of defendant's car parked near the golf course gate at about the time of the break-in. Two deputies testified defendant admitted the burglary after being advised of his Miranda rights but prior to requesting an attorney. Although the evidence was circumstantial, there being no witness to the actual burglary, the evidence was supportive of the conviction of burglary. St. v. Tome, 228 M 398, 742 P2d 479, 44 St. Rep. 1629 (1987).

Testimony that defendant entered darkened trailer house without invitation, woke one of the occupants, discussed taking money or property, and actually took a wallet, which was found empty the next day outside the trailer, is sufficient evidence to support burglary conviction. St. v. Manthie, 197 M 56, 641 P2d 454, 39 St. Rep. 350 (1982).

Evidence that defendant had removed a fire extinguisher from the wall and placed it near one of the doors of the clothing store he entered at 3:00 a.m. was sufficient to prove intent to commit an offense therein. St. v. Hardy, 185 M 130, 604 P2d 792 (1980).

Where defendant was found unlawfully on premises (furniture store) of another in the nighttime with television pushed up against lower panel of garage door and where defendant's account of the reason for his presence there was supported only by a friend of his who was also unlawfully on the premises, evidence was sufficient to allow inference that defendant was on the premises for the purpose of committing a theft and to uphold conviction of burglary. St. v. Pascgo, 173 M 121, 566 P2d 802 (1977).

Although mere possession of recently stolen property did not raise a presumption of guilt, where it was accompanied by other incriminating circumstances such as familiarity with the burglarized premises, unexplained possession of large sum of money, and fact that defendant suddenly left the state the day after the crime had been committed, there was sufficient evidence to support the conviction. St. v. Pepperling, 166 M 293, 533 P2d 283 (1974).

Search of defendant's premises which revealed a pistol matching the make, model, and serial number of pistol reported stolen, a narcotics label with the pharmacy owner's initials, which labels were kept on the narcotics in the safe at the drugstore, and an attache case containing numerous drugs along with watches and cigarette lighters constituted sufficient evidence to sustain conviction of burglary of pharmacy. St. v. Watkins, 163 M 491, 518 P2d 259 (1974).

Evidence that defendants were driving car described by eyewitness as having been involved in a burglary, that defendant had a fresh cut on his arm and glass fragments in his shoes which matched broken glass at rear entrance of burglarized premises, and that a footprint inside the premises matched the defendant's shoe was sufficient to support conviction of burglary. St. v. Black, 163 M 302, 516 P2d 1163 (1973).

Conviction Supported by Credible Circumstantial Evidence: Substantial credible evidence, though circumstantial, supported a conviction for burglary where: (1) defendant knew victim would be away from home; (2) defendant had expressed an interest in victim's guns that were subsequently stolen; (3) victim knew of defendant's desire to move and need for money; (4) a shoeprint found outside victim's window matched that of defendant's shoe; (5) the day following the burglary, defendant attempted to pawn guns matching the description of those stolen; and (6) defendant's vehicle was adequately described as matching that of the person who attempted to sell the guns. St. v. Oliver, 228 M 322, 742 P2d 999, 44 St. Rep. 1567 (1987).

Sufficiency of Corroborative Evidence to Prove Burglary: The defendant in a burglary case questioned whether there was sufficient corroborative evidence to confirm testimony at trial by the accomplices to the crime that defendant committed burglary. The Supreme Court found that the record contained corroborative testimony of a service station attendant who witnessed the crime, as well as notes written by the defendant himself discussing the events surrounding the burglary, which tended to connect the defendant with the burglary. This was found to be sufficient evidence to corroborate testimony from the accomplices. St. v. Woods, 221 M 17, 716 P2d 624, 43 St. Rep. 601 (1986).

Involuntary Intoxication — Limits on Expert Testimony: Defendant was convicted of burglary after being found in a store in a shopping mall after hours. Defendant was admittedly a chronic alcoholic who could not control his drinking; he contended he was therefore involuntarily intoxicated at the time of the crime. As part of his defense he intended to have a psychiatrist and a psychologist testify that his intoxicated condition deprived him of the capacity to appreciate the criminality of his conduct. The expert testimony was excluded through a motion in limine. The Supreme Court, relying on St. v. Ostwald, 180 M 530, 591 P2d 646 (1979), held that the proffer of expert testimony comes within 46-14-213, which specifically limits the testimony an expert may give. It does not include opinions on the ability to appreciate the criminality of conduct or to conform conduct to the requirements of the law. St. v. Peavler, 195 M 379, 636 P2d 270, 38 St. Rep. 1937 (1981).

"Substantial Evidence" Test Applied: Where the defendant was convicted of felony burglary, the District Court did not err in finding that there was sufficient evidence to support the conviction. The correct evidentiary test is whether there is substantial evidence supporting the conviction. A review of the entire record in a light most favorable to the state indicates there is substantial evidence upon which a rational jury could have found the defendant guilty. St. v. Wilson, 193 M 318, 631 P2d 1273, 38 St. Rep. 1040 (1981).

Accountability — Proof of Overt Act Required: Defendant Fish had an argument with Miller at the bar where Miller worked over money Miller owed Fish. A fight ensued, which was broken up by patrons. Fish left saying he would settle with Miller. Fish recruited some friends and went to Miller's trailer park. Miller had already arrived and had friends with him. Fish, upon discovering that Miller was at home, began knocking and pounding on the door. Fish's friends, Hubbard and Lodge, were with him. Lodge began kicking the door. Miller got a gun and shot through the door, killing Lodge. Hubbard got in his truck, and Miller put the gun through the truck window. Hubbard got the gun from Miller, who ran away from the truck. Hubbard shot and killed Miller. Fish was convicted of attempted burglary, and Hubbard was convicted of mitigated deliberate homicide. Fish contended the facts did not support his conviction. To support an attempted burglary charge it is essential that the prosecution establish, with substantial credible evidence and beyond a reasonable doubt, that the defendant attempted to enter an occupied structure with the purpose to commit an offense therein. It is well established that an attempt must consist of more than mere preparation and that there must be some overt act committed in furtherance of the offense charged. No evidence was presented other than that Fish was knocking and pounding on the door. Based on a review of all evidence in a light most favorable to the State, the Supreme Court was unable to find that Fish's conduct constituted an overt act that could be construed as an attempt to enter the trailer. St. v. Fish, 190 M 461, 621 P2d 1072, 37 St. Rep. 2065 (1980).

Intent:

Defendant's intent to commit larceny from van was established by evidence that a pair of bolt cutters with a padlock in its jaws was found in defendant's car which was backed up to side door of van, a group of tools had been stacked near door of van in anticipation of removal, defendant had been seen leaving the van, and there was no justification for defendant to have entered van. St. v. Austad, 166 M 425, 533 P2d 1069 (1975).

Entry to tavern after closing hours with unauthorized duplicate key and defendant's subsequent apprehension outside tavern with checks and currency identified as having come from tavern safe showed felonious intent. St. v. Harris, 159 M 425, 498 P2d 1222 (1972).

It was not necessary to a conviction under 94-401, R.C.M. 1947 (now 45-6-204), that express intent to commit larceny or any felony be proved; rather, it may be manifested by all the circumstances. St. v. Board, 135 M 139, 337 P2d 924 (1959).

Evidence of Purchase of Valuable Goods: Defendant's watch and ring together with purchase receipt for same were properly admitted in evidence for purpose of showing a substantial change in defendant's pecuniary circumstances subsequent to the burglary, and their admission raised no inference that the items had been stolen. St. v. Pepperling, 166 M 293, 533 P2d 283 (1974).

Identification of Money: Inability of witness to identify his money positively did not render the money inadmissible, where the money stolen consisted of uncirculated bills and rolls of Indian head pennies and the money in defendant's possession corresponded in a close and peculiar way. St. v. Pepperling, 166 M 293, 533 P2d 283 (1974).

Possession of Stolen Property:

It was permissible for court to instruct, in prosecution for burglary under 94-901, R.C.M. 1947 (now 45-6-204), that one found in possession of property from burglarized premises is bound to explain possession in order to remove the effect of possession as a circumstance pointing to guilt. St. v. Branch, 155 M 22, 465 P2d 821 (1970).

Proof of the corpus delicti, together with evidence that the property taken was found in defendant's possession and that defendant made inconsistent and partially incriminating statements as to the manner in which the property came into his possession, supported a conviction under 94-901, R.C.M. 1947 (now 45-6-204). St. v. Kinghorn, 109 M 22, 93 P2d 964 (1939). See also St. v. Cox, 226 M 111, 733 P2d 1307, 44 St. Rep. 496 (1987).

Tools as Evidence: Tools found near the site of an attempted burglary were not admissible as evidence unless properly connected with the crime or the defendants, and it was error to permit a police officer to testify as to how the tools might be used in effecting entry. St. v. Filacchione, 136 M 238, 347 P2d 1000 (1960).

Evidence of Other Offenses: Evidence of defendant's possession of a comb taken in a previous burglary of the same structure was inadmissible since mere possession did not prove defendant's guilt of the previous burglary beyond a reasonable doubt, and its admission in a prosecution under 94-901, R.C.M. 1947 (now 45-6-204) for a subsequent burglary was prejudicial. St. v. Ebel, 92 M 413, 15 P2d 233 (1932).

Corpus Delicti: Proof that furnishings in a billiard hall were in order when it was locked up at night, that the furnishings were in disorder when the hall was unlocked the next morning, and that some articles were missing established the corpus delicti of burglary under 94-901, R.C.M. 1947 (now in 45-6-204), even without proof of the means by which entry was effected, and defendant's confession became admissible. St. v. Dixson, 80 M 181, 260 P 138 (1927).

Proof of Entry: Evidence that a tire and chains were taken from an automobile inside a barn, that a letter addressed to defendant was found next to automobile, and that part of the stolen property was found on defendant's premises supported conviction under 94-901, R.C.M. 1947 (now 45-6-204) for burglary of barn. St. v. Larson, 75 M 274, 243 P 566 (1926).

JURY INSTRUCTIONS

Failure to Instruct Jury Regarding Need for Unanimous Verdict on Alternative Charges — Reversible Error: Hardaway was initially charged with burglary, and the information was amended to charge that Hardaway knowingly entered or remained unlawfully in an unoccupied structure with intent to commit theft or a sexual crime. Hardaway contended that the jury instructions were improperly given in the alternative, allowing the jury to convict even though some members believed that he intended theft, while others believed that he intended a sexual crime. The Supreme Court agreed. Article II, sec. 26, Mont. Const., requires a unanimous verdict in all criminal actions. Unanimity requires more than a conclusory agreement that the accused is guilty of some charged offense. The jury must agree as to the principal factual elements underlying a specified offense, so when an accused is charged in the alternative, the jury must be clearly instructed that it is required to reach a unanimous verdict as to each individual alternative. Absent such an instruction, Hardaway was denied his right to a unanimous verdict, constituting reversible error. St. v. Hardaway, 2001 MT 252, 307 M 139, 36 P3d 900 (2001).

Assault Not Lesser Included Offense of Burglary: Since burglary does not require any showing of bodily injury and a person may be convicted of burglary without any such showing, assault is not a lesser included offense of burglary. St. v. McDonald, 226 M 208, 734 P2d 1216, 44 St. Rep. 593 (1987).

Lesser Included Offense — Criminal Trespass:

Although criminal trespass is by definition a lesser included offense of burglary, the evidence in the record is determinative of whether a lesser included offense instruction should be given. The trial court's instructions must cover every theory having support in the evidence. St. v. Harvey, 219 M 402, 713 P2d 517, 43 St. Rep. 46 (1986).

The essence of defendant's contention that the court erred in refusing a lesser included offense instruction in a burglary trial is that under a criminal trespass instruction he would be entitled to argue that even if the jury found he was in the lumber company building, it could conclude he had merely committed a trespass because he had no purpose to commit theft. However, there was no evidence in the record from which such argument could be made. St. v. Radi, 176 M 451, 578 P2d 1169 (1978).

Jury Instruction With Permissive Inference Proper: The defendant was charged with burglary after kicking in the door of a bar at 3:00 a.m. The trial court instructed the jury ". . . if you find that the defendant was unlawfully in the Wagon Wheel Bar in the nighttime you may or may not infer, as you find the evidence to be, that he was there for the purpose of committing a theft." Because the instruction was clearly worded as a permissive inference, it was proper. St. v. Welling, 199 M 135, 647 P2d 852, 39 St. Rep. 1215 (1982).

Intent Crucial Factor — Evidence Not Overwhelming — "Sandstrom Instruction" Error: Defendant was tried and convicted of theft and burglary. A "Sandstrom-type" instruction was given. Defendant appealed claiming to have had his normal thought processes affected at the time by a drug overdose. The Supreme Court held that, under this set of facts, defendant's intent was a crucial fact question. The instruction was not worded to be merely a permissive inference and could have been interpreted as mandatory. Since evidence of intent was not overwhelming, it was reversible error to give the instruction. St. v. Kyle, 192 M 374, 628 P2d 263, 38 St. Rep. 578 (1981).

Intent: Instruction charging jury to acquit if it found that defendant entered building with lawful intent was properly refused in the absence of evidence that defendant may have had that intent. St. v. Larson, 75 M 274, 243 P 566 (1926).

SENTENCING

Defendant's Right to Speedy Trial Not Violated — No Showing of Prejudice — Remanded for Resentencing Based on Inaccurate Information at Time of Sentencing. St. v. Kirn, 2023 MT 98, 412 Mont. 309, 530 P.3d 1.

No Error in Refusal to Allow Withdrawal of Voluntary Guilty Plea: McFarlane contended that his guilty plea was entered both involuntarily and unintelligently because trial counsel provided ineffective assistance in explaining a guilty plea and because he did not understand what acts amount to being guilty of burglary. The Supreme Court declined to address the ineffective assistance claims because they were raised for the first time on appeal. Regarding the voluntariness issue, the court applied the Brady standard to determine whether McFarlane was fully aware of the direct consequences of a guilty plea. The court noted that during the plea colloquy, McFarlane expressed understanding of the charges, the maximum penalties, and the waiver of the right to a trial and stated that he had discussed the consequences of a guilty plea with counsel and was satisfied with counsel's services. McFarlane's argument that he misunderstood or was confused about the meaning of a guilty plea was further belied by the fact that McFarlane fled the jurisdiction for more than 2 years to avoid imposition of a sentence and by the fact that McFarlane had a criminal history of 13 counts of burglary in six separate proceedings spanning nearly 40 years and was thus well acquainted with the criminal justice system and burglary charges in particular. Denial of the motion to withdraw the guilty plea was affirmed. St. v. McFarlane, 2008 MT 18, 341 M 166, 176 P3d 1057 (2008), followed in St. v. LeMay, 2011 MT 323, 363 Mont. 172, 266 P.3d 1278.

No Ineffective Assistance in Counsel's Failure to Cite Proper Standard for Plea Withdrawal and to Challenge Plea Colloquy: McFarlane contended that he received ineffective assistance of counsel for his motion to withdraw a guilty plea when counsel cited the test in St. v. Huttinger, 182 M 50, 595 P2d 363 (1979), rather than the more lenient test in Brady v. U.S., 397 US 742 (1970), which replaced the Huttinger test (see St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005)). The Supreme Court held that despite counsel's improper reliance on Huttinger, the outcome would have been the same if counsel had relied on Brady, so McFarlane's challenge failed because he did not show that but for counsel's deficient performance, he would not have entered a guilty plea. McFarlane also contended that he received ineffective assistance because counsel failed to challenge the adequacy of the plea colloquy when the colloquy was flawed by the District Court's failure to enumerate lesser included offenses of which McFarlane might have been convicted had he proceeded to trial. The Supreme Court noted that although the District Court did not enumerate lesser included offenses, McFarlane was clearly informed that by pleading guilty, the opportunity to be convicted of a lesser offense would be lost. Additionally, pursuant to St. v. Thee, 2001 MT 294, 307 M 450, 37 P3d 741 (2001), the court had no duty to inform McFarlane about the possibility of lesser included offenses if none existed, and McFarlane failed to demonstrate any lesser included offenses to burglary that would have been applicable under the circumstances of his charge. Thus, McFarlane's ineffective assistance claim was without merit, and denial of the motion to withdraw the guilty plea was affirmed. St. v. McFarlane, 2008 MT 18, 341 M 166, 176 P3d 1057 (2008), followed in St. v. LeMay, 2011 MT 323, 363 Mont. 172, 266 P.3d 1278.

No Error in Requiring Completion of Sexual Offender Course as Condition of Suspended Sentence for Burglary Conviction When Sexual Action Taken During Burglary: Following Marshall's conviction for burglary, the sentencing court imposed a 6-year deferred sentence with a number of conditions, including a requirement that Marshall complete a sexual offender course. Marshall argued that the court lacked authority to require the course because burglary was not a sexual crime. Nevertheless, the sentencing court designated Marshall as a level 1 sexual offender and required completion of the course, so Marshall appealed. The Supreme Court held that the condition was reasonably related to the crime because there was a nexus between sex offender treatment and the circumstances of the burglary. The presentence report revealed that during the burglary, Marshall became aroused after going through a woman's underwear drawer, took some underwear from the drawer, and masturbated on the woman's bed. Because the underlying factual situation included sexual actions taken by Marshall during the burglary, the sentencing court was not precluded from imposing sexual offender treatment as a condition designed to rehabilitate Marshall and to protect society, even though Marshall was not convicted of a sexual crime. St. v. Marshall, 2007 MT 218, 339 M 50, 170 P3d 923 (2007).

Adoption of Federal Test for Voluntariness of Guilty Pleas — Huttinger Overruled — Standard of Review: Since St. v. Huttinger, 182 M 50, 595 P2d 363 (1979), the Supreme Court has applied a good cause test in determining whether to permit a plea of guilty or nolo contendere to be withdrawn and a plea of not guilty substituted. The good cause test involved a balancing of three conflicting factors: (1) the adequacy of the interrogation by the District Court of the defendant at the entry of the guilty plea as to the defendant's understanding of the consequences of the plea; (2) the promptness with which the defendant attempted to withdraw the prior plea; and (3) the fact that the defendant's plea was apparently the result of a plea bargain in which the guilty plea was given in exchange for dismissal of another charge. None of the factors required a court to consider the voluntariness, knowledge, or intelligence of a defendant's plea, although a defendant has been allowed to withdraw a guilty plea upon a showing that the plea was made unknowingly or involuntarily. Citing Bousley v. U.S., 523 US 614 (1998), the Supreme Court concluded that the ultimate test for withdrawal of a plea is voluntariness, which subsumes the relevant elements of the Huttinger test, so Huttinger was overruled. Therefore, a guilty plea may be withdrawn only upon a showing that the plea was made involuntarily, and the Supreme Court will review questions of voluntariness in pleas and plea agreements de novo. St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005), overruling St. v. Miller, 248 M 194, 810 P2d 308 (1991), and overruling St. v. Martin, 2004 MT 288, 323 M 320, 100 P3d 146 (2004), and other cases that have applied the abuse of discretion standard, followed in Duffy v. St., 2005 MT 228, 328 M 369, 120 P3d 398 (2005). See also St. v. Warclub, 2005 MT 149, 327 M 352, 114 P3d 254 (2005), in which the Supreme Court clarified Lone Elk and held that, with respect to appeals of denials of motions to withdraw guilty pleas, the court will review the findings of fact to determine if they are clearly erroneous and the conclusions of law to determine if they are correct. When voluntariness of the plea is at issue, the court will review that ultimate mixed question of law and fact de novo to determine if the trial court was correct in holding that the plea was voluntary. Warclub was followed in St. v. Muhammad, 2005 MT 234, 328 M 397, 121 P3d 521 (2005), and Maldonado v. St., 2008 MT 253, 345 M 69, 190 P3d 1043 (2008). Warclub and Lone Elk were followed in St. v. Leitheiser, 2006 MT 70, 331 M 464, 133 P3d 185 (2006). In St. v. Deserly, 2008 MT 242, 344 M 468, 188 P3d 1057 (2008), the Supreme Court noted that the standard for reviewing the voluntariness of a guilty plea adopted in St. v. Miller, 248 M 194, 810 P2d 308 (1991) (overruled in Lone Elk), under which a plea would be considered involuntary when it appeared that defendant was laboring under such a strong inducement, fundamental mistake, or serious mental condition that the possibility existed that defendant may have pleaded guilty to a crime for which he was innocent, had been followed in other cases. To avoid confusion, the court overruled the following cases to the extent that they may be read as supporting the Miller standard: St. v. Pelke, 143 M 262, 389 P2d 154 (1964), St. v. LeMay, 144 M 315, 396 P2d 83 (1964), St. v. Griffin, 167 M 11, 535 P2d 498 (1975), State ex rel. Gladue v. District Court, 175 M 509, 575 P2d 65 (1978), St. v. Huttinger, 182 M 50, 595 P2d 363 (1979), St. v. Campbell, 182 M 521, 597 P2d 1146 (1979), St. v. Hilton, 183 M 13, 597 P2d 1171 (1979), St. v. Nelson, 184 M 491, 603 P2d 1050 (1979), Benjamin v. McCormick, 243 M 252, 792 P2d 7 (1990), St. v. Milinovich, 248 M 373, 812 P2d 338 (1991), St. v. Cameron, 253 M 95, 830 P2d 1284 (1992), St. v. Barker, 257 M 31, 847 P2d 300 (1993), St. v. Skroch, 267 M 349, 883 P2d 1256 (1994), St. v. Schaff, 1998 MT 104, 288 M 421, 958 P2d 682 (1998), St. v. Ereth, 1998 MT 197, 290 M 294, 964 P2d 26 (1998), St. v. Sanders, 1999 MT 136, 294 M 539, 982 P2d 1015 (1999), St. v. Kellames, 2002 MT 41, 308 M 347, 43 P3d 293 (2002), St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002), St. v. Chase, 2006 MT 13, 331 M 1, 127 P3d 1038 (2006), and St. v. Milligan, 2008 MT 36, 341 M 316, 177 P3d 500 (2008). The "however slightly" language in the analysis of the voluntariness of a plea as set out in Lone Elk and Deserly was overruled in St. v. Brinson, 2009 MT 200, 351 M 136, 210 P3d 164 (2009).

Effects of Fear and Medication Not Affecting Voluntariness of Guilty Plea — Denial of Motion to Withdraw Plea Proper: Lone Elk contended that he should have been allowed to withdraw a guilty plea because: (1) he was unduly influenced by hope and fear and pleaded guilty to a burglary charge because he was afraid that if he went to trial and was convicted of sexual intercourse without consent he would be required to complete sex offender treatment; and (2) the guilty plea was involuntary because he was not stabilized on his antidepressant medication at the time that the plea was entered. The Supreme Court held that the effect of neither fear nor medication affected the voluntariness of Lone Elk's guilty plea, so the trial court did not err in denying the motion to withdraw the plea. St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005), followed in Duffy v. St., 2005 MT 228, 328 M 369, 120 P3d 398 (2005), and St. v. Muhammad, 2005 MT 234, 328 M 397, 121 P3d 521 (2005). See also Brady v. U.S., 397 US 742 (1970), and St. v. Allen, 265 M 293, 876 P2d 639 (1994).

Joint and Several Liability for Restitution Properly Imposed: Following conviction for three counts of burglary, the District Court found Workman jointly and severally liable for the full amount of restitution to the burglary victims and ordered Workman to pay restitution in the amount of $26,840.33. Workman was accompanied in the burglaries by four accomplices, and Workman argued that he should be held responsible only for his proportionate share as divided among all the defendants. That argument was rejected, and Workman appealed on grounds that restitution was improperly imposed. Workman relied on the 2001 version of 46-18-242, contending that the required documentation of his financial resources was inaccurate, and on the 2001 version of 46-18-244, arguing that the sentencing court failed to establish a payment schedule or set the amount of installment payments. The Supreme Court noted that both the required documentation and payment schedule provisions were deleted by the 2003 Legislature and are no longer required. Workman's argument that restitution should be apportioned among his accomplices also failed because the fate of the accomplices was immaterial to the court's authority to impose restitution. Under the 2003 versions of the restitution laws and given that Workman stipulated that he owed the full amount, the District Court properly held Workman jointly and severally liable for the pecuniary loss suffered by his victims. St. v. Workman, 2005 MT 22, 326 M 1, 107 P3d 462 (2005).

No Sentence Enhancement for Felony Assault With Weapon or Aggravated Burglary: Sentences on convictions for felony assault with a weapon and aggravated burglary are the only offenses that may not be enhanced under 46-18-221. St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002).

Court Misstatement of Maximum Possible Penalty at Change of Plea Hearing — Error in Refusal to Allow Withdrawal of Noncompliant Plea: Roach requested a hearing to change his plea to guilty on burglary and theft charges. Roach was questioned regarding his understanding of his constitutional rights, and a discussion was held concerning possible penalties. The District Court Judge erroneously informed Roach that the maximum penalty for both crimes was 10 years and $50,000. Neither Roach's counsel nor the County Attorney, who were both present, responded or objected in any way to the court's misstatement of the maximum possible penalty. Roach was sentenced 2 months later to consecutive sentences of 20 years suspended for burglary and 10 years with no time suspended for theft, plus restitution. Roach later asserted that he was misled by the District Court, that his change of plea was coerced and based on misinformation, and that he should have been granted postconviction relief allowing him to either withdraw the guilty plea or be sentenced in conformity with the penalty that he was advised of at the change of plea hearing. The Supreme Court agreed. Because Roach was misinformed about the maximum possible sentence, his plea was neither knowing nor in compliance with statutory requirements. The District Court erred in refusing to allow withdrawal of the guilty plea; the Supreme Court remanded with instructions to allow withdrawal. St. v. Roach, 1999 MT 38, 293 M 311, 975 P2d 817, 56 St. Rep. 161 (1999), following St. v. Brown, 262 M 499, 865 P2d 282, 50 St. Rep. 1658 (1993).

Discretion of Court — Different Sentences for Co-Offenders: On appellate review, undermining the legality of a sentence requires a showing that the judge abused his discretion in the sentencing process. There was no abuse of discretion where defendant and another were separately convicted of the same burglary, the other person was offered and accepted a bargain for a 3-year deferred sentence, and defendant was offered a bargain for a 10-year sentence with 5 years suspended, refused it, and was tried, convicted, and sentenced to 10 years. There was a strong possibility that his alibi defense was frivolous, and he had a prior felony record. St. v. White, 200 M 123, 650 P2d 765, 39 St. Rep. 1619 (1982).

Improper Sentencings — Excess of Maximum — Failure to Prove Essential Element: Where the District Court sentenced defendant to 20 years for burglary and the maximum possible sentence was 10 years, the Supreme Court reduced the sentence to 10 years. The Supreme Court also reversed the 10-year sentence the defendant received upon his conviction for felony theft, as the State failed to prove the essential element that the value of the property taken exceeded $150. All other sentences received by the defendant, as well as the provision of the sentence for no parole or work furlough, were within the maximum allowed by law and as such were within the discretion of the sentencing judge and were not overturned. St. v. Sunday, 187 M 292, 609 P2d 1188 (1980).

Misuse of Plea Bargaining Process and Habitual Criminal Statute: Without declaring the plea bargaining process constitutionally infirm or the habitual criminal statute unconstitutional on its face, the Supreme Court held that defendant was denied due process under federal and state provisions when he realistically was sentenced to 10 years for attempted burglary and 40 years for refusing to plead guilty and insisting upon a jury trial. St. v. Sather, 172 M 428, 564 P2d 1306 (1977).

45-6-205. Possession of burglary tools.

Criminal Law Commission Comments

Source: Ill. C.C. 1961, Chapter 38, § 19-2.

This section does not represent a substantial change from the old Montana law, R.C.M. 1947, section 94-908, which prohibited possession of burglary tools. The main purpose for the change is, first, to reconstruct the language of the provision to conform with that of the other burglary statutes in this chapter, and second, to eliminate the concept of altering a tool or instrument for the purpose of committing a felony or misdemeanor, since possession of an altered instrument or tool with the intent to use it to commit a crime, cannot logically be distinguished from possession of an unaltered burglarious tool. The new provision does not alter the penalty for the crime.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This section, while drawn from Illinois, does not represent a substantial change from prior law, R.C.M. 1947, § 94-908, which also prohibited possession of burglary tools. The only real change is the elimination of the old law's prohibition of making, altering or repairing burglary tools.

Case Notes

Sentence and Punishment: Where attempted burglary and unlawful possession of burglary tools arise from the same course of conduct, the defendant may be convicted and sentenced for only one of such offenses. People v. Hambreck, 6 Ill. App.3d 739, 286 N.E.2d 557 (1972); People v. Blahuta, 131 Ill. App.2d 200, 264 N.E.2d 819 (1970); People v. Myles, 132 Ill. App.2d 962, 271 N.E.2d 62 (1971). Accord, People v. Beall, 8 Ill. App.3d 739, 290 N.E.2d 410 (1972).

In General: To sustain a conviction under this section, it must be proved that tools are adapted and designed for breaking and entering, that defendant possessed them with knowledge of their character, and that he intended to use them for breaking and entering. Proof of an intent to commit a burglary of some place or vehicle is necessary. People v. Matthews, 122 Ill. App.2d 264, 258 N.E.2d 378 (1970); People v. Ray, 3 Ill. App.3d 517, 278 N.E.2d 170 (1972). Possession of keys designed for entering a vending machine and proof of intent to commit a crime therein were held to constitute the crime of possession of burglary tools. People v. Oliver, 129 Ill. App.2d 83, 262 N.E.2d 597, 45 ALR 3d 1279 (1970). See also People v. Johnson, 88 Ill. App.2d 265, 232 N.E.2d 554 (1967).

Nature of Burglary Tools: In a prosecution for unlawful possession of burglary tools, the fact that tools in defendant's possession were suitable for lawful purposes was held to be immaterial when these tools were also suitable for breaking and entering. People v. Johnson, 88 Ill. App.2d 265, 232 N.E.2d 554 (1967). Conviction for possession of burglary tools does not require that the tools be intended for breaking into traditional entrances of vehicles. Tools which are suitable for entering any integral portion of a mechanism, such as a transmission, are sufficient. People v. Matthews, 122 Ill. App.2d 264, 258 N.E.2d 378 (1970).

Indictment and Information: Attention is directed to the following cases which discuss the sufficiency of indictments charging possession of burglary tools: People v. Stafford, 4 Ill. App.3d 606, 279 N.E.2d 395 (1972); People v. Matthews, 122 Ill. App.2d 264, 258 N.E.2d 378 (1970); People v. Hall, 55 Ill. App.2d 255, 204 N.E.2d 473 (1965).

Admissibility of Evidence: Stolen property and crowbar were properly admitted into evidence where there was ample showing that shop was burglarized by codefendant and that the articles were found in the path taken by the fleeing suspect. People v. Bryan, 27 Ill.2d 191, 188 N.E.2d 692 (1963). Similarly, burglary tools were held to be admissible where defendants were seen fleeing from burglarized premises by police officer and the burglary tools were found by the owner of the business in the premises shortly after defendants fled. People v. Craddock, 30 Ill.2d 348, 196 N.E.2d 672 (1964). See also, People v. Johnson, 88 Ill. App.2d 265, 232 N.E.2d 554 (1967).

Part 3
Theft and Related Offenses

45-6-301. Theft.

Criminal Law Commission Comments

Source: Ill. C.C. 1961, Chapter 38, § 16-1.

The first sentence of the section requires that the act must be done "knowingly" or "purposely." As is true in all except absolute liability offenses the act and the mental state must coincide. Therefore, the offense of theft is committed when any one of the acts coincides with any one of the mental states. After extended and exhaustive study and consideration by the commission, matching various combinations of the subsections to cover every type of conduct proscribed by the old law, and extending such matching to conduct covered by statutes in other states, it is believed that this section will cover any conceivable form of theft.

Subsection (1) is the most comprehensive and should include most if not all forms of theft.

Subdivision (1)(a) covers the traditional mental state required in theft. This mental state is the one which will be present in the great majority of cases. However, special situations may exist where it is difficult to prove a specific purpose to permanently deprive, but the offender's handling or disposition of the property is such that it directly results in a permanent deprivation to the owner, or would have so resulted but for the fortuitous intervention of circumstances of recovery. Subdivision (1)(c) is not intended to convert all "joy-riding" escapades into theft unless the abandonment of the vehicle is under such circumstances that the owner probably would be deprived permanently of the use or benefit of his car.

While the method by which unauthorized control is obtained or exerted is immaterial in subsection (1), and probably, in conjunction with one of the subdivisions (a), (b), or (c), would cover all forms of theft the commission felt that such an approach might be too concise, and might create problems of application, in view of the large body of statutory material and the large number of offenses it is intended to replace. Therefore, subsections (2) and (3) were added, to cover the specific offenses of theft by threat or deceit and receipt of stolen property, although the commission intends that all forms of theft could be charged and proved under subsection (1).

Compiler's Comments

2023 Amendments — Composite Section: Section 2, Ch. 70, L. 2023, in (5) near end of introductory clause inserted "51 or". Amendment effective October 1, 2023.

Section 1, Ch. 162, L. 2023, in (7)(a) and (7)(b) inserted reference to (7)(e); inserted (7)(e) providing penalties for theft of a light vehicle; and made minor changes in style. Amendment effective October 1, 2023.

2019 Amendment: Chapter 372 in (7)(a) in first sentence inserted reference to subsection (7)(d) and after "convicted of" inserted "a first offense of"; in (7)(b)(ii) after "common scheme" inserted "as defined in 45-2-101"; inserted (7)(d) regarding penalty scheme for theft of property not exceeding $1,500 in value when an emergency exit is used in furtherance of the offense; and made minor changes in style. Amendment effective October 1, 2019.

Applicability: Section 3, Ch. 372, L. 2019, provided: "[This act] applies to crimes committed on or after [the effective date of this act]." Effective October 1, 2019.

2017 Amendments — Composite Section: Chapter 151 deleted former (6)(c) (see Ch. 396 note); and made minor changes in style. Amendment effective October 1, 2017.

Chapter 321 in (7)(a) at end of first sentence after "shall be fined an amount not to exceed" substituted "$500" for "$1,500 or be imprisoned in the county jail for a term not to exceed 6 months, or both", in second sentence and third sentence substituted "an amount not to exceed $500" for "$1,500", and at end of third sentence substituted "5 days or more than 1 year" for "30 days or more than 6 months"; in (7)(b)(i) and (7)(b)(ii) substituted current text for former text that read: "(i) Except as provided in subsection (8)(c), a person convicted of the offense of theft of property exceeding $1,500 in value or theft of any amount of anhydrous ammonia for the purpose of manufacturing dangerous drugs shall be fined an amount not to exceed $50,000 or be imprisoned in a state prison for a term not to exceed 10 years, or both"; inserted (9) concerning deferred imposition of sentence for certain offenders; and made minor changes in style. Amendment effective July 1, 2017.

Chapter 396 deleted former (6) that read: "(6) (a) A person commits the offense of theft when the person purposely or knowingly commits insurance fraud as provided in 33-1-1202 or 33-1-1302;

(b) purposely or knowingly diverts or misappropriates insurance premiums as provided in 33-17-1102; or

(c) purposely or knowingly receives small business health insurance premium incentive payments or premium assistance payments or tax credits under Title 33, chapter 22, part 20, to which the person is not entitled"; and made minor changes in style. Amendment effective May 19, 2017.

Applicability: Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

Section 35, Ch. 396, L. 2017, provided: "[This act] applies to acts committed on or after [the effective date of this act]." Effective May 19, 2017.

Severability: Section 57, Ch. 151, L. 2017, was a severability clause.

2009 Amendments — Composite Section: Chapter 400 in (8)(b)(i) near beginning after "value" deleted "theft of any commonly domesticated hoofed animal"; inserted (8)(b)(ii) establishing penalty for theft of any commonly domesticated hoofed animal; and made minor changes in style. Amendment effective April 28, 2009.

Chapter 473 in (8)(a) in four places and near beginning of (8)(b) increased amount of property value or amount of fines from $1,000 to $1,500. Amendment effective October 1, 2009.

Applicability: Section 8, Ch. 400, L. 2009, provided: "[This act] applies to proceedings begun on or after [the effective date of this act]." Effective April 28, 2009.

Retroactive Applicability: Section 31(2), Ch. 399, L. 2007, provided: "(2) For purposes of receiving a tax credit, [this act] and Chapter 595, Laws of 2005, apply retroactively, within the meaning of 1-2-109, to eligible premiums paid after December 31, 2005, by eligible small employers registered under 33-22-208 [33-22-2008, now repealed]."

2005 Amendments — Composite Section: Chapter 137 at beginning of (8)(a) inserted exception clause; in (8)(b) after "animal" inserted "or theft of any amount of anhydrous ammonia for the purpose of manufacturing dangerous drugs"; and made minor changes in style. Amendment effective March 30, 2005.

Chapter 416 in (5) in introductory clause near end after "chapter 71" deleted "or 72". Amendment effective July 1, 2005.

Chapter 595 inserted (6)(c) related to small business health insurance premium incentive payments, premium assistance payments, and tax credits; and made minor changes in style. Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

Section 22, Ch. 595, L. 2005, provided: "[This act] applies to tax years beginning after December 31, 2005."

2003 Amendment: Chapter 380 inserted (6)(b) relating to diversion or misappropriation of insurance premiums; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendments — Composite Section: Chapter 227 at end of (6) inserted "or 33-1-1302". Amendment effective October 1, 2001.

Chapter 427 inserted (7) creating offense of theft of property by embezzlement; in (8)(b) at beginning inserted exception clause and near end substituted "a state prison" for "the state prison"; inserted (8)(c) establishing penalty for offense of theft of property by embezzlement; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 397 in (7)(a) in first sentence increased maximum value of property for first offense from $500 to $1,000 and increased maximum fine for first offense from $500 to $1,000 and in second sentence increased mandatory fine for second offense from $500 to $1,000; and in (7)(b) increased minimum value of property from more than $500 to more than $1,000. Amendment effective October 1, 1999.

1995 Amendment: Chapter 237 inserted (6) relating to insurance fraud; and made minor changes in style. Amendment effective July 1, 1995.

1993 Amendments — Composite Section: Chapter 190 in (4) inserted reference to Title 52; and made minor changes in style.

Chapter 616 in (6)(a) and (6)(b) increased property value from $300 to $500; and made minor changes in style.

Chapter 618 in (5), after "exerts", inserted "or helps another obtain or exert"; and made minor changes in style.

Style changes in (1)(c), (2)(c), and (3)(c) were slightly different in the three chapters. In each case, the codifier chose the more appropriate of the three.

1991 Amendment: Inserted second and third sentences in (6)(a) requiring that person convicted of second offense be fined $500 or imprisoned up to 6 months, or both, and requiring that person convicted of third or subsequent offense be fined $1,000 and imprisoned from 30 days to 6 months; and made minor changes in style.

1987 Amendment: Inserted (5) providing that theft includes the unauthorized control of workers' compensation benefits or occupational disease benefits.

1985 Amendment: In (4) substituted "provided under Title 53 by a state or county agency, regardless of the original source of assistance" for "as defined in 53-3-101".

1983 Amendment: In (5), increased the value from "$150" to "$300" in two places.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This part of the new Criminal Code dealing with Theft and Related Offenses comprises a comprehensive treatment of crimes which have presented numerous problems to courts and attorneys. The thirteen substantive provisions of this part encompass the former offenses of larceny, larceny by trick, embezzlement, false pretenses, confidence games, fraudulent checks, receiving stolen property and many other crimes which were the subject of at least four chapters in the old code. The approach taken by the new code eliminates the troublesome technical distinctions traditionally made between different forms of theft and avoids entirely any reference to prior statutory or common-law terminology. Illinois Criminal Code, chapters 16, 17, and 38, are the source for most of the provisions in this part of chapter 6.

This section on Theft encompasses the traditional crimes of larceny, larceny by trick, false pretenses, embezzlement, receiving stolen property as well as numerous associated offenses. The Montana Criminal Law Commission intended that this section cover every conceivable form of theft and in so doing, eliminate the common-law distinctions which encumbered virtually every one of the theft-related offenses.

Perhaps the greatest problems found in the traditional approach to the theft-related offenses are the definitional dilemmas found in the terms "property", "possession", "custody", and "title". The nature of the property acquired has always been a determinant of which offense could be charged. To avoid this problem, the former statutes contained long lists of different types of property, choses in action, etc., which were included in the coverage of the provision. The technical distinctions concerning the type of property interest acquired by the offender played a central role in deciding which offense, if any, had been committed. In Montana, these technical distinctions were twisted and juxtaposed to apply the statutes to activities which did not fit precisely into the common-law categories. For example, in St. v, Dickinson, 21 M 595, 55 P 539 (1898), the Montana court held, contrary to the traditional position, that both possession and title must be acquired to charge larceny by trick. In St. v. Love, 151 M 190, 440 P2d 275 (1968), the court held, again in opposition to the common law, that only possession need be acquired in order to sustain a charge of false pretenses. These problems have been solved in the new Code by the use of the phrase "obtains or exerts control" which includes every possible property interest which may be acquired and by reference to the broadly defined term "property" which means "anything of value". See MCA, 45-2-101(39), (54), respectively. Thus, any possible interest in any kind of property is covered by this section.

Subsection (1) is the key provision of this section and should prohibit most if not all forms of theft. The subsection requires that the obtainment of control be either "purposeful" (§ 45-2-101), with some design, or "knowing" (§ 45-2-101), with knowledge of facts and circumstances. Inadvertent or negligent exertion of control is not punishable. Subsection (1)(a) requires proof of a purpose to deprive—the mental state prevalent in most thefts. This mental state is ordinarily implied from the offender's disposition or handling of the property. Subsections (1)(b) and (1)(c) are designed to cover those situations in which the purpose to deprive is more difficult to prove, such as the taking and subsequent abandonment of vehicles. Subsection (1)(b) makes such conduct an offense if the property has been used by the offender in a manner which would deprive the owner of the property of its use, while (1)(c) allows conviction in the alternative situation where the offender has knowledge that his activities will deprive the owner of his property. It should be noted that none of the provisions in subsection (1) require an intent to permanently deprive, as required under former law. Only obtainment of control for a sufficient period of time to indicate that the offender himself had dominion over the property is necessary under this section. Because subsection (1) makes no distinction concerning the way in which the property was obtained, the subsection should cover all conceivable forms of theft including receiving of stolen property. Because only two elements must be proved under this subsection, a knowing exertion of control and a purpose to deprive, the provision represents a considerable simplification from the traditional approach.

Subsections (2) and (3) cover the specific offenses of theft by threat or deceit and the receiving of stolen property. While these crimes are included within subsection (1), the Criminal Law Commission felt the concise approach of subsection (1) might create problems of application, in view of the bulk of offenses embodied in that section.

Subsection (2) prohibits the intentional acquisition of property of another by "threat" (MCA, 45-2-101) or "deception" (MCA, 45-2-101) when either the purpose to deprive can be shown or when, as in subsection (1), the purpose to deprive can be implied from the offender's use of the property or knowledge of his conduct. "Deception", as defined in § 45-2-101, no longer distinguishes between representations of past, present, and future facts—thus, eliminating a problem which had plagued the prior law on false pretenses and larceny by trick. "Deception", as defined, includes any knowingly false misrepresentation or promise. "Threat", as provided in 45-2-101, includes virtually any form of extortion.

Subsection (3) deals with the offense of receiving stolen property. This particular subsection has been interpreted by the Illinois courts as requiring in addition to the basic elements of subsection (1) the proof that 1) the property was stolen by someone other than the accused receiver; and, 2) that the defendant knew that the property was stolen at the time he took possession. People v. Berg, 91 Ill. App.2d 166, 234 N.E.2d 400 (1968). Because of these difficult proof requirements it seems advisable to charge under subsection (1)(a) where possible. There only the receipt of possession with a purpose to deprive is required for conviction. People v. Nunn, 63 Ill. App.2d 465, 212 N.E.2d 342 (1965).

Subsection (4) was enacted by the 1979 amendment and specifically includes the fraudulent obtaining of public assistance within the offense of theft.

Subsection (5) imposes penalties depending upon the value of the property. If the "value" of the property stolen, as defined in § 45-2-101, exceeds [$300] the offense is punishable as a felony. Lesser thefts are misdemeanor offenses. The determinative value has been raised from $50 in the old code to reflect the change in prices and philosophy about the seriousness of minor thefts. [The value was raised from $150 to $300 in 1983.] The wording for this section has been adapted from substantially similar language from the Illinois source.

The value amount separating misdemeanor and felony theft may now, by virtue of the 1977 amendment which added subsection (6), be met by aggregating the amounts involved in thefts arising from a common scheme or the same transaction. Subsection (6) is identical to 45-2-101(69)(c), part of the definition of "value".

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CONSTITUTIONALITY

Consecutive Sentences Upon Conviction for Multiple Thefts, Common Scheme — Prosecutorial Discretion Correctly Exercised — No Double Jeopardy Found: During a 5-day period in April 1994, Savaria issued bad checks upon the same nonexistent checking account to numerous retail merchants in the Missoula area. He was charged with six counts of theft, common scheme, to which he pleaded guilty. The District Court sentenced Savaria to consecutive 10-year sentences on each of the counts, which Savaria argued constituted multiple punishments for commission of the same offense, in violation of the constitutional prohibition against double jeopardy. The Supreme Court recognized that the U.S. Constitution prohibits both multiple punishments for the same offense and multiple prosecutions for offenses arising out of the same transaction, but, after application of the test announced in Blockburger v. U.S., 284 US 299 (1932), and in reliance upon St. v. Crowder, 248 M 169, 810 P2d 299 (1991), and Stilson v. St., 278 M 20, 924 P2d 238 (1996), held that the prosecutor had the discretion to charge each of the bad check writing incidents as an individual felony theft, common scheme, pointing out that each of the multiple common schemes was supported by separate and distinct evidence. The Supreme Court held that the District Court therefore did not err in imposing consecutive sentences on the separate charges because they were not prohibited by the constitutional prohibition against double jeopardy. St. v. Savaria, 284 M 216, 945 P2d 24, 54 St. Rep. 852 (1997).

Preindictment Delay — No Violation of Due Process: Defendant forged and cashed a check of his wife's and kept the proceeds for himself. The County Attorney's office investigated in March 1988 but declined to prosecute because the wife was barred from testifying against defendant by 26-1-802 (spousal privilege) and 46-16-212 (competency of spouses). The couple was divorced in May 1989. On December 12, 1989, defendant was charged with theft and forgery and was eventually convicted of theft. The Supreme Court affirmed and found that defendant had not shown actual, substantial prejudice as a result of the delay in prosecution. Prosecution was commenced within the applicable 5-year statute of limitations. The fact that defendant could no longer rely on the spousal privilege and competency of spouses statutes to prevent a witness from coming into court and testifying about the theft does not constitute "prejudice" to defendant. St. v. Krinitt, 251 M 28, 823 P2d 848, 48 St. Rep. 1088 (1991).

Inability to Pay Restitution — Prison Term Not Violative of Equal Protection in Light of State Correctional Policy and Previous Offenses: A defendant convicted of felony theft was sentenced to 5 years in the state prison with 2 years suspended and, in addition, was ordered to pay restitution. The defendant asserted on appeal that he was sentenced to a prison term because of his indigency, in violation of his right to equal protection. However, the District Judge specifically noted the prison term was necessary to protect the property of others and that the defendant's criminal record contained three previous misdemeanor thefts. The Supreme Court found these to be sufficient reasons to support incarceration and upheld the state's correctional policy outlined in 46-18-101. The court noted that the sentence was well within the parameters of punishment for felony theft in 45-6-301. Finding no abuse of discretion or violation of the defendant's constitutional rights, the District Court was affirmed. St. v. Carroll, 220 M 466, 716 P2d 212, 43 St. Rep. 531 (1986).

Term "Deprive" Not Unconstitutionally Vague: Defendant challenged the terms "reasonable apprehension" in the aggravated assault statute and "deprive" in the theft statute as unconstitutionally vague. The court rejected the contention, indicating that the first term had been construed by the court before and that the second term was defined in 45-2-101. St. v. Campbell, 219 M 194, 711 P2d 1357, 42 St. Rep. 1948 (1985).

Retrial on Same Charge — Double Jeopardy: The state's failure to present sufficient evidence to support a charge of felony theft precludes a retrial on the same charge. St. v. Furlong, 213 M 251, 690 P2d 986, 41 St. Rep. 2096 (1984).

Theft and Receiving Stolen Property — Conviction From Same Act — Double Jeopardy: Defendant pleaded guilty to burglary and theft of coins from a residence. Based on a plea agreement, other charges against him were dismissed and he was placed on probation. Restitution was not ordered. While on probation, defendant sold some of the coins for which he had previously been convicted of theft. Criminal charges were filed against defendant under 45-6-301, receiving stolen property. The Supreme Court reversed defendant's second conviction because since both convictions arose from the same transaction, the second conviction was a violation of the prohibition against double jeopardy. St. v. Hernandez, 213 M 221, 689 P2d 1261, 41 St. Rep. 2063 (1984).

Livestock Theft — Felony: Because in Montana theft of livestock is a particularly serious problem due to the large geographical area and the small population, the classification in this section making the theft of livestock a felony without regard to the monetary value and the theft of other items a felony only if the item has a value of more than $150 does not offend the Equal Protection Clauses of the federal and state constitutions. St. v. Feeley, 170 M 227, 552 P2d 66 (1976).

Not Vague or Uncertain: The Illinois courts have held that the section as a whole is not unconstitutionally vague or uncertain and that various terms used within this section such as "unauthorized control" and "owner" are sufficiently definite to be valid. See People v. Harden, 42 Ill.2d 301, 247 N.E.2d 404, 406 (1969); People v. Cleveland, 104 Ill. App.2d 415, 244 N.E.2d 212, 214, certiorari denied 396 US 986 (1969); People v. Kamsler, 78 Ill. App.2d 349, 223 N.E.2d 237 (1966); People v. Thompson, 75 Ill. App.2d 289, 221 N.E.2d 120 (1966).

IN GENERAL

Escape Attempt 3 Weeks After Crime Relevant: The defendant was shot in the leg by a homeowner in the course of a burglary. While recovering at a rehabilitation center, the defendant escaped and was arrested after a high-speed chase with police. At trial, the state sought to introduce evidence of the defendant's escape, to which defense counsel objected because it occurred weeks after the burglary and therefore was irrelevant. The state argued that the evidence of the escape attempt was relevant because it showed consciousness of guilt. The District Court allowed evidence to be presented to the jury, and the defendant was convicted. On appeal, the Supreme Court affirmed, agreeing that evidence of the defendant's escape from the rehabilitation center was relevant to prove consciousness of guilt. St. v. Strizich, 2021 MT 306, 406 Mont. 391, 499 P.3d 575.

Sufficient Evidence to Sustain Conviction — Theft: Although suspended by the fire district board of trustees, two firefighters subsequently entered the fire hall to retrieve equipment to assist a disabled vehicle, including cones, flares, and two jackets. The defendants informed the fire district that they had taken some of the items and later returned most of those items, but they did not tell the fire district they had taken the jackets nor did they return the jackets. The Supreme Court held that because the firefighters were not privileged to take inventory without permission, a reasonable juror could conclude that the defendants exercised unauthorized control over the jackets with the intent to deprive the fire district of them. St. v. Robertson, 2014 MT 279, 376 Mont. 471, 336 P.3d 367.

Full Restitution for Theft Without Consideration of Offender's Ability to Pay — No Error: Following conviction for theft by common scheme, Brownback was ordered to pay restitution in full. Brownback appealed on grounds that the sentencing court erred by failing to consider Brownback's ability to pay restitution. The Supreme Court disagreed. The former provision requiring a sentencing court to consider an offender's ability to pay was removed from the restitution statutes in 2003 and was replaced by the mandate that District Courts require an offender to pay full restitution. Therefore, the sentencing court did not err in requiring Brownback to pay full restitution without considering the ability to pay. St. v. Brownback, 2010 MT 96, 356 Mont. 190, 232 P.3d 385.

Restrictions Against Gambling and Use of Alcohol Unrelated to Offense of Theft or to Defendant Stricken — Drug Testing Requirement Affirmed: As conditions of Lessard's conviction for the theft of carved bears from neighborhood lawns, the sentencing court required that Lessard not consume alcohol or drugs, submit to alcohol and drug testing, and refrain from entering casinos and gambling. Lessard contested the conditions as unrelated to the theft of carved bears and asserted that he had no problem with or criminal history related to substance abuse or gambling, even though a marijuana pipe was found in Lessard's bedroom during a search for the bears and Lessard admitted to smoking marijuana 2 days prior to the search. In deliberating whether the conditions had a nexus to the offense or to Lessard himself, the Supreme Court held that the alcohol and gambling conditions were too much, that requiring no conditions would be too little, but that the drug testing condition was just right. The case was remanded with instructions to strike the alcohol and gambling conditions and the alcohol testing requirement from Lessard's sentence, while leaving the drug testing requirement in effect. St. v. Lessard, 2008 MT 192, 344 M 26, 185 P3d 1013 (2008).

Sentencing Conditions for Theft Conviction, Except Requirement for Mental Health Evaluation, Affirmed: As conditions of Greensweight's sentence for theft, the sentencing court required Greensweight to obtain a chemical dependency evaluation and to attend either Alcoholics Anonymous or Narcotics Anonymous, prohibited Greensweight from possessing, using, or drinking intoxicants and from entering any place where intoxicants were the chief item of sale, and required Greensweight to participate in counseling, including mental health counseling. Greensweight contested the conditions as unrelated to the crime, and the Supreme Court considered each condition for legality and reasonableness and considered whether the conditions were related either to the crime or to Greensweight's unique background and characteristics. In light of Greensweight's history of chronic drug use, the chemical dependency evaluation and attendance at group meetings were reasonable and were affirmed. Citing St. v. Brotherton, 2008 MT 119, 342 M 511, 182 P3d 88 (2008), the court also affirmed the "no intoxicants" condition as legal because of the history of chronic drug use and as necessary for Greensweight's rehabilitation, including a requirement for drug and alcohol testing. The court also affirmed the counseling requirement, but absent any history of mental health issues or nexus to the theft crime, the requirement for mental health counseling was ordered stricken. St. v. Greensweight, 2008 MT 185, 343 M 474, 187 P3d 613 (2008).

Evidence to Support Theft Conviction Despite Acquittal of Burglary and Criminal Mischief Charges: Kelley was convicted of theft, but acquitted of criminal mischief and burglary charges in connection with a break-in at a pet store. On appeal, Kelley asserted that the acquittals demonstrated the insufficiency of the evidence underlying the theft conviction. The Supreme Court disagreed. Each of the crimes charged consisted of distinct elements, and the theft charge was not inseparable from the criminal mischief and burglary charges. When each act is a separate offense, an acquittal or conviction of one or more counts does not affect the other counts, and it is permissible for a jury to convict on one count and acquit on another when it is within the province of the jury to convict on both counts on the same evidence. Thus, Kelley's contention that acquittal of criminal mischief and burglary had the effect of negating his participation in a theft was rejected, and the theft conviction was affirmed. St. v. Kelley, 2005 MT 200, 328 M 187, 119 P3d 67 (2005), followed in St. v. Borsberry, 2006 MT 126, 332 M 271, 136 P3d 993 (2006), with regard to the ability of a jury to convict on one count and acquit on another when it is within the jury's province to convict on both counts on the same evidence and the fact that an acquittal resulting from the state's failure to prove an element of a crime cannot be considered tantamount to an affirmative proposition that a defendant did or did not engage in a particular act. See also St. v. Daly, 77 M 387, 250 P 976 (1926), St. v. Azure, 2002 MT 22, 308 M 201, 41 P3d 899 (2002), and St. v. Bailey, 2003 MT 150, 316 M 211, 70 P3d 1231 (2003).

Restitution Amount Set by Sentencing Court Rather Than Jury — No Error: After the jury found Field guilty of theft by deception, the District Court imposed restitution in the amount of $17,632.67. Field contended that under Apprendi v. N.J., 530 US 466 (2000), any fact that increases a penalty for a crime above the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt and that because the restitution amount was set by the court rather than by the jury, Field should not be required to pay restitution in the court-ordered amount. The Supreme Court held that the Apprendi rule does not apply to restitution because restitution is not a criminal punishment, but rather is a civil remedy administered for convenience by courts that have entered criminal convictions. Thus, once the jury found Field guilty of theft by deception, the District Court was free to apply the maximum statutory sentences and to order Field to pay an appropriate amount of restitution. St. v. Field, 2005 MT 181, 328 M 26, 116 P3d 813 (2005). See also U.S. v. George, 403 F3d 470 (7th Cir. 2005).

Costs Directly Related to Defendant's Criminal Conduct Properly Included in Restitution Calculation: Thompson was a maintenance worker at a commercial building and had keys to the entire building. Thompson was convicted of stealing and then pawning tools from the maintenance room in the building and was ordered to pay restitution, including the costs of rekeying the entire building. Thompson contended that requiring payment of the cost of rekeying the building went beyond recovery for any pecuniary losses and was an abuse of discretion. The Supreme Court disagreed. The reason the building was rekeyed was a direct result of Thompson's criminal conduct, and the expense was an out-of-pocket loss directly related to the thefts, so including those special damage expenses in the restitution calculation was proper. St. v. Thompson, 2004 MT 131, 321 M 332, 91 P3d 12 (2004).

Conviction of Robbery but Acquittal of Assault With Weapon Not Considered Inconsistent Verdict — Sufficient Evidence of Robbery to Affirm Verdict: Bailey was acquitted of felony assault with a weapon, but was convicted of felony robbery and misdemeanor theft, and appealed on grounds that it was inconsistent to convict someone of robbery and acquit the same person of assault with the same evidence. The Supreme Court noted that the elements of the two crimes are not identical and that the verdict was not really inconsistent because robbery does not require a weapon. Further, the court declined to speculate about the jury's intention, citing U.S. v. Powell, 469 US 57 (1984), in holding that a criminal defendant is already afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by trial and appellate courts. Thus, the question is not whether a criminal verdict is inconsistent, but whether the verdict is supported by sufficient evidence. In this case, there was sufficient evidence for a rational trier of fact to find the essential elements of robbery, and the court affirmed. St. v. Bailey, 2003 MT 150, 316 M 211, 70 P3d 1231 (2003). See also St. v. Merrick, 2000 MT 124, 299 M 472, 2 P3d 242 (2000).

Deferral of Sentence to Allow Payment of Restitution Not Violative of Due Process Rights: Benoit was charged with felony theft and entered a nonbinding plea agreement to plead guilty in exchange for a recommendation for a 2-year deferred sentence, based on the possible imposition of various conditions, including the payment of restitution. Benoit was then convicted and ordered to repay $15,933.90 in restitution. At the restitution hearing, Benoit admitted that with her current take-home salary and expenses, the restitution could not be repaid in 2 years, so the sentencing court sentenced Benoit to a 6-year deferred sentence to allow time to pay the restitution, but gave Benoit the opportunity to withdraw the guilty plea after 2 years if restitution was paid within that time. Benoit appealed on grounds that increasing the deferred sentence was a violation of due process, citing St. v. Farrell, 207 M 483, 676 P2d 168 (1984), and St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000), and asserted that the sentence should be remanded for determination of a length of sentence consistent with the charge and Benoit's history instead of the ability to pay restitution. The Supreme Court distinguished Farrell and Pritchett, noting that Benoit's sentence was not based on indigency, and coupled with the fact that Benoit was given the opportunity to withdraw the guilty plea prior to the termination of the 6-year deferred sentence, Benoit's due process rights were not violated through imposition of the conditional 6-year deferred sentence. St. v. Benoit, 2002 MT 166, 310 M 449, 51 P3d 495 (2002).

Imposition of Restitution Upon Satisfaction of Statutory Procedures: Benoit was convicted of felony theft for falsifying voided transactions and customer discounts while employed at a restaurant over a 1½-year period. Benoit was ordered to pay $15,933.90 in restitution to the employer, based on calculations by the business manager who examined transaction records during the time that Benoit was on duty, and estimated the business's pecuniary losses. Benoit contested the restitution award on grounds that documentation of the victim's pecuniary loss was not provided in the presentence investigation or at the restitution hearing and that because the restitution amounts were speculative, the District Court had no authority to impose restitution. The Supreme Court noted that a sentencing court is required to impose a sentence that includes full restitution if the victim is found to have sustained a pecuniary loss, but restitution may not be imposed unless the procedures in 46-18-241 through 46-18-249 are satisfied. Failure of a presentence investigation to document a victim's loss and the offender's financial resources and ability to pay restitution, as required in 46-18-242, renders the judgment illegal, but that information was included in the presentence report in this case. Therefore, the District Court did have authority to impose restitution. Further, although the actual losses resulting from Benoit's admitted theft could not be determined with certainty, the method employed in calculating the loss was reasonable based on the best evidence available under the circumstances. The employer was entitled to recover its estimated pecuniary losses, plus reasonable out-of-pocket expenses incurred in cooperating in the investigation and prosecution of the case, including wages paid to three employees who assisted in calculating restitution. St. v. Benoit, 2002 MT 166, 310 M 449, 51 P3d 495 (2002), followed in St. v. O'Connor, 2009 MT 222, 351 M 329, 212 P3d 276 (2009), with regard to reasonableness of the method employed in calculating the loss based on the best evidence available under the circumstances, and in St. v. Dodson, 2011 MT 302, 363 Mont. 63, 265 P.3d 1254. However, see St. v. Johnson, 2011 MT 286, 362 Mont. 473, 235 P.3d 638 (declining to address a challenge to a restitution award when the defendant failed to object to the imposition of restitution at his sentencing hearing). See also St. v. O'Connell, 2011 MT 242, 362 Mont. 171, 261 P.3d 1042, which held that the District Court erred in ordering the defendant to pay lost profits as part of the defendant's restitution obligation when the evidence presented was not calculated by the use of reasonable methods based on the best evidence available under the circumstances.

Permanent Deprivation Not Required to Establish Theft: In his job as a vacuum salesman, Doyle was allowed to check out vacuums in order to demonstrate and sell them, but instead he held himself out as the owner of the vacuums and pawned them, securing cash loans. Doyle maintained that he did not intend to permanently deprive the real owner of the vacuums, but rather intended to return them within the 30-day checkout period. However, the term "deprive" in the theft statute is not limited to permanent deprivations. Doyle withheld the property for a sufficient period to appropriate a portion of the value of the property, thereby using the property for the purpose of depriving the owner, in violation of this section. Doyle's theft conviction was affirmed. St. v. Doyle, 1999 MT 318, 297 M 270, 993 P2d 9, 56 St. Rep. 1270 (1999). See also St. v. Long, 227 M 199, 738 P2d 487, 44 St. Rep. 1008 (1987).

Court Misstatement of Maximum Possible Penalty at Change of Plea Hearing — Error in Refusal to Allow Withdrawal of Noncompliant Plea: Roach requested a hearing to change his plea to guilty on burglary and theft charges. Roach was questioned regarding his understanding of his constitutional rights, and a discussion was held concerning possible penalties. The District Court Judge erroneously informed Roach that the maximum penalty for both crimes was 10 years and $50,000. Neither Roach's counsel nor the County Attorney, who were both present, responded or objected in any way to the court's misstatement of the maximum possible penalty. Roach was sentenced 2 months later to consecutive sentences of 20 years suspended for burglary and 10 years with no time suspended for theft, plus restitution. Roach later asserted that he was misled by the District Court, that his change of plea was coerced and based on misinformation, and that he should have been granted postconviction relief allowing him to either withdraw the guilty plea or be sentenced in conformity with the penalty that he was advised of at the change of plea hearing. The Supreme Court agreed. Because Roach was misinformed about the maximum possible sentence, his plea was neither knowing nor in compliance with statutory requirements. The District Court erred in refusing to allow withdrawal of the guilty plea; the Supreme Court remanded with instructions to allow withdrawal. St. v. Roach, 1999 MT 38, 293 M 311, 975 P2d 817, 56 St. Rep. 161 (1999), following St. v. Brown, 262 M 499, 865 P2d 282, 50 St. Rep. 1658 (1993).

Theft of Lost or Mislaid Property Not Lesser Included Offense of Theft of Stolen Property: Smith was charged with theft of stolen property and subsequently convicted. The District Court refused to give an instruction that theft of lost or mislaid property was a lesser included offense. The Supreme Court used the Blockburger test applied in St. v. Long, 223 M 502, 726 P2d 1364 (1986), and St. v. Arlington, 265 M 127, 875 P2d 307 (1994)—that is, whether proof of the same facts will support a conviction under either charge. The Supreme Court held that because the state would have to prove that the defendant knew that the property was lost or mislaid under one section of law but not under the other, theft of lost or mislaid property was not a lesser included offense of theft of stolen property. St. v. Smith, 276 M 434, 916 P2d 773, 53 St. Rep. 459 (1996).

Theft of Purse and Use of Bank Card Constituting One Transaction: The defendant argued that it was error to combine the value of the purse he stole and the money he withdrew from a teller machine using a card from the purse in order to arrive at a value constituting felony theft. The Supreme Court held that the amounts involved in the theft of the purse and from the bank account were the same transaction and could be aggregated to determine the total amount taken. St. v. Steele, 247 M 480, 807 P2d 1348, 48 St. Rep. 268 (1991).

Conclusion Through Evidence and Instructions That Mental State Existed for Conviction of Felony Attempted Theft: Given the evidence and instructions presented to the jury, it could reasonably conclude beyond a reasonable doubt that defendant had the requisite mental state for conviction of felony attempted theft. When the evidence, viewed in a light most favorable to the prevailing party, permits a rational trier of fact to find the essential elements of a crime, the Supreme Court will not reverse the conviction. St. v. Johnstone, 244 M 450, 798 P2d 978, 47 St. Rep. 1715 (1990).

Theft Not Lesser Included Offense of Robbery: The offense of robbery does not require the completed act of theft as an element of robbery. The offense of theft requires proof of an additional fact—that the offense was completed. Therefore, theft is not a lesser included offense of robbery. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990), followed in St. v. Greywater, 282 M 28, 939 P2d 975, 54 St. Rep. 16 (1997).

Result of Deprivation as Element of Offense: Defendant was a long distance truck driver operating a truck belonging to his employer. While defendant was on a trip outside Montana, the employer withdrew authorization for defendant to operate the truck, after which defendant failed to return the truck to its owner. The majority found that the result of depriving the owner of his truck was an element of the offense of theft under this section, that the deprivation occurred in Montana because of defendant's failure to return the truck to its owner in Montana, and that therefore the Montana court had jurisdiction of the charge under 46-2-101(2). A dissenting opinion asserted that the elements constituting theft are elements of conduct and mental state, and not result. St. v. White, 230 M 356, 750 P2d 440, 45 St. Rep. 270 (1988).

Definition of "Deprive" Not Mentioned in Felony Theft Case — Conviction Upheld on Evidence: Although the definition of "deprive" was not mentioned in the information or warrant charging felony theft and defendant contended he therefore did not understand the charge against him and was improperly allowed to plead guilty, there was substantial credible evidence through defendant's own admission of facts to support the plea and the legal conclusion that the rightful owners had been deprived of their property. St. v. Long, 227 M 199, 738 P2d 487, 44 St. Rep. 1008 (1987).

Theft and Criminal Mischief — Conviction From Same Act — No Error: Conviction of a defendant of both the crime of felony theft and the crime of felony criminal mischief as a result of the defendant's involvement in one criminal incident is permissible under 46-11-502 (renumbered 46-11-410) and is not a violation of the constitutional prohibition against double jeopardy. St. v. Palmer, 207 M 152, 673 P2d 1234, 40 St. Rep. 1957 (1983).

Accomplice Testimony — Theft Offenses Distinct Crimes: The theft crimes enumerated in 45-6-301 are statutorily distinct crimes; hence, a person who may have received stolen property, a possession theft crime under 45-6-301(3)(c), was not legally accountable for the same crime as the defendant charged with theft by actual taking under 45-6-301(1)(a) for the purposes of requiring corroboration of his testimony under 46-16-213. St. v. Lamere, 202 M 313, 658 P2d 376, 40 St. Rep. 110 (1983), followed in St. v. Rodriguez, 228 M 522, 744 P2d 875, 44 St. Rep. 1732 (1987), and distinguished in St. v. Hernandez, 213 M 221, 689 P2d 1261, 41 St. Rep. 2063 (1984).

Theft — Burden on Defendant to Disprove Unlawful Possession or Prove Lawful Possession — Unconstitutional: Defendant was convicted of felony theft of an air compressor, which he contended he had rented from an unidentified party. On appeal, defendant contended that an instruction couched in the exact language of 45-6-304 (which, on the basis of this case, was repealed in 1991) was unconstitutional in that it created a rebuttable presumption placing a burden of persuasion on the defendant as to the effect of possession, and that it undermined the "beyond a reasonable doubt" standard of proof in that it contained no time constraints nor was it limited to "exclusive possessions". The Supreme Court held 45-6-304 (now repealed) unconstitutional and held any instruction using the language of the statute to be prejudicial to a defendant. The court stated that the burden of proving every essential element of theft must always be on the State. Section 45-6-304 (now repealed) takes away the presumption of innocence and forces a defendant to testify by placing a burden on him to either disprove unlawful possession or prove lawful possession. The court set forth what it considered a proper instruction on the effect a jury may give to the unauthorized possession of stolen property. (Former 45-6-304 provided: "Possession of stolen property shall not constitute proof of the commission of the offense of theft. Such fact shall place a burden on the possessor to remove the effect of such fact as a circumstance to be considered with all other evidence pointing to his guilt." St. v. Kramp, 200 M 383, 651 P2d 614, 39 St. Rep. 1819 (1982), followed in St. v. Morigeau, 202 M 36, 656 P2d 185, 39 St. Rep. 2311 (1982).

Venue — Jurisdictional Fact to Be Proved at Trial: Venue is a jurisdictional fact that must be proved at the trial the same as any other material fact in a criminal prosecution. Positive testimony that the violation occurred at a specific place is not required; it is sufficient if it can be concluded from the evidence as a whole that the act was committed in the county where the indictment is found. Here, there was no testimony specifically directed to the venue issue, but testimony taken for other purposes indicated that defendant had the stolen property in his possession in Yellowstone County. St. v. Jackson, 180 M 195, 589 P2d 1009 (1979). Jackson and other cases were overruled by Helena v. Frankforter, 2018 MT 193, 392 Mont. 277, 423 P.3d 581, to the extent that they confuse venue with jurisdiction and state or hold that venue is a jurisdictional fact that must be proven at trial beyond a reasonable doubt.

Identity of Owner: Identity of the owner is an essential element of the offense of theft. However, because of the term "unauthorized control", it has been held sufficient if the owner of the property named in the indictment can be shown to have had some possessory interest in the property at the time of the offense. People v. Dell, 77 Ill. App.2d 318, 222 N.E.2d 357, 360 (1966), certiorari denied 389 US 826 (1967); People v. Moyer, 1 Ill. App.3d 245, 273 N.E.2d 210, 213 (1971). Thus, a payee of an allegedly stolen check was held to have sufficient interest in the check and the proceeds of the check to meet the definition of "owner" of the property under this section. People v. Jones, 123 Ill. App.2d 389, 259 N.E.2d 393 (1970); People v. Demos, 3 Ill. App.3d 284, 278 N.E.2d 89, 90 (1971). See also People v. Nunn, 63 Ill. App.2d 465, 212 N.E.2d 342, 346 (1965); People v. Baddeley, 106 Ill. App.2d 154, 245 N.E.2d 593, 595 (1969).

Statute Encompasses All Forms of Theft: In applying the terminology of this section to specific factual circumstances, the Illinois courts have generally held that the statute is broad enough to encompass virtually all forms of theft and all types of fraudulent acquisitions of property interests. See People v. Henderson, 72 Ill. App.2d 89, 218 N.E.2d 795, 797 (1966); People v. Nunn, 63 Ill. App.2d 465, 212 N.E.2d 342, 344 (1965); People v. Marino, 44 Ill.2d 562, 256 N.E.2d 770, 778 (1970); People v. Bullock, 123 Ill. App.2d 30, 259 N.E.2d 641, 643 (1970).

ELEMENTS OF OFFENSE

Knowing Participation — Obtains or Exerts Control: Knowing participation, by acting as a lookout during a burglary of a computer and van keys and by driving a stolen van that the minor knew did not belong to him, met the definitions in 45-2-101 of "obtains or exerts [unauthorized] control", "purposely", and "knowingly" under this section to satisfy the elements of felony theft under subsection (1)(a). In re S.F., Jr., 2010 MT 244, 358 Mont. 185, 244 P.3d 316.

State as Victim of Crime — Restitution Owing: Brownback's mother engaged in a 6-year scheme to embezzle money from the state and then pass the money on to Brownback to support his gambling addiction. An investigation into his mother's embezzlement led to charges against Brownback for theft by common scheme. Following conviction, Brownback was ordered to pay nearly $1 million in restitution, including $739,312 to the state for the money his mother embezzled and passed on to him. Brownback contested the restitution award on grounds that he did not know that the money he received from his mother was embezzled from the state. The Supreme Court affirmed the restitution award. But for Brownback's continuing course of conduct, the state would not have lost $739,312. The causation standard for restitution was therefore satisfied, and because the state was a victim that suffered pecuniary loss, the state was entitled to full restitution. Even though Brownback thought the money was coming from his stepfather rather than the state, Brownback knew all along that he was obtaining unauthorized control over the property of the owner, so Brownback's ignorance that the money was embezzled from the state did not negate the mental state for theft. A person may not steal property from a stranger with impunity, so Brownback's mistake as to the identity of the source of the money did not affect the causal relationship. St. v. Brownback, 2010 MT 96, 356 Mont. 190, 232 P.3d 385, distinguishing St. v. Breeding, 2008 MT 162, 343 Mont. 323, 184 P.3d 313.

No Requirement That Defendant Knew Property Was Stolen to Prove Theft: After Shively pawned a welder that had been stolen from a construction company, she was charged with theft. Shively contended that she did not know that the welder was stolen property, so the theft charge could not be proven, and that the trial court's instruction to the jury that the state did not have to prove that Shively knew the property was stolen was also in error. The Supreme Court disagreed. Section 45-6-301(1), under which Shively was charged, is a general provision under which all forms of theft can be charged, and the subsection does not contain a requirement that a person act without authorization only by receiving stolen property or with knowledge that the property was stolen. Therefore, the state was not required to prove that Shively knew that the welder was stolen, nor was it error for the trial court to instruct the jury to that effect. St. v. Shively, 2009 MT 252, 351 M 513, 216 P3d 732 (2009). See also St. v. Meeks, 2008 MT 40, 341 M 341, 176 P3d 1073 (2008).

Theft Through Control of Items Returned to Stores for Refunds: Meeks was charged with and convicted of theft from several Missoula stores. Meeks used various methods of obtaining merchandise, including: (1) taking items off the shelves and then taking the items to the customer service counter and requesting a refund without a receipt; (2) switching price stickers from lower to higher priced items and then paying the lower price; and (3) bringing a receipt from a previous purchase, loading a cart with the same items on the receipt, and then taking the items to the customer service counter and requesting a refund or gift card. Meeks asserted that the state failed to prove his unauthorized control of another's property based on the fact that store employees authorized his control over the items through store policies for returns of merchandise. The Supreme Court disagreed. Asset protection associates from all of the stores testified that Meeks was not authorized to use the techniques to obtain merchandise, so Meeks' control was in fact unauthorized. Under the circumstances, a rational trier of fact could have found Meeks guilty of theft beyond a reasonable doubt, and the conviction was affirmed. St. v. Meeks, 2008 MT 40, 341 M 341, 176 P3d 1073 (2008).

Conviction of Possessing Stolen Vehicle in Washington Barring Prosecution for Theft of Same Vehicle in Montana: Cech stole a car in Montana and drove it to Washington where he was arrested and convicted of possession of stolen property. Cech was subsequently charged in Montana for theft of the same vehicle. At the Montana trial, Cech asserted double jeopardy. The trial court determined prosecution was not prohibited because the offenses were not the same and because Cech did not meet the first part of the three-part test in St. v. Tadewaldt, 277 M 261, 922 P2d 463 (1996), which provides that subsequent prosecution is barred if a defendant's conduct constitutes an offense within the jurisdiction of the court in which the first prosecution occurred and within the jurisdiction of the court in which the subsequent prosecution is pursued. On appeal, the Supreme Court disagreed and reversed. The underlying conduct that served as a basis for both prosecutions sought to accomplish the same criminal objective of controlling the stolen vehicle that led to the filing of analogous charges directed at that conduct in both states. Cech could not have been charged with possession of the stolen car in Washington if he had not first stolen the car in Montana and taken it to Washington. Thus, the charges arose out of the same transaction, and the double jeopardy provisions of 46-11-504 barred the subsequent prosecution for theft in Montana. St. v. Cech, 2007 MT 184, 338 M 330, 167 P3d 389 (2007). See also St. v. Sword, 229 M 370, 747 P2d 206 (1987).

Sufficient Evidence of Actual Taking Rather Than Mere Possession of Stolen Property: Kelley was convicted of theft in connection with a break-in at a pet store, but there was no physical evidence of Kelley's presence there. However, Kelley was found in possession of two dogs from the store and numerous $2 bills identified as being taken from the till at the store. Initially, Kelley admitted being at the store and seeing a broken window, but claimed he found the dogs on the street outside the store. He later changed his story, claiming that he bought the dogs from two people and received the $2 bills in change. On appeal, Kelley asserted that the state failed to prove actual taking rather than mere possession of stolen property. The Supreme Court noted that the jury chose to believe the first part of Kelley's story, placing him at the store, but did not believe the rest of the story regarding how Kelley came into possession of items stolen from the store. The court found that the jury was in the best position to view the evidence, ascertain Kelley's credibility, and determine the weight to be attached to Kelley's testimony. Here, there was sufficient evidence for a rational trier of fact to find the essential elements of theft beyond a reasonable doubt, and the Supreme Court declined to disturb the jury's verdict. St. v. Kelley, 2005 MT 200, 328 M 187, 119 P3d 67 (2005).

Sufficient Evidence of Theft of Child's Snowmobile and Violation of Protective Order: When defendant was divorced, his ex-wife received a protective order prohibiting defendant from going to the ex-wife's residence and from contacting the ex-wife or the children. Subsequently, defendant and his ex-wife each gave their son $2,400 to purchase two snowmobiles, which were registered in the son's name. When defendant became desperate for money, he called both the ex-wife and the son and told them that he intended to take a snowmobile from the ex-wife's residence in order to sell it. When defendant took a snowmobile, he was arrested for theft and for violating the protective order. Following conviction on both charges, defendant appealed, but the Supreme Court affirmed. Viewed in a light most favorable to the prosecution, the jury had sufficient evidence to find that defendant purposely or knowingly obtained or exerted unauthorized control of property owned by the son, with the purpose of depriving the son of the property, and that defendant's action in taking the snowmobile violated the terms of the protective order beyond a reasonable doubt. St. v. Kuipers, 2005 MT 156, 327 M 431, 114 P3d 1033 (2005).

Evidence of Market Value Not Presented — Replacement Value Insufficient to Prove Elements of Felony Theft: When fleeing from a pursuing police officer, Martin shot the officer and stole his service revolver. He was convicted of felony theft for exerting unauthorized control over the weapon. At trial, the only evidence presented as to the value of the revolver was an estimate of the replacement value, but no evidence was given regarding the market value. To prove felony theft, the value of the stolen property must be shown to exceed $500. By definition, value means the market value of the property at the time and place of the crime. Replacement value is to be used only if market value cannot be satisfactorily ascertained. Here, the state relied solely on replacement value and presented no evidence of market value or evidence that market value could not be ascertained. Having failed to meet the burden of proof regarding value, the essential elements of felony theft were not shown and the conviction was reversed. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

District Court Lacking Jurisdiction to Hear Charges of Theft Allegedly Committed on Indian Reservation — Felony Theft Not Continuing Offense: Eagle Speaker was charged with five counts of felony theft for allegedly stealing five horses on the Blackfeet Indian Reservation and transporting them off-reservation to Shelby for sale. Eagle Speaker contended that as an enrolled tribal member, the state lacked jurisdiction to prosecute because the alleged thefts occurred on the reservation and involved other members of the tribe. The District Court agreed. On appeal, the state alleged that there was probable cause to believe that both elements of felony theft occurred outside the reservation when Eagle Speaker tried to sell the horses in Shelby. The Supreme Court affirmed. Under St. v. Mullin, 268 M 214, 886 P2d 376 (1994), the crime of felony theft is not a continuing offense for purposes of tolling the statute of limitations. Rather, a theft is complete once all the elements of the crime transpire, and in this case, all elements of the theft, if it occurred, clearly occurred on the reservation. The offense of theft occurs for jurisdictional purposes where the elements of the offense take place. The alleged theft occurred on the reservation, and the lower court was without jurisdiction to hear the charges. St. v. Eagle Speaker, 2000 MT 152, 300 M 115, 4 P3d 1, 57 St. Rep. 600 (2000).

No Theft Prosecution for Removal of Funds From Joint Account: Kane was charged with theft for purposely or knowingly obtaining or exerting unauthorized control over funds and other items belonging to Hilger. Kane filed a motion to dismiss, which the District Court granted on grounds that as a joint tenant on a checking account with Hilger, Kane could not, as a matter of law, be prosecuted for theft of funds taken from the joint account. The state contended that 72-6-211 governed the joint account and permitted prosecution for theft in such cases. The Supreme Court affirmed, holding that the statute did not apply to controversies between cotenants. Absent evidence that Kane had threatened or deceived Hilger into establishing the joint tenant arrangement, Kane's actions did not make out the elements of criminal theft. St. v. Kane, 1999

MT 337, 297 M 421, 992 P2d 1283, 56 St. Rep. 1343 (1999), following St. v. Haack, 220 M 141, 713 P2d 1001 (1986), and distinguishing St. v. Curtis, 241 M 288, 787 P2d 306, 47 St. Rep. 277 (1990).

Signing Another's Name Without That Person's Knowledge and With Intent to Defraud: When an agent exceeds the agent's authority with respect to an instrument in writing, with intent to defraud, the offense of forgery is committed. Defendant's inserting of a pastor's name on money orders, with the knowledge that the pastor had not given authority for the use of the pastor's name and with an intent to defraud the parish, constitutes forgery. The offense of deceptive practices is complete upon the knowing or purposeful making of a false financial statement. There was sufficient evidence to support the convictions. St. v. Richards, 274 M 180, 906 P2d 222, 52 St. Rep. 1176 (1995).

Felony Theft Not Continuing Course of Conduct: Felony theft of two snowmobiles occurred in 1988. The state argued that the theft was a continuing course of conduct, that the theft was not "committed" until the snowmobiles were discovered in 1994, and that therefore the 5-year statute of limitations had not yet expired. Citing St. v. Hamilton, 252 M 496, 830 P2d 1264 (1992), the Supreme Court held that because there was no explicit language in the statute indicating a legislative intent to compel that conclusion, the offense would not be considered continuing. The Supreme Court noted that to accept the state's argument would be tantamount to holding that there is no statute of limitations applicable to the crime of theft unless the stolen property had been abandoned. (However, see 1995 amendment to 45-1-205.) St. v. Mullin, 268 M 214, 886 P2d 376, 51 St. Rep. 1247 (1994).

Implied Threat in Robbery: Defendant claimed that his conviction for robbery was improper because the victim voluntarily gave him her money and because he made no threat that communicated a specific request for money. However, threat is implicit when a lone and unarmed woman on foot is forced into a dimly lit alley by a man claiming to have a gun and the man answers affirmatively to her question as to whether he wants her money. St. v. Dow, 256 M 126, 844 P2d 780, 49 St. Rep. 1168 (1992).

Conviction of Criminal Trespass to Vehicles and Attempted Theft — Not Conviction Under Same Transaction: Defendant contended that he was improperly convicted of criminal trespass to vehicles and attempted theft in violation of 46-11-410. The Supreme Court applied the test set out in Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932), in deciding whether there were two offenses or only one. Each provision required proof of a fact that the other did not. Because each crime involved separate and distinct elements, defendant's conviction did not violate 46-11-410. St. v. Johnstone, 244 M 450, 798 P2d 978, 47 St. Rep. 1715 (1990).

Burglary, Theft, and Tampering Convictions Affirmed: Defendant forcefully entered a neighbor's apartment at night without consent and purposely removed a rifle and ammunition. After shooting his wife with the rifle, defendant concealed it beside the road, impairing its availability as evidence and causing its condition to change. These circumstances, coupled with defendant's own admissions of the actions, justified convictions for burglary, theft, and tampering with evidence. St. v. McKimmie, 232 M 227, 756 P2d 1135, 45 St. Rep. 1011 (1988).

Withdrawal of Funds by Co-Owner From Joint Tenancy Bank Account: As a matter of law, a co-owner of a joint tenancy bank account cannot be convicted of the crime of theft for withdrawing funds from the joint tenancy account. A joint tenancy bank account is a special relationship between co-owners; this special relationship precludes application of the theft laws. Section 45-6-303, relating to the offender's interest in property, requires the owner to have "an interest to which the offender is not entitled". The special relationship between co-owners in a joint tenancy bank account ensures that there is no "interest to which the offender is not entitled" by a joint tenant. St. v. Haack, 220 M 141, 713 P2d 1001, 43 St. Rep. 242 (1986), followed in St. v. Kane, 1999 MT 337, 297 M 421, 992 P2d 1283, 56 St. Rep. 1343 (1999).

"Deprive" Construed: The defendant was the bookkeeper for the MacKay ranch. When her employment was terminated, she withheld ranch funds until she was paid $500, the value of the garden that she had put in. The defendant was charged with theft. Section 45-6-301 provides four alternative definitions of "deprive", and the jury was instructed on all four alternatives. On appeal, the court was unable to determine which definition of "deprive" the jury used in arriving at the conviction. It is obvious that not all of the definitions used could be supported under the facts in this case. Since it cannot be determined upon which theory the jury may have convicted the defendant of theft, this alone would require, on appellate review, reversal of the conviction. Under the facts of this case, the defendant did not commit the offense of theft. St. v. Ferrel, 208 M 456, 679 P2d 224, 41 St. Rep. 463 (1984), distinguished in St. v. Milhoan, 224 M 505, 730 P2d 1170, 43 St. Rep. 2371 (1986), and overruled in part in St. v. Mills, 2018 MT 254, 393 Mont. 121, 428 P.3d 834, to the extent that its conclusion was based on the belief that 45-6-301(1)

proscribes only the purpose to permanently deprive an owner of property, thereby precluding jury consideration of whether the defendant truly held such a belief in good faith.

Accountability of Accomplice for Theft: There was sufficient evidence to prove that defendant Dess was accountable within the meaning of 45-2-302 for theft of two bicycles committed in violation of this section when the following facts were proven at trial: (1) Dess was in the company of Haas and Owens (the perpetrators) immediately before the theft; (2) Dess was in his white station wagon at the time of the theft from where he could see the stealing of the bicycles; (3) a white station wagon was seen following the stolen bicycles; and (4) Dess was found driving his white station wagon, with one of the bicycles in the back, and was stopped only 200 yards past the other bicycle. St. v. Dess, 207 M 468, 674 P2d 502, 41 St. Rep. 81 (1984).

Felony Theft — Not Lesser Included Offense of Robbery: LaMere was convicted of felony theft and robbery of the Dumas Hotel in Butte. On appeal, he contended that the District Court erred in not treating theft as a lesser included offense of the charge of robbery. Applying the "Blockburger test" as explained in Iannelli v. U.S., 420 US 770, 95 S Ct 1284, 43 L Ed 2d 616 (1975), the Supreme Court looked to determine if each offense required proof of a fact the other did not. The proof of robbery was complete if, as an element of the offense, the State proved the threat of injury in the commission of misdemeanor or felony theft. In order to prove felony theft, the State must prove that the value of the property taken exceeds $150. There is an additional element required to prove felony theft not required for conviction of the charge of robbery. The theft in this case was not a lesser included offense within the charge of robbery. St. v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983), affirmed in LaMere v. Risley, 827 F2d 622 (9th Cir. 1987). Madera was followed in St. v. Greywater, 282 M 28, 939 P2d 975, 54 St. Rep. 16 (1997).

False Representation of Sale of Dangerous Drug — Attempted Felony Theft by Deception Upheld: Where the defendant was arrested after selling a substance, represented to be cocaine, to an undercover agent and was charged with attempt to commit felony theft from the agent by deception when the substance was subsequently discovered to be a prescription drug called lidocaine, the District Court did not err in convicting the defendant of attempted felony theft. The defendant's argument that the agent received a fair price for the prescription drug is not persuasive, as defendant represented the drug to be something that it was not, i.e., cocaine. The District Court therefore properly refused the instructions requested by the defendant. St. v. Starr, 204 M 210, 664 P2d 893, 40 St. Rep. 796 (1983).

Identification and Ownership of Property: The prosecution in a trial for theft must show that the property stolen does not belong to accused and must adequately identify the property, including its ownership, so as to protect accused from any further prosecution involving the theft of that same property. St. v. Johnson, 199 M 211, 646 P2d 507, 39 St. Rep. 1014 (1982).

Intent Crucial Factor — Evidence Not Overwhelming — "Sandstrom Instruction" Error: Defendant was tried and convicted of theft and burglary. A "Sandstrom-type" instruction was given. Defendant appealed, claiming to have had his normal thought processes affected at the time by a drug overdose. The Supreme Court held that, under this set of facts, defendant's intent was a crucial fact question. The instruction was not worded to be merely a permissive inference and could have been interpreted as mandatory. Since evidence of intent was not overwhelming, it was reversible error to give the instruction. St. v. Kyle, 192 M 374, 628 P2d 263, 38 St. Rep. 578 Q (1981).

Improper Sentencings — Excess of Maximum — Failure to Prove Essential Element: Where the District Court sentenced defendant to 20 years for burglary and the maximum possible sentence was 10 years, the Supreme Court reduced the sentence to 10 years. The Supreme Court also reversed the 10-year sentence the defendant received upon his conviction for felony theft, as the State failed to prove the essential element that the value of the property taken exceeded $150. All other sentences received by the defendant, as well as the provision of the sentence for no parole or work furlough, were within the maximum allowed by law and as such were within the discretion of the sentencing judge and were not overturned. St. v. Sunday, 187 M 292, 609 P2d 1188 (1980).

Value as Essential Element of Felony Theft: Where the State failed to present any evidence that the value of the personalty allegedly taken by the defendant was greater than the $150 minimum required by statute, defendant was not required to object prior to the entry of judgment, because value is an essential element of the crime of felony theft and such an error may be raised at any time. The Supreme Court refused to take judicial notice of the value of the property because it was an essential element of the crime charged and the jury was not properly instructed as to value. St. v. Sunday, 187 M 292, 609 P2d 1188 (1980).

Victim Not Capable of Ratifying Criminal Act: Martinez was charged with theft of a stereo owned by Polotto. Polotto told the police that he did not give anyone permission to take his stereo, but at trial he testified that it was all right for Martinez to sell the stereo since the money was to be used for Polotto's bail. The Supreme Court said that a victim cannot ratify a criminal act after the crime has been completed. The testimony of Polotto goes to the element of "purpose of depriving the owner of the property". St. v. Martinez, 188 M 271, 613 P2d 974, 37 St. Rep. 982 (1980).

Mental State: Where intent is necessary in the commission of a crime, it may be proved by circumstances and by the action of the party at the time. The question of intent is a question for the jury. It may be inferred by them from what the accused does and says and from all the facts and circumstances involved in the transaction. One will be held accountable for the logical and ordinary consequences resulting from his acts. Where defendant admitted knowing the property was "hot" and displayed furtive actions in the presence of such property, he acted with purpose and knowledge sufficient to sustain a felony theft conviction. St. v. Jackson, 180 M 195, 589 P2d 1009 (1979).

Possession and Asportation Not Required: In prosecution for theft, the State need not prove a defendant took possession of another's property and carried it away; evidence which shows that defendant brought about a transfer of title and possession of property of another to one other than the owner through wrongful sale which deprived the owner of his property coupled with proof of the requisite mental state will suffice to sustain a conviction for theft. St. v. McCartney, 179 M 49, 585 P2d 1321 (1978).

Control Over Property: Control over the property of another as defined in 45-2-101(39) is an essential element of the offense of theft. Mere association with a stolen article is not sufficient to show control over the stolen article and does not establish the control element of theft. St. v. Campbell, 178 M 15, 582 P2d 783 (1978).

Location of Crime: Location of crime is not an element of the crime of theft as defined in this section, so the State need not present evidence establishing the location of the crime. St. v. Feeley, 170 M 227, 552 P2d 66 (1976).

Theft a Specific Intent Crime: Court held, inter alia, that suspicious circumstances in connection with control of alleged stolen items does not meet burden of proof of specific intent, after unrefuted explanation of possession by defendant. St. v. Jimison, 168 M 18, 540 P2d 315 (1975).

DEFENSES

Belief in General Self-Help Right Insufficient to Claim Fact Defense to Theft: Evidence of an honest, good faith belief, even if mistaken, that a defendant had a legal right to take or withhold the property of another to satisfy or secure a claimed debt is a cognizable fact defense to theft as defined in 45-2-101 and 45-6-301. The good faith belief precludes the state's contrary assertion that the defendant acted with knowledge that the defendant had no lawful authority to conditionally withhold the property for payment or as security on the debt. However, a mere belief in a general self-help right to satisfy or secure a claimed debt from nonspecific property owned by a debtor is insufficient to claim the defense. Rather, a defendant must prove a good faith belief in a civil law right to take or withhold specific, identifiable property. St. v. Mills, 2018 MT 254, 393 Mont. 121, 428 P.3d 834.

Partnership Interest in Property No Defense to Charge of Theft: Kuntz claimed that he could not be convicted of theft of partnership property because under Montana common law, a partner cannot be guilty of stealing partnership property because a partner's interest extends to every portion of partnership property. He also argued that nothing in the Uniform Partnership Act in effect prior to the 1993 revision superseded the common law. The Supreme Court ruled that Kuntz was entitled only to an interest in the property for partnership purposes and that state criminal law specifically abandoned the common-law theory and made it a crime to steal property in which an individual has an interest but to which the individual is not entitled. St. v. Kuntz, 265 M 253, 875 P2d 1034, 51 St. Rep. 502 (1994).

Restitution No Defense:

Under former law, a jury instruction was proper in stating that in the crime of larceny by bailee restitution is not a defense when the criminal intent existed at the time of the taking. The crime is complete at the point of taking with the intent to permanently deprive, and restitution is only a defense when the defendant intended to return the property at the time it was taken. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

In general, restitution, promised or performed, is not a defense to theft; nor is the fact that the owner of the stolen property eventually recovers it. People v. Green, 74 Ill. App.2d 308, 218

N.E.2d 840, 841 (1966), certiorari denied 387 US 930, rehearing denied, 389 US 890 (1967); People v. Gant, 121 Ill. App.2d 222, 257 N.E.2d 181, 183 (1970).

Intent of Restitution — No Negation of Embezzlement: The fact that a public officer made reimbursement to activity fund did not negate former offense of embezzlement which proscribed punishable conduct without reference to an intent to make restitution. St. v. Lewis, 169 M 290, 546 P2d 518 (1976).

INDICTMENT AND INFORMATION

Sufficiency of Charging Documents — Probability, Not Prima Facie Showing, That Defendant Committed Crime of Theft Sufficient: Harlson allegedly stole a pickup and drove it 60 miles an hour through downtown Billings. Harlson was charged with theft, criminal endangerment, and DUI. Harlson moved to dismiss on grounds that the charging documents failed to show probable cause or allege a specific location, a substantial risk of death or serious bodily injury, a speed limit, or the presence of people in the area. The motion was denied, and on appeal, the Supreme Court affirmed. Citing St. v. Elliott, 2002 MT 26, 308 M 227, 43 P3d 279 (2002), the court noted that the sufficiency of the charging documents is established by reading the information together with the affidavit in support of the motion for leave to file the information. The affidavit need not make out a prima facie case that defendant committed an offense. A mere probability that the offense was committed is sufficient. In addition, the charging documents made clear that Harlson allegedly committed theft of a vehicle and drove the vehicle at high speed through downtown Billings, exceeding the speed limit and endangering any pedestrians in the area. Harlson was acquitted of the DUI charge, so the sufficiency of the charging document as to DUI was not at issue. The theft and endangerment charges were thus supported by the charging documents, and the motion to dismiss was properly denied. St. v. Harlson, 2006 MT 312, 335 M 25, 150 P3d 349 (2006).

Anxiety During Preindictment Period Insufficient to Trigger Prejudice Establishing Due Process or Speedy Trial Violation: In January 1996, Burt's former employer filed suit to recover more than $250,000 that Burt allegedly stole while employed as office manager and bookkeeper for the business. In January 1997, the state filed an information charging Burt with five counts of felony theft. In October 1998, Burt was convicted on all counts and later appealed, alleging that the preindictment delay between the time when the state could have filed charges and the time when the information was actually filed violated her due process rights and that she suffered actual prejudice in the effect of the delay on her health and emotions. Applying the two-step analysis in St. v. Taylor, 1998 MT 121, 289 M 63, 960 P2d 773 (1998), the Supreme Court held that, without more, Burt was not prejudiced by the preindictment delay simply because of her anxiety. Anxiety, no matter how real, does not in itself impair the accused in defending against a charge and thus does not qualify as prejudice in the due process context. The delay did not cause a loss of witnesses or evidence, nor did requiring Burt to stand trial violate the fundamental conceptions of justice that lie at the base of our civil and political institutions and that define the community's sense of fair play and decency. Burt was not incarcerated. Her stress was not excessive. Her economic hardship, the stigma of being charged with a crime for the first time, and her recourse to a psychiatrist could not be considered consequences of the pretrial delay. Although a total of 208 days of institutional delay was chargeable to the state, the remainder was chargeable to Burt. Absent a showing of prejudice, the convictions were affirmed. St. v. Burt, 2000 MT 115, 299 M 412, 3 P3d 597, 57 St. Rep. 482 (2000), following Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998). See also St. v. Mouser, 806 P2d 330 (Alaska Ct. App. 1991).

Unreasonable Preindictment Delay — Dismissal Warranted: The state delayed about 2 years from the time of investigation of criminal allegations until indictment of Taylor on charges of theft of workers' compensation benefits. The state suggested that whatever prejudice Taylor suffered by the delay was insignificant to the more important necessity of allowing the state reasonable time to investigate the crime. The Supreme Court noted that the criminal justice system should put a premium on conscientious investigation and that prosecutors have no duty to file charges as soon as possible. Further, a reasonable preindictment delay ultimately protects both the state and the defendant. However, in this case, the delay was unreasonable because it resulted in the loss of potential testimony and the state presented no justification for the delay. Taylor's due process rights were violated, and the Supreme Court dismissed the information. St. v. Taylor, 1998 MT 121, 289 M 63, 960 P2d 773, 55 St. Rep. 481 (1998).

Restitution Allowed for Period Longer Than Charged Offense: Defendant was charged with theft and tampering with public records over a 2-year period. All but 6 months of her 20-year sentence were suspended on the condition that she repay the money she stole at work over a

5-year period. She argued the amount was not substantiated by evidence because she was not being tried for her activities during the first 3 years and that in essence, she was sentenced for criminal activity for which she was not convicted. There was evidence in the sentencing hearing that her crimes were spread out over a 5-year period. The restitution order was proper. St. v. Korang, 237 M 390, 773 P2d 326, 46 St. Rep. 892 (1989).

Similar Offenses — Not to Be Combined to Charge Felony — Not Same for Venue: Defendants were charged with theft of coins from a juke box in Roosevelt County and also with the same offense in Blaine County. Defendants were originally charged with misdemeanor theft in Blaine County and later charged with felony theft in an amended information combining the offense in Roosevelt County. Defendants objected, claiming the offenses were unrelated and that venue for the Roosevelt County theft did not properly lie in Blaine County. The general venue rule is that in criminal actions venue is proper only in the jurisdiction where the crime occurred. The State claimed that the offense fit into the "common scheme" exception, where the acts requisite to the commission of a crime, occurring in more than one jurisdiction, establish proper venue in any one of the affected counties. The court held that the offenses were linked by similarity and nothing else. The court held that two separate and distinct offenses had occurred in two different jurisdictions. Under Montana law, the crimes must be charged and tried in the counties where they occurred. St. v. Adams, 190 M 233, 620 P2d 856, 37 St. Rep. 2053 (1980).

Act and Mental State: In order to correctly charge a theft, there must be alleged in the indictment both an act and a mental state of the defendant. An indictment which fails to allege either of these two elements is fatally defective. People v. Hayn, 116 Ill. App.2d 241, 253 N.E.2d 575, 577 (1969); People v. Nunn, 63 Ill. App.2d 465, 212 N.E.2d 342, 346 (1965); St. v. Akers, 106 M 43, 74 P2d 1138 (1938); St. v. Grimsley, 96 M 327, 30 P2d 85 (1934).

Minor Variances Not Fatal: Minor variances between allegations in a complaint and the facts as finally proved at trial are not fatal to the validity of the indictment. People v. Jordan, 115 Ill. App.2d 307, 252 N.E.2d 701 (1969); People v. Kaye, 112 Ill. App.2d 141, 251 N.E.2d 306 (1969); People v. Harden, 42 Ill.2d 301, 247 N.E.2d 404, 406 (1969).

Ownership of Property: Ownership of property allegedly stolen is a necessary averment in an indictment for theft. People v. Berndt, 101 Ill. App.2d 29, 242 N.E.2d 273, 274 (1968); People v. Jones, 7 Ill. App.3d 183, 287 N.E.2d 206 (1972); St. v. Akers, 106 M 43, 74 P2d 1138 (1938); St. v. Grimsley, 96 M 327, 30 P2d 85 (1934). The primary purpose for this requirement that the ownership of the property be alleged in the indictment is to protect the accused from a possible subsequent trial for the same offense. People v. Harden, 42 Ill.2d 301, 247 N.E.2d 404, 406 (1969); St. v. Akers, 106 M 43, 74 P2d 1138 (1938); St. v. Grimsley, 96 M 327, 30 P2d 85 (1934).

Place and Time: An indictment is not defective if it fails to list the specific place and time of theft. People v. Orndoff, 39 Ill.2d 96, 233 N.E.2d 378, 381 (1969); People v. Patrick, 38 Ill.2d 255, 230 N.E.2d 843, 846 (1967). See also People v. Stevenson, 107 Ill. App.2d 441, 246 N.E.2d 309, 312 (1969); People v. Slaughter, 67 Ill. App.2d 314, 214 N.E.2d 20 (1966).

ADMISSIBILITY AND SUFFICIENCY OF EVIDENCE

Evidence of Other Theft and Property Damage and Threatening Note Admissible Under Transaction Rule: During defendant's trial for theft and burglary, the District Court allowed the introduction of evidence of a prior theft and property damage, as well as a threatening note, that defendant had been involved with earlier in the day. Defendant contended that the evidence related to other acts or crimes and should not have been admitted. However, the prior theft and property damage and the note were intertwined with the theft and burglary, and the jury was entitled to hear what had transgressed immediately prior to the commission of the crime charged, so the evidence was admissible under the transaction rule. St. v. Flowers, 2004 MT 37, 320 M 49, 86 P3d 3 (2004).

Sufficient Evidence to Support Conviction for Theft of Cow: Benson admitted that on December 5, 1996, he killed a cow on his land and prepared it for butchering. The following day, a fire was visible on Benson's land. Partially burned remains of a cow and a fresh waste pile were discovered at the site of the fire. Included in the remains were a cow's head, a red hide with a hole cut in the middle of the left side, and an immature uterus that had no ovaries attached to it. This evidence was used to convict Benson of theft of one of his neighbor's cows. An expert testified that the cow Benson butchered probably had been surgically spayed based on the uterus with missing ovaries. Benson's neighbor was likely the only person in the area who spayed her heifers that year, and the hole in the hide matched the area where the neighbor branded her cattle. Benson contended that the evidence was not conclusive because the expert's testimony could as easily have confirmed Benson's version of the events. The Supreme Court noted that the jury has the prerogative to accept or reject testimony and must determine which of two conflicting versions of an incident is reasonable. The trial court properly instructed the jury that it was not bound to accept the expert opinion as conclusive, but the jury nevertheless had the prerogative to do so. Because a rational trier of fact could link evidence of the cow's head, hide, and uterus with a cow once belonging to the neighbor, Benson was properly found guilty of depriving his neighbor of a cow. St. v. Benson, 1999 MT 324, 297 M 321, 992 P2d 831, 56 St. Rep. 1295 (1999). See also St. v. Crazy Boy, 232 M 398, 757 P2d 341, 45 St. Rep. 1145 (1988).

Sufficient Corroborative Evidence of Burglary and Theft to Allow Testimony of Legally Accountable Witness: Before his trial for burglary and theft, Teske sought to exclude the testimony of a witness who was alleged to be legally accountable for Teske's crimes. Nevertheless, the District Court allowed the witness to testify. The testimony was corroborated by the testimony of another witness and by the physical evidence. Although the witness may have been more involved in the crimes than he was willing to admit, the question before the jury was whether Teske was guilty, and on that issue, there was sufficient evidence to convict. St. v. Teske, 1999 MT 227, 296 M 88, 987 P2d 368, 56 St. Rep. 894 (1999).

Changing Character of Property as Evidence of Knowledge That Property Was Stolen: E.B.G. recycled copper wire that he had burned in order to remove insulation, even though the wire was worth considerably more with the insulation intact. This evidence was sufficient to lead a jury to determine that E.B.G. knew the wire was stolen and therefore tried to change its appearance. In re E.B.G., 258 M 96, 852 P2d 538, 50 St. Rep. 445 (1993).

Circumstantial Evidence Sufficient for Conviction: The defendant was arrested after selling several stolen items to a recycling center. The defendant argued that the circumstantial evidence was not sufficient to prove that he had actually stolen the items. The Supreme Court held that possession of stolen property, accompanied by other incriminating circumstances, and a false or unreasonable explanation by the suspect is sufficient to sustain a conviction. St. v. Ramstead, 243 M 162, 793 P2d 802, 47 St. Rep. 1101 (1990), followed in In re E.B.G., 258 M 96, 852 P2d 538, 50 St. Rep. 445 (1993).

Sufficient Evidence of Theft of Public Money and Tampering With Public Records by Public Employee: Evidence was sufficient to support convictions of theft and tampering with public records. Seven witnesses, including defendant's boss and co-workers and a CPA hired to do an audit, testified to defendant's behavior at work and how it fit the pattern of missing money. There was testimony of direct observation of her voiding entries on the cash register and making other unusual entries. There was also direct observation of unusual calculations in balancing the books and in working with cash register tapes and deposit slips. The testimony was accompanied by exhibits of books and records. St. v. Korang, 237 M 390, 773 P2d 326, 46 St. Rep. 892 (1989).

Corroborated Evidence Sufficient to Support Conviction: Evidence was sufficient to support a guilty verdict on counts of robbery, sexual assault, and sexual intercourse without consent by accountability when the victim's testimony was corroborated by: (1) two people who came to an accomplice's apartment during the assault; (2) a police officer who interviewed the victim immediately after the assault; (3) the physician who examined the victim; and (4) two investigating officers who searched the apartments of defendant and accomplice. St. v. Powers, 233 M 54, 758 P2d 761, 45 St. Rep. 1286 (1988).

Sufficient Evidence of Common Scheme Felony Theft: Evidence was sufficient to prove common scheme felony theft when defendant committed 19 related acts of misappropriation of school district property for personal gain over a 5-year period after being warned orally and in writing that his activities were unauthorized and unacceptable. St. v. Milhoan, 224 M 505, 730 P2d 1170, 43 St. Rep. 2371 (1986).

Proof That Corporate Owner Is Incorporated: When theft is charged and the owner of the stolen property is a corporation, the State need not allege and prove that the owner is incorporated. St. v. Johnson, 199 M 211, 646 P2d 507, 39 St. Rep. 1014 (1982).

Proving Possession Sufficient to Prove Ownership — Theft From Store: Proof of possession suffices to prove ownership for purposes of theft, whether the possessor is an individual or a corporation, and where State proved by testimony of jewelry store employees that stolen rings had been in the store's possession at the time they were stolen, there was adequate proof of possession. St. v. Johnson, 199 M 211, 646 P2d 507, 39 St. Rep. 1014 (1982).

Theft From Store — Circumstantial Proof of Exercise of Control: Although no witness actually saw stolen rings in the possession of defendant charged with theft of rings from jewelry store, several employees and customers saw him behind the counter where the ring case was kept, with his hand inside the case holding the tray containing the rings, and saw him rapidly leave the store. The tray contained rings 10 minutes prior to defendant's departure and was found to be empty immediately after his departure. There was substantial credible evidence to support the jury's finding that defendant exercised unauthorized control over the rings, and the verdict of guilty would not be overturned. St. v. Johnson, 199 M 211, 646 P2d 507, 39 St. Rep. 1014 (1982).

Theft — Establishment of "Knowing" Element: Defendant was convicted of felony theft for knowingly obtaining and exercising control over stolen property, a truckload of lumber. Defendant contended that the State failed to establish that he "knew" the lumber had been stolen. The State first had to establish that defendant "knowingly" obtained control of the lumber. This was proven by establishing that he "was aware of his conduct in doing the act". Second, the State had to prove that he obtained control "knowing" the property to have been stolen. This was established by showing he was "aware of a high probability" that the lumber was stolen. Third, the State had to show he used the lumber "knowing" his use would deprive the owner of the property. This was proven by showing it was "highly probable that the result caused by his conduct" would deprive the owner of his property. The State could prove this through the use of circumstantial evidence. In looking at all the facts, there was sufficient evidence to sustain defendant's conviction. St. v. Weaver, 195 M 481, 637 P2d 23, 38 St. Rep. 2050 (1981).

Photographic Lineup — When Not Overly Suggestive — No Right to Have Counsel Present: A defendant appealed from a robbery conviction. He alleged that a motion to suppress evidence relating to pretrial photographic lineup procedures should have been sustained. The motion was based on contentions that the victim's ability to identify him was tainted by the fact the victim had seen him in police custody shortly after the robbery and that the victim may have seen another photograph of him which had been in the custody of a police officer. The defendant also challenged the suggestiveness of the lineup because his attorney was not present. If the photographic identification process was so suggestive as to present a "substantial likelihood of misidentification", an in-court identification of the defendant would not be permitted. Under the circumstances of this particular case, there was not a substantial chance of misidentification. Further, the reviewing court followed a U.S. Supreme Court decision and stated that the confrontation clause is not violated by a photoarray identification process, and therefore the right to counsel does not attach. Accordingly, the motion to suppress was properly denied. St. v. Dahl, 190 M 207, 620 P2d 361, 37 St. Rep. 1852 (1980).

Discovery Limited by Court — Witness' Bias a Jury Question: The defendant, convicted of theft in the holdup of a truckstop, contended that the trial court had erred in refusing to allow discovery of the "rap sheet" of a suspected accomplice. Defendant argued on appeal that he was denied due process. The reviewing court disagreed saying that (unlike the defendant in the case this defendant relied upon, who was unable to make a record from which to argue the witness' bias or lack of impartiality because the witness' criminal record could not be presented to the jury) this defendant was permitted to present fully evidence of the criminal character and bias of the suspected accomplice. The jury was aware of the immunity bargain between the witness and the prosecution and of the witness' complicity in the truckstop theft. The trial court's denial of the defendant's motion was well within its discretion to control cross-examination. St. v. Dolan, 190 M 195, 620 P2d 355, 37 St. Rep. 1860 (1980).

Proof of Crimes Charged — Proof of Ownership of Stolen Money — Disbelief of Portion of Witness' Testimony as Not Requiring Total Disbelief: Defendant charged with robbery and theft was convicted of theft but found not guilty of robbery. One ground of his appeal was the assertion that the prosecution's evidence was insufficient to prove theft. Defense counsel argued that the jury must have distrusted the testimony of the truckstop cashier who was held up because they found the defendant not guilty of robbery. Further, since the cashier's testimony was critical to prove a theft was committed, the evidence was insufficient to prove theft if the jury disbelieved the cashier. The Supreme Court dismissed this argument because sufficient disbelief of the cashier's testimony to find the defendant not guilty of robbery would not require the jury to disbelieve all of the cashier's testimony. The jury had instructions about its right to believe or disbelieve any portion of a witness' testimony. As long as there was substantial evidence to support the verdict, it will not be disturbed on appeal. The Supreme Court found sufficient evidence to convict here and sufficient evidence to refute the defendant's argument that the truckstop did not own the stolen money. Here, proof of possession sufficed to prove ownership because the defendant's jury instruction to that effect was accepted by the court. St. v. Dolan, 190 M 195, 620 P2d 355, 37 St. Rep. 1860 (1980).

Delinquent Youth Conviction — Inadmissible Hearsay — Corroboration of Testimony of Others Accountable for Same Offense: After a minor was cited for running a red light and for driving without a license, the County Attorney charged he was a delinquent youth under the Youth Court Act alleging the minor had taken the car without the owner's consent. The minor appealed stating that the testimony of two police officers concerning the stolen property report was inadmissible hearsay and that his conviction declaring him a delinquent youth was improperly based on the testimony of other individuals who were legally accountable for the offense. The Supreme Court found that the officers' testimony was inadmissible hearsay. The court also found that the corroborating evidence supplied by the officer who stopped the vehicle tended to connect the youth directly with the offense and that, therefore, the testimony of other minors responsible or legally accountable for the same offense was properly admitted. Despite the fact that the testimony of the other youths in the car, in conjunction with the independent corroborating evidence, could support a conviction in some cases, the reviewing court reversed the conviction. It found that the admission of the hearsay so affected the substantial rights of the accused as to require reversal. In re D.W.L., A Youth, 189 M 267, 615 P2d 887, 37 St. Rep. 1452 (1980).

Voluntary Admission of Guilt — Factual Basis of Plea Not Required: When a plea is otherwise voluntary, the record need not disclose a factual basis for the plea, but the conviction may rest on the admission of guilt. Defendant knew the difference between misdemeanor and felony theft under 45-6-301, yet pled guilty to the felony theft of two of the three items charged. If the plea of guilty to felony theft was voluntary, then that plea constitutes an admission of sufficient proof of value to sustain the judgment. Brown v. Crist, 492 F. Supp. 965 (D.C. Mont. 1980).

Mental State: There was sufficient evidence to prove that defendant acted "purposely" or "knowingly" where the evidence showed that defendant had described the property as "hot" and had furtively sought out an isolated location before displaying the goods to a prospective purchaser; that defendant was in possession of the stolen goods was a factor to be considered in connection with other circumstances in determining guilt. St. v. Jackson, 180 M 195, 589 P2d 1009 (1979).

Owner Identification of Stolen Property: Rejecting defendant's argument that "positive" identification of stolen property cannot be made unless the property carries some unique marking, the Montana court held that if the owner can testify that the recovered property is similar in appearance to his property, then the property has been sufficiently identified to become evidence upon which a conviction can be based. St. v. Jackson, 180 M 195, 589 P2d 1009 (1979).

Value: Where testimony established that stolen property was purchased new a few years before the theft at a cost in excess of $1,700 and it was shown that defendant attempted to sell the property for $800, there was sufficient evidence of value in excess of $150 and the prices established by defendant were tacit admissions that the property was valued at $150 or more. St. v. Jackson, 180 M 195, 589 P2d 1009 (1979).

Owner Deprived of Property: Evidence that defendant issued bill of sale to one who thought him to be rightful owner and that defendant forged rightful owner's name to bill of sale held sufficient to show that defendant had knowingly brought about transfer of possession of property of another so as to deprive the owner of the property. St. v. McCartney, 179 M 49, 585 P2d 1321 (1978).

Mere Association: Evidence that defendant was present on certain occasions at house where stolen property was found and that defendant paid rent for the premises one time while named lessee was being hospitalized held insufficient to establish control over the property and show more than mere association of defendant with the stolen goods. St. v. Campbell, 178 M 15, 582 P2d 783 (1978).

Intent:

Even if defendants shot steer accidentally while hunting deer, they satisfied the prima facie case for theft when they "knowingly" butchered steer belonging to another and carried carcass to their home, thus depriving lawful owner of his property. St. v. Openshaw, 172 M 511, 565 P2d 319 (1977).

Defendant's testimony that he had had bill of sale for stolen horse, coupled with evidence that he did not produce the bill of sale either when the horse was subsequently inspected or when he sold it and evidence that on the day of the inspection he told a witness that he had never seen the horse before but told the inspector that he had owned the horse for some time held sufficient to establish the criminal intent element, i.e., that defendant knew he possessed a horse belonging to someone else and did so with criminal intent to deprive owner of horse. St. v. Feeley, 170 M 227, 552 P2d 66 (1976).

Bogus Bill of Sale: Evidence that defendant delivered bogus bill of sale for stolen horse to auction yard, claimed to be wife of person named in bill as owner, and directed yard to pay proceeds from sale of horse to her daughter held sufficient to establish that defendant was at least aware of high probability that the horse was stolen and that defendant had exerted unauthorized control over the horse with the purpose of depriving the true owner of the horse. St. v. Farnes, 171 M 368, 558 P2d 472 (1976).

Unauthorized Control: Evidence that defendant was in possession of stolen horse, that defendant sold the horse, that the horse was owned by someone else, and that defendant was not acting on behalf of the owner at any time held sufficient to indicate that defendant exerted unauthorized control over property of the owner so as to deprive the owner of the property. St. v. Feeley, 170 M 227, 552 P2d 66 (1976).

Proof of Mental State Required: Proof that property had been stolen is not sufficient to establish theft or possession of stolen property since proof is also required of the mental state of the defendant. St. v. Jimison, 168 M 18, 540 P2d 315 (1975).

Circumstantial Evidence: Circumstantial evidence surrounding theft and the possession of stolen property is admissible in a prosecution under this section and may give rise to inferences of guilt to support a conviction. People v. Bixler, 49 Ill.2d 328, 275 N.E.2d 392, 396 (1971), certiorari denied 405 US 1066 (1972); People v. Canaday, 49 Ill.2d 416, 275 N.E.2d 356, 361 (1971); People v. Moore, 130 Ill. App.2d 266, 264 N.E.2d 582, 584 (1970). See also People v. Smith, 107 Ill. App.2d 267, 246 N.E.2d 880, 881 (1969); People v. Curtis, 116 Ill. App.2d 298, 254 N.E.2d 87, 89 (1969). As with other elements of the offense of theft, the required mental state may be deduced by the trial court from facts and circumstances surrounding the alleged criminal act. People v. McClinton, 4 Ill. App.3d 253, 280 N.E.2d 795, 798 (1972). See also People v. Williams, 75 Ill. App.2d 342, 221 N.E.2d 28 (1966). Attention is directed to the following cases which examined whether the use of specific evidence constituted reversible error in trial court theft: People v. Adams, 106 Ill. App.2d 396, 245 N.E.2d 904, 909 (1969); People v. Hyde, 97 Ill. App.2d 43, 239 N.E.2d 466, 470 (1968).

JURY INSTRUCTIONS

Sufficient Evidence to Support Conviction for Theft of Cow: Benson admitted that on December 5, 1996, he killed a cow on his land and prepared it for butchering. The following day, a fire was visible on Benson's land. Partially burned remains of a cow and a fresh waste pile were discovered at the site of the fire. Included in the remains were a cow's head, a red hide with a hole cut in the middle of the left side, and an immature uterus that had no ovaries attached to it. This evidence was used to convict Benson of theft of one of his neighbor's cows. An expert testified that the cow Benson butchered probably had been surgically spayed based on the uterus with missing ovaries. Benson's neighbor was likely the only person in the area who spayed her heifers that year, and the hole in the hide matched the area where the neighbor branded her cattle. Benson contended that the evidence was not conclusive because the expert's testimony could as easily have confirmed Benson's version of the events. The Supreme Court noted that the jury has the prerogative to accept or reject testimony and must determine which of two conflicting versions of an incident is reasonable. The trial court properly instructed the jury that it was not bound to accept the expert opinion as conclusive, but the jury nevertheless had the prerogative to do so. Because a rational trier of fact could link evidence of the cow's head, hide, and uterus with a cow once belonging to the neighbor, Benson was properly found guilty of depriving his neighbor of a cow. St. v. Benson, 1999 MT 324, 297 M 321, 992 P2d 831, 56 St. Rep. 1295 (1999). See also St. v. Crazy Boy, 232 M 398, 757 P2d 341, 45 St. Rep. 1145 (1988).

Failure to Instruct Jury on Defense of Consent Not Reversible Error: Defendant convicted of theft contended that the District Court had a duty to instruct the jury on every theory having support in the evidence. While his counsel did not offer an instruction on the defense of consent, defendant contends that had the court given an instruction on consent as it related to theft, the jury could have concluded that he did not act beyond the scope of his authority by selling his girlfriend's automobile and television. The Supreme Court held that the District Court was under no obligation to instruct on a theory that had not been established by evidence and did not err by failing to instruct the jury on the defense of consent as it related to theft. St. v. Tumbleson, 249 M 153, 815 P2d 592, 48 St. Rep. 690 (1991).

Demonstration of Stolen Item's Operability — No Objection — No Instruction: Defendant was convicted of felony theft of a jackhammer. At trial, the operability of the jackhammer was demonstrated in response to testimony that the jackhammer would have greater value if it worked. Defendant failed to object at trial that it was not operated "under a load". The court rejected defendant's attack on the validity of the demonstrative evidence and his complaint that there was no precautionary instruction to the jury about the demonstration. Defendant proposed no such instruction to the court as required by 46-16-401 (as it read prior to 1991 amendment). St. v. Field, 215 M 361, 697 P2d 1339, 42 St. Rep. 431 (1985).

Value of Stolen Property at Issue — Error in Refusal of Instruction on Lesser Included Offense: Where the defendant had been charged with the felony theft of a guitar alleged to have a value of more than $150, the District Court erred in refusing an instruction requiring the jury to convict the defendant of the lesser included offense of misdemeanor theft if they found the value of the guitar to be less than $150. Under the rationale of St. v. Taylor, 163 M 106, 515 P2d 695 (1973), the instruction should have been given because the weight of the evidence of value of the guitar was a question for the jury. St. v. Young, 206 M 19, 669 P2d 239, 40 St. Rep. 1474 (1983).

Depriving Owner of Property: The definitions of "deprive" contained in 45-2-101 are alternative definitions, and court in trial for theft of rings from jewelry store properly gave instruction giving a different definition than that contained in the instruction offered by defendant. The instruction offered by defendant referred to the permanent withholding of property of another. The instruction given adequately defined "deprive" as it applied to the facts, and defendant denied asserting any control whatsoever, so that there was no issue as to permanency. St. v. Johnson, 199 M 211, 646 P2d 507, 39 St. Rep. 1014 (1982).

Obtaining or Exerting Control: The defendant requested instruction that possession is the knowing control of anything for a sufficient time to be able to terminate control. The trial court properly refused that instruction and gave an instruction in terms of the statute concerning the definition of "obtains or exerts control". St. v. Johnson, 199 M 211, 646 P2d 507, 39 St. Rep. 1014 (1982).

Improper Jury Instructions — Elements of Crime — Failure to Pursue Civil Remedy Implying Theft — "Plain Error": The jury was not instructed on the statutory elements of the crime. The jury's instructions on the defendant's civil remedy, an agister's lien, permitted the inference from his failure to pursue the civil remedy that he was guilty of theft. In granting a new trial, the Supreme Court noted that the issue of jury instructions not offered or objected to at trial, usually a nonappealable issue, was reviewed here to determine if the jury was properly instructed. The failure to instruct on the elements of the crime constituted "plain error". Instructing the jury that each element of the crime had to be proved was insufficient if the elements were not given to the jury as well. St. v. Lundblade, 191 M 526, 625 P2d 545, 38 St. Rep. 441 (1981), distinguished in St. v. Williams, 2015 MT 247, 380 Mont. 445, 358 P.3d 127.

"Mere Presence at Scene" Instruction Not Required: In appealing his conviction for robbery, the defendant claimed that he had been entitled to a jury instruction that "mere presence at or about the scene where a crime is committed does not make one a party to a crime" because his defense involved an admission of being at the scene of the crime but of not being involved except after the fact. The reviewing court concluded that the defendant had not been prejudiced by the trial court's refusal to give this instruction, noting that no authority was cited for this instruction, that the jury instruction fairly covered the issues raised, and that the charge of robbery as well as the jury instructions required the jury to find more than mere presence at the scene of the robbery. Thus, the jury was fully aware, even without the instruction, that mere presence at the scene of a crime was not sufficient to prove criminal involvement. The jury believed that the defendant committed the crime by holding the knife to the store clerk's throat, and the evidence was clearly sufficient to sustain this belief. St. v. Dahl, 190 M 207, 620 P2d 361, 37 St. Rep. 1852 (1980).

Sandstrom Instruction — Not Harmless: Martinez was charged with theft of a stereo owned by Polotto. Polotto told the police that he had not given anyone permission to take his stereo. On cross-examination Polotto testified that he ratified the taking after he found out that the stereo was being sold to raise his bail money. There was also testimony that Martinez was selling the stereo for money to get out of town. The jury was given the Sandstrom instruction. The element of intent was one of the principal issues at trial, and there was no overwhelming evidence of Martinez's intent. As a result, the use of the instruction cannot be considered harmless. Conviction was reversed and a new trial ordered. St. v. Martinez, 188 M 271, 613 P2d 974, 37 St. Rep. 982 (1980).

Instruction on Lesser Included Offense Required: An instruction on a lesser offense must be given if there is evidence introduced which could lead a jury to rationally believe that the defendant is guilty of a lesser offense and innocent of the greater offense. It is stressed that the belief must be rational. St. v. Jackson, 180 M 195, 589 P2d 1009 (1979).

Misdemeanor Theft: Where no evidence was introduced which would lead a jury rationally to believe that the stolen property was worth less than $150 and where, in fact, the uncontroverted evidence placed its value between $800 and $1,600, an instruction on misdemeanor theft was not required. St. v. Jackson, 180 M 195, 589 P2d 1009 (1979).

Definitions of Mental States: The Illinois appellate court has held that once a trial court gave instructions defining the crime of theft and the essential elements to be proved to sustain the charge, the court had no further responsibility to instruct the jury as to specific definitions of the mental states required in the statute. People v. Wick, 125 Ill. App.2d 297, 260 N.E.2d 487, 488 (1970).

Objection: If the defendant fails to make objections to instructions given by the trial court, any error in instructions is waived. People v. Wooff, 120 Ill. App.2d 225, 256 N.E.2d 881, 882 (1970).

THEFT OF MOTOR VEHICLE

Defendant Not Involved in Initial Vehicle Theft or Damage — Restitution Not Owing: Seghetti stole a vehicle and picked up Breeding and another friend for a ride, during which the vehicle was damaged while Seghetti was driving. Seghetti then revealed that the vehicle was stolen, and Breeding suggested driving the vehicle to California. During the trip, Breeding and Seghetti shared the driving. California police stopped the vehicle for a broken turn signal, and Breeding and Seghetti were subsequently charged with and convicted of felony theft. At sentencing, the District Court ordered that Breeding pay restitution for damage to the vehicle. Asserting that he was not driving when the damage occurred and thus was not responsible for the damage, Breeding appealed the restitution order. The Supreme Court reversed. Without a causal connection between Breeding's commission of theft and the damage inflicted earlier by Seghetti, there was no basis for requiring Breeding to pay restitution for that damage, so the District Court was ordered to strike the restitution requirement from Breeding's sentence. St. v. Breeding, 2008 MT 162, 343 M 323, 184 P3d 313 (2008). See also St. v. Cole, 2020 MT 259, 401 Mont. 502, 474 P.3d 323, in which restitution was reversed when the state failed to prove causal nexus.

Felony Theft for Failure to Return Loaned Vehicle — Assessment of Rental Fees Improper: After Dahlin's van broke down, he got permission to use Anguiano's truck to drive from Lavina, in Golden Valley County, to Billings for work, with the understanding that the truck would be returned the following day. The arrangement worked for about 3 months, but one day, Dahlin took the truck and did not return it or contact Anguiano thereafter, so Anguiano reported the truck as stolen. Dahlin was arrested, convicted of felony theft, and ordered to pay restitution in the amount of $1,336.12, including $500 for fair rental of the truck. On appeal, Dahlin contended that the state failed to prove the elements of theft, because he had permission to use the truck, and failed to prove that the theft occurred in Golden Valley County. Dahlin also argued that the rental fees were improperly assessed because there was no evidence to support the award. The Supreme Court held that Dahlin's failure to return the truck as agreed was sufficient to establish that the theft had occurred because Anguiano was deprived of the property. The court also noted that the agreement provided that the truck be returned to Golden Valley County and thus fixed that county as the situs of the crime. However, the state conceded, and the court agreed, that the assessment of rental fees was improper, so restitution was reduced by $500. St. v. Dahlin, 2004 MT 19, 319 M 303, 84 P3d 35 (2004). See also St. v. White, 230 M 356, 750 P2d 440 (1988).

Interaction With Motor Vehicle Theft Statute — Jurisdiction: While 45-6-308 covers the specific offense of theft of motor vehicles, prosecution for such activities are possible under this section. Unauthorized use of a motor vehicle under 45-6-308 is a lesser included offense in the crime of theft defined by this section, and the District Court retains jurisdiction to accept a guilty plea on the lesser offense, although the latter is a misdemeanor. St. v. Shults, 169 M 33, 544 P2d 817 (1976).

Application of Section by Illinois Courts: For decisions interpreting the application of this section to theft of motor vehicles, attention is directed to the following cases: People v. Bullock, 123 Ill. App.2d 30, 259 N.E.2d 641, 643 (1970); People ex rel. Insolata v. Pate, 46 Ill.2d 268, 263 N.E.2d 44 (1970); People v. Torello, 109 Ill. App.2d 433, 248 N.E.2d 725, 728 (1969); People v. Smith, 107 Ill. App.2d 267, 246 N.E.2d 880, 882 (1969); People v. Schumacher, 90 Ill. App.2d 385, 234 N.E.2d 574, 575 (1968); People v. Davis, 69 Ill. App.2d 120, 216 N.E.2d 490 (1966); People v. Nunn, 63 Ill. App.2d 465, 212 N.E.2d 342, 345 (1965); People v. Walker, 54 Ill. App.2d 365, 204 N.E.2d 141, 143 (1965).

THEFT OF ENTRUSTED PROPERTY

Sentencing Condition Unrelated to Underlying Offense Stricken: Attorney Holt pleaded not guilty to five counts of felony theft of clients' funds. As a condition of a suspended sentence, the trial court prohibited Holt from possessing or consuming alcohol and from establishing a checking or credit card account. Holt appealed both sentencing conditions. The Supreme Court noted that under St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), and St. v. Lucero, 2004 MT 248, 323 M 42, 97 P3d 1106 (2004), a sentencing limitation or condition must have some correlation to the underlying offense in order to be reasonably related to the objectives of rehabilitation and protection of the victim and society. In this case, there was no evidence that alcohol contributed to the offenses in question, so the Supreme Court struck that condition from the judgment. However, there was a correlation between Holt being allowed to establish a checking or credit card account and the crime of theft of clients' funds, so imposition of that condition was not improper and was affirmed. St. v. Holt, 2006 MT 151, 332 M 426, 139 P3d 819 (2006), followed in St. v. Armstrong, 2006 MT 334, 335 M 131, 151 P3d 46 (2006), and St. v. Greeson, 2007 MT 23, 336 M 1, 152 P3d 695 (2007).

Sufficient Probable Cause for Filing Information — No Requirement That Information Supporting Charge Be Excised Before Determination of Probable Cause Made: Attorney Holt pleaded not guilty to five counts of felony theft of clients' funds, then moved to dismiss two of the counts, alleging that the affidavit supporting the information did not establish probable cause. The motion was denied. Pursuant to a subsequent plea agreement, Holt pleaded nolo contendere to the contested counts, but reserved the right to withdraw the plea if the agreed sentences were not imposed. Following conviction, Holt appealed on grounds that the District Court erred by not dismissing the counts because the affidavit in support of the information did not allege independent admissible evidence that Holt exercised unauthorized control over the money that was allegedly stolen, asserting in effect that the affidavit contained evidence that must be excised and that without that evidence, the affidavit failed to establish probable cause. The Supreme Court affirmed. A showing of a mere probability that a defendant committed the offense charged is sufficient to establish probable cause to file an information. It is not required that information in the affidavit supporting a charge, which might later be found inadmissible at trial, be excised before a determination of probable cause is made. At the time that Holt entered a plea, it was too early in the case to hold that a motion to dismiss would be successful at the conclusion of the state's case in chief, so denial of the dismissal motion was not error. St. v. Holt, 2006 MT 151, 332 M 426, 139 P3d 819 (2006).

Dissolved Corporation's Officer's Use of Corporate Funds for Personal Expenses: Although the Montana Business Corporation Act does not specifically limit a director's use of corporate property to corporate purposes, the limitation is implied by the duties of good faith and care fundamental to a director's relationship to the corporation. Absent shareholders consent, defendant, who was president, director, and majority shareholder of a corporation, was not authorized to use its money for noncorporate purposes, and after it was dissolved, he was required to hold its assets in trust until creditor and shareholder debts were satisfied. Therefore, he was not authorized to write checks on the corporation's account to pay his personal debts to his attorney and former wife. He produced no evidence to support his claim that his need to pay child support to his wife and that his arrest for failure to do so would negatively affect the company's future and therefore justified the checks to her. Furthermore, it was not in the best interests of winding up the dissolved corporation. Moreover, it was not a defense that because of his ownership interest in the company he was spending his own money. The shareholders have a vested equitable interest in a dissolved corporation's property, but do not have a legal ownership interest in the property until the creditors are paid and the winding up is complete, at which point the shareholders have a legal ownership interest deriving from their right to a pro rata share of the assets remaining after the creditors are paid. Because the corporation was insolvent when the checks were written, there would have been no assets left for the shareholders had the creditors been paid off at the time that the checks were written. Therefore, it could not be said that defendant stole their money, and the theft conviction was set aside. St. v. Debus, 2002 MT 307, 313 M 57, 59 P3d 1154 (2002).

Criminal Liability — Intentional Breach of Fiduciary Duty: Defendant entered a lease agreement with Town Pump, Incorporated to operate a gas station. Defendant was required to make daily deposits to Town Pump's bank account as payment for gasoline sold. A gasoline audit revealed defendant had failed to deposit $6,377 of proceeds due Town Pump. Defendant contended that a debtor-creditor relationship existed and that he only had a contractual duty to repay the debt, and that a breach of this civil obligation could not be the basis for criminal liability. The evidence showed Town Pump entrusted defendant with the gasoline it supplied with the understanding that its share of sale proceeds would be deposited to its account. The jury was presented with the factual question of when title to the gasoline passed. The jury concluded title did not pass upon delivery. Through the course of dealing in the months preceding the audit, defendant demonstrated his understanding of the entrustment and his responsibility. The deviation from this recognized fiduciary duty when he falsified accounting reports to the company clearly indicated an intent to purposely deprive Town Pump of its proceeds. The deliberate attempt to conceal retention of the proceeds is inconsistent with an ordinary debtor-creditor relationship. There was nothing in the record to show the parties' intent to create a debtor-creditor relationship. Defendant could not avoid criminal liability for taking money entrusted to him by calling it a loan. St. v. Frederick, 208 M 112, 676 P2d 213, 41 St. Rep. 207 (1984).

Security Deposit — Landlord's Refusal to Return: This section encompasses the prior offense of embezzlement. It was held, however, that this section does not apply to a landlord's refusal to return a portion of a security deposit. People v. Mattingly, 106 Ill. App.2d 74, 245 N.E.2d 647, 648 (1969).

Disparity Between Amount Alleged in Indictment and That Proven: Where a charge of embezzlement under this section was adequately proved and established by evidence received in the trial court, it was held to be immaterial that the total amount proven to have been embezzled fell short of the amount alleged in the indictment. People v. Brown, 68 Ill. App.2d 17, 214 N.E.2d 465, 469 (1966).

THEFT OF PUBLIC ASSISTANCE

Theft of Medicaid Funds Properly Charged as Felony Theft — Prosecutorial Discretion in Charging Crime When Facts Support More Than One Crime: Podiatrist Daniels billed and received Medicaid reimbursement for a number of custom orthotic shoe inserts that were never provided to Medicaid-eligible patients. Daniels was charged under this section with felony theft of public assistance and convicted. On appeal, Daniels contended that he should have been charged with Medicaid fraud under 45-6-313 instead of felony theft. The Supreme Court disagreed. The language of this section is broad enough on its face to encompass obtaining or exerting unauthorized control over Medicaid funds. Although 45-6-313 specifically covers the crime of Medicaid fraud, the facts of the case supported a possible charge under either statute, so the crime to be charged was a matter of prosecutorial discretion. St. v. Daniels, 2003 MT 30, 314 M 208, 64 P3d 1045 (2003).

False Representation of Separate Household to Obtain Food Stamps: The Supreme Court affirmed a conviction for felony theft of food stamps that involved false representations after finding that defendant did not maintain a separate household in accordance with governing regulations, and that the false statement was knowingly made since the regulations had been reviewed by defendant with several SRS employees but the application for assistance nevertheless claimed separate households. St. v. Crumley, 223 M 224, 725 P2d 214, 43 St. Rep. 1675 (1986).

Meaning of "False Statement": A welfare recipient's failure to report changes in his financial condition does not constitute the making of a "false statement" within the meaning of subsection (4)(a) of this section. St. v. Farrell, 207 M 483, 676 P2d 168, 41 St. Rep. 91 (1984).

Consideration of Indigency in Sentencing — Violation of Due Process: Defendant was convicted of theft of public assistance funds in violation of 45-6-301 and sentenced to the maximum term of imprisonment, 10 years. The sentence was then suspended on the conditions that defendant seek alcohol treatment, make restitution of the funds, and pay the fees of his court-appointed attorney. The Supreme Court ruled that if the reason for defendant's receiving the maximum sentence was that he is indigent and will therefore make restitution slowly, the sentence is a violation of his right to due process. The court remanded the case for reconsideration of the sentence in view of the opinion. St. v. Farrell, 207 M 483, 676 P2d 168, 41 St. Rep. 91 (1984).

FRAUD OR DECEPTION

Restitution Proper for Insurance Fraud: Borsberry was convicted of insurance fraud and ordered to pay restitution of $22,997.52 to the insurer in repayment of the fraudulently obtained amount. Borsberry appealed on grounds that restitution was not proper because the insurer was not a victim who suffered a pecuniary loss. The Supreme Court disagreed. Borsberry's policy contained a provision that his policy would be voided if a fraudulent claim was filed. The insurer paid the fraudulent claim under a reservation of rights and suffered a pecuniary loss based on Borsberry's criminal activity. Under Tyler v. Fireman's Fund Ins. Co., 255 M 174, 841 P2d 538 (1992), insurance payments made under fraudulent claims entitle the insurer to restitution in the amount of the payments. The restitution fell within statutory parameters and was affirmed. St. v. Borsberry, 2006 MT 126, 332 M 271, 136 P3d 993 (2006).

Sufficient Evidence of Insurance Fraud Despite Conflicting Evidence: Borsberry was cited for criminal endangerment while engaging in a speed contest, false reporting to law enforcement, and insurance fraud. In light of conflicting evidence, the jury acquitted on the criminal endangerment and false information charges, and Borsberry contended that insufficient evidence existed to convict on insurance fraud. However, the conflicting evidence did not render the state's evidence regarding insurance fraud insufficient to support a guilty verdict, nor did the acquittals equate to an affirmative finding that Borsberry did not engage in a speed contest that voided his insurance policy. Viewed in a light most favorable to the prosecution, the jury could rationally have concluded that Borsberry provided incomplete information to the insurer, constituting insurance fraud. The conviction was affirmed. St. v. Borsberry, 2006 MT 126, 332 M 271, 136 P3d 993 (2006).

No Error in Denying and Modifying Jury Instructions on Elements of Theft by Deception: Field contended that the District Court erroneously modified one jury instruction and denied two of Field's requested instructions. The Supreme Court found no error. The amended instruction was covered in another instruction, and Field's proposed instructions regarding agency and the fungibility of money were unrelated to the charge of theft by deception, common scheme. The Supreme Court affirmed. St. v. Field, 2005 MT 181, 328 M 26, 116 P3d 813 (2005).

Theft by Deception, Common Scheme, Proved by Circumstantial Evidence: While managing a hotel, Field engaged in highly irregular accounting practices, altering bank deposit slips and manipulating direct-bill accounts, resulting in losses of thousands of dollars to the hotel. Field was convicted of theft by deception, common scheme. On appeal, Field contended that there was insufficient evidence to prove theft beyond a reasonable doubt, including the fact that no one saw him take any money. Although true, there was substantial circumstantial evidence on which the jury could rely, including altered bank deposit slips handwritten by Field and transactions conducted under Field's personal computer password, in concluding that Field committed theft of greater than $1,000. Field's conviction was affirmed. St. v. Field, 2005 MT 181, 328 M 26, 116 P3d 813 (2005).

Conflicting Evidence Regarding Falsification of Prison Payroll Records — Denial of Directed Verdict Proper: Struble was charged with falsifying payroll records at the state prison where he was employed. After the state presented its case, Struble moved for a directed verdict on grounds that: (1) no evidence was presented to show that he was not entitled to the payroll and benefits that he received; (2) there was no direct evidence linking him to the offense; (3) no witnesses testified that he was not working or engaged in employment at the times reported on his time cards; and (4) the logbooks on which the state relied were inaccurate, untrustworthy, and unreliable. The District Court denied the motion, and the Supreme Court affirmed. A directed verdict is proper only if reasonable persons could not conclude from the evidence taken in a light most favorable to the prosecution that guilt has been proved beyond a reasonable doubt. Here, the jury had considerable evidence that was susceptible to differing interpretations, and it was within the province of the jury to decide which interpretation would prevail, so the standard for granting a directed verdict was not satisfied. St. v. Struble, 2004 MT 107, 321 M 89, 90 P3d 971 (2004).

Motion to Introduce Letter Unrelated to Payment for Work Hours Properly Denied: Struble was charged with falsifying work records at the state prison where he was employed. Struble made a motion in limine to introduce a letter from the County Attorney to the Department of Corrections outlining the County Attorney's concern that there was insufficient evidence to prosecute six other employees on similar charges. The motion was denied, and Struble appealed, but the Supreme Court affirmed. The letter did not directly concern Struble, was unrelated to the charges against him, was irrelevant to the state's case against Struble, and thus was properly not admitted into evidence. St. v. Struble, 2004 MT 107, 321 M 89, 90 P3d 971 (2004).

Sufficient Evidence of Theft and Deceptive Practices to Warrant Dismissal of Motion for Directed Verdict: Landis contended that the District Court abused its discretion in denying his motion for a directed verdict on charges of theft and deceptive practices. The Supreme Court noted that as long as sufficient evidence existed upon which a rational jury could find the elements of the charged offenses beyond a reasonable doubt, denial of the directed verdict was not an abuse of discretion. Landis did not present a meritorious challenge to the sufficiency of any essential element of the theft charge. The evidence of deceptive practices, although circumstantial, was sufficient for the jury to find that Landis made statements to persons over a period of months, that the statements were made for the purpose of promoting Landis's training and sales program, and that the statements were purposely or knowingly false or deceptive. The District Court was affirmed. St. v. Landis, 2002 MT 45, 308 M 354, 43 P3d 298 (2002).

No Theft Prosecution for Removal of Funds From Joint Account: Kane was charged with theft for purposely or knowingly obtaining or exerting unauthorized control over funds and other items belonging to Hilger. Kane filed a motion to dismiss, which the District Court granted on grounds that as a joint tenant on a checking account with Hilger, Kane could not, as a matter of law, be prosecuted for theft of funds taken from the joint account. The state contended that 72-6-211 governed the joint account and permitted prosecution for theft in such cases. The Supreme Court affirmed, holding that the statute did not apply to controversies between cotenants. Absent evidence that Kane had threatened or deceived Hilger into establishing the joint tenant arrangement, Kane's actions did not make out the elements of criminal theft. St. v. Kane, 1999

MT 337, 297 M 421, 992 P2d 1283, 56 St. Rep. 1343 (1999), following St. v. Haack, 220 M 141, 713 P2d 1001 (1986), and distinguishing St. v. Curtis, 241 M 288, 787 P2d 306, 47 St. Rep. 277 (1990), distinguished in St. v. Kane, 1999 MT 337, 297 M 421, 992 P2d 1283, 56 St. Rep. 1343 (1999).

Deception in Creation of Joint Account: The defendant, relying on St. v. Haack, 220 M 141, 713 P2d 1001 (1986), argued that her conviction for theft should be overturned because the victim had agreed to set up the joint account and had approved her actions. The Supreme Court held that the defendant's case was distinguishable from Haack because the issue in the defendant's case was whether she had used deception in getting the victim to open the account. The court held that there was sufficient evidence to support the jury's guilty verdict. St. v. Curtis, 241 M 288, 787 P2d 306, 47 St. Rep. 277 (1990), distinguished in St. v. Kane, 1999 MT 337, 297 M 421, 992 P2d 1283, 56 St. Rep. 1343 (1999).

Withdrawal Slip Not Considered Check or Order: On appeal from a conviction of issuing a bad check for writing savings withdrawal forms as checks, the Supreme Court found that withdrawal slips negotiated through deception did not meet the definition of check found in 30-3-104 or the definition of order found in 30-3-102. Conviction under 45-6-316 was reversed because defendant should properly have been charged with theft. St. v. Taylor, 229 M 138, 745 P2d 337, 44 St. Rep. 1843 (1987).

Particular Types of Fraud or Deception: Under former law, evidence that a defendant charged with larceny by bailee received settlement money while performing acts consistent with his role as attorney and evidence that there were times that the balances in bank accounts into which settlement checks had been deposited were insufficient to allow distribution of clients' share of the settlements were sufficient to show an attorney-client relationship and the intent to permanently deprive his clients of their money. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Particular Types of Fraud or Deception: This section has been applied to defrauding an insurance company by burning insured property, obtainment of property by false claims that the property was to go for charitable purposes, purchasing property with a forged check, and securing a fur coat by using a false driver's license and social security card. See People v. Elmore, 128 Ill. App.2d 312, 261 N.E.2d 736, 737 (1970), affirmed 50 Ill.2d 10, 276 N.E.2d 325 (1971); People v. Nickey Chevrolet Sales, Inc., 41 Ill. App.2d 50, 190 N.E.2d 154, 155 (1963); People v. Cassman, 7 Ill. App.3d 786, 288 N.E.2d 667, 668 (1972); People v. Jones, 4 Ill. App.3d 927, 282 N.E.2d 283, 284 (1972); People v. Neary, 109 Ill. App.2d 302, 248 N.E.2d 695, 696 (1969). However, a conviction based on this section was overturned when the complaining witnesses were shown to be experienced investors who fully understood the nature of the defendant's scheme. People v. Warren, 2 Ill. App.3d 983, 276 N.E.2d 92, 93 (1971). In regard to admissibility of evidence, evidence indicating a subsequent scheme similar to the one with which the defendant is charged is proper. People v. Hill, 98 Ill. App.2d 352, 240 N.E.2d 801, 805 (1968), certiorari denied 395 US 984 (1969).

Comparison With Deceptive Practices Statute: Prosecution for theft through fraud or deception is possible under this section as well as under 45-6-317. Because the elements of the offense, if prosecuted under this section, are simpler to apply than the elements of the deceptive practices statute, this section seems preferable and has received considerably more use in Illinois, which is the source for both statutes. In applying this statute on theft it has been held that the acquisition of property through false promise of future payment was indictable—a considerable change from prior law. People v. Kamsler, 78 Ill. App.2d 349, 223 N.E.2d 237 (1966).

Comparison With Robbery: In applying this section to the acquisition of property by threat, the courts have held that where there has been a threat of force prosecution for robbery would be more appropriate than prosecution for theft by deception. People v. Denman, 69 Ill. App.2d 306, 217 N.E.2d 457, 459 (1966).

RECEIVING STOLEN PROPERTY

Defendant Not Responsible for Restitution in Excess of Damages Caused by Criminal Conduct: During the course of a drug investigation, Beavers admitted accepting stolen property in exchange for illegal drugs. The District Court ordered Beavers to pay restitution to the victims of the thefts, even though Beavers did not actually steal the property. Under St. v. Blanchard, 270 M 11, 889 P2d 1180 (1995), an accused is liable for restitution for offenses to which the accused has admitted guilt, been found guilty, or has agreed to pay restitution, so Beavers was not responsible for restitution for offenses she did not commit. Beavers' admission of the offense of receiving stolen property was sufficient to satisfy the causal standard of 46-18-241, that the victim suffered loss as a result of Beavers' offense, so the court did not abuse its discretion in ordering restitution; however, Beavers was required to pay restitution only for the property that formed the basis of the offense, not for property that was stolen by others but not received and possessed by Beavers. When stolen property is recovered, the amount of restitution owed is the difference between the value of the property taken and the salvage value of the property returned, and the state has the burden of establishing those values. The case was remanded for calculation of the amount of restitution owed. St. v. Beavers, 2000 MT 145, 300 M 49, 3 P3d 614, 57 St. Rep. 567 (2000).

Elements of Felony Theft Present — Control Established — Conviction Affirmed: Jungers was an intermittent guest in the Newbreast apartment, sleeping on a couch in the front room when he was there. The residence was searched, stolen articles were recovered, and Jungers was arrested for receiving stolen property. At trial, four seized articles were entered in evidence, with a total value of $307 to $312, including a rifle valued at $225 that was found in the Newbreasts' bedroom closet. Jungers asserted that the state failed to prove he had control over the rifle and that the only items proved to be in his control were worth $87 at the most, less than the $300 necessary for a felony conviction. After his arrest, Newbreast told police that Jungers brought the rifle into the apartment but later changed his story at trial. Testimony also established that Jungers had full access to the apartment, including permission to enter the Newbreasts' room and access to their personal belongings. In light of this testimony, control was established, the elements of felony theft were found present, and Jungers' conviction was affirmed. St. v. Jungers, 245 M 519, 802 P2d 615, 47 St. Rep. 2229 (1990).

Elements:

A conviction of receiving stolen property must be supported by proof that the property has been stolen by someone other than the receiver. St. v. Hernandez, 213 M 221, 689 P2d 1261, 41 St. Rep. 2063 (1984).

The necessary elements of receiving stolen property are: (1) that the property was stolen; (2) that the defendant bought it or received it knowing it to have been stolen; and (3) that he did so for his own gain or to prevent the owner from regaining possession of it. People v. Baxa, 50 Ill.2d 111, 277 N.E.2d 876, 878 (1971).

How Theft Established: Theft can be shown by establishing that defendant was purposely or knowingly in possession of stolen property. St. v. Standley, 179 M 153, 586 P2d 1075 (1978).

Theft Distinguished: Because there is no longer a distinction between theft and receiving stolen property, one cannot be guilty of both offenses. People v. Horton, 126 Ill. App.2d 401, 261 N.E.2d 693, 695 (1970). For further interpretations of this section with regard to receiving stolen property see the following cases: People v. Marino, 95 Ill. App.2d 369, 238 N.E.2d 245, 253 (1968); People v. McCormick, 92 Ill. App.2d 6, 235 N.E.2d 832, 836 (1968); People v. Sanders, 75 Ill. App.2d 422, 220 N.E.2d 487, 490 (1966); People v. Malone, 1 Ill. App.3d 860, 275 N.E.2d 236, 237 (1971); People v. Everett, 117 Ill. App.2d 411, 254 N.E.2d 659, 661 (1969); People v. LaValley, 7 Ill. App.3d 1051, 289 N.E.2d 45, 47 (1972); People v. Hansen, 28 Ill.2d 322, 192 N.E.2d 359, 369 (1963); People v. Dell, 7 Ill. App.2d 318, 222 N.E.2d 357, 363 (1966), certiorari denied 389 US 826 (1967); People v. Gates, 29 Ill.2d 586, 195 N.E.2d 161, 163 (1964).

VALUE OF PROPERTY

Witness Testimony Estimating Amount of Money Taken in Casino Robbery Sufficient to Establish Felony Theft: Black was convicted of conspiracy to commit felony theft through his involvement in a casino robbery. Black contended that because of uncertainty by the casino owner and the manager regarding how much money may have been in the till at the time, it was impossible to determine the amount stolen, so felony theft was not established. However, the owner testified that the amount stolen was about $1,270, and the manager estimated the amount at $1,300, and neither the state nor Black presented evidence that a lesser amount was taken. Further, the amount recovered from the conspirators following the robbery nearly duplicated the estimated amounts. Thus, a rational trier of fact could have found the evidence sufficient to establish that more than $1,000 was taken from the casino, and Black's conviction was affirmed. St. v. Black, 2003 MT 376, 319 M 154, 82 P3d 926 (2003).

No Error in Failure to Give Instruction Citing Statutory Language Regarding Value When Adequately Covered in Another Instruction: In a trial for attempted theft, Maloney offered a jury instruction, drawing from the statutory definition of value in 45-2-101, which included language that if value cannot be determined beyond a reasonable doubt, the value must be considered to be less than $1,000. The District Court rejected that instruction and gave an instruction that adequately informed the jury that value was an element of attempted theft and that the jury had to find that the value in question exceeded $1,000 to find Maloney guilty of felony theft. Although Maloney's proposed instruction followed more closely the statutory definition, citing exact statutory language in an instruction is not necessary if the instructions given explain the crime. Maloney's instruction would have added little to the jury's understanding of the law, and the District Court did not err in rejecting Maloney's instruction when the element of value was adequately covered in another instruction. St. v. Maloney, 2003 MT 288, 318 M 66, 78 P3d 1214 (2003).

Value of Property in Attempted Theft Properly Based on Amount of False Insurance Claim: Maloney bought a used car for $150 and then took out a title loan for $200. When the loan was not repaid, the car was repossessed. However, Maloney reported that the car had been stolen and filed a vehicle theft report stating that an insurance claim would be made for $2,575. When the insurer discovered that the car was not stolen, the claim was denied, and Maloney was charged with felony attempted theft. At the close of the state's case, Maloney moved for a directed verdict on grounds that the value of the property had not been established at more than the $1,000 threshold to establish a felony. Maloney asserted that the insurer would not have paid the full amount claimed in the theft report and that the state failed to establish what the claim was actually worth. However, the property at issue was not the car, but rather the insurance claim, and whether the insurer would have paid the full amount of the claim was irrelevant to the question of how much money Maloney attempted to gain from the insurer. Thus, there was sufficient evidence for the jury to determine that the amount Maloney attempted to steal was more than $1,000. St. v. Maloney, 2003 MT 288, 318 M 66, 78 P3d 1214 (2003).

Proper Charge Under Definition of Felony Theft in Effect at Time Crime Committed: Between 1996 and 1999, podiatrist Daniels billed and received Medicaid reimbursement for a number of custom orthotic shoe inserts that were never provided to Medicaid-eligible patients. The 1999 Legislature increased the threshold amount for felony theft from $500 to $1,000, and Daniels argued that because the jury found him guilty of theft over $500 but made no findings that the value exceeded $1,000, he should have been sentenced for a misdemeanor instead of a felony. However, under St. v. Cline, 170 M 520, 555 P2d 724 (1976), persons alleged to have committed criminal offenses must be charged with violating the law in effect at the time that the crime was committed. Further, a change in the definition of an offense does not affect acts committed prior to the effective date of the definitional change. Daniels was properly charged, and the felony theft conviction was affirmed. St. v. Daniels, 2003 MT 30, 314 M 208, 64 P3d 1045 (2003), distinguishing St. v. Wilson, 279 M 34, 926 P2d 712 (1996).

Sufficient Evidence Presented by Owner of Stolen Oboe to Establish Value: Pitzer tried to pawn an oboe that was stolen from a music store the previous day by an unknown person. Pitzer was charged with knowingly obtaining control over stolen property valued at more than $1,000 with the purpose to deprive the owner of the property. Pitzer was convicted and appealed on grounds that the state failed to prove the value of the stolen oboe. The state's witness was the victim of the theft and was also a music educator for 37 years, played the oboe in college, was qualified to teach oboe and all double reed and woodwind instruments, had been employed as a music consultant for 2 years prior to the theft, taught private music lessons, and coordinated with school districts in the area as a music adjudicator, guest conductor, and musical instrument salesperson. The witness estimated the value of the oboe at between $2,500 and $3,000, and Pitzer did not present evidence in support of a lower valuation. Rather, Pitzer asserted that the state could meet its burden of proving value only by presenting an independent valuation instead of a valuation by the owner. The Supreme Court disagreed. The weight and credibility of witnesses are exclusively within the province of the trier of fact, so the jury was free to rely on the owner's extensive experience with musical instruments and accept the owner's testimony regarding the unique features of the oboe that enhanced the instrument's value. Viewed in a light most favorable to the prosecution, sufficient evidence existed from which the jury could find beyond a reasonable doubt that the value of the oboe exceeded $1,000, and Pitzer's conviction was affirmed. St. v. Pitzer, 2002 MT 82, 309 M 285, 46 P3d 582 (2002).

Improper Exclusive Reliance on Replacement Value to Prove Felony Theft — Erroneous Failure to Address Ascertainment of Market Value Warranting Reversal of Felony Theft Conviction: Ohms was charged with felony theft of a masonry saw valued at over $1,000. At trial, Ohms argued that the saw was less than the statutory minimum required to obtain a felony conviction, and requested dismissal, but the request was denied. To establish the value of the saw, the state elicited expert testimony from a masonry industry salesperson, who testified as to the replacement cost of a similar saw, but could not provide a market value for the stolen saw at the time and place of the crime, nor did the state establish that the market value of the saw could not be ascertained. Under the definition of value in 45-2-101, evidence of replacement value is to be considered only when the market value cannot be satisfactorily ascertained. Thus, the state failed to establish the necessary predicate to the use of replacement value for purposes of determining the value of the saw, so no rational factfinder could have found the elements of felony theft beyond a reasonable doubt. Ohms's felony theft conviction was reversed. St. v. Ohms, 2002 MT 80, 309 M 263, 46 P3d 55 (2002), retroactively applying St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Part-Time Antique Dealer's Testimony of Retail Value: Testimony of a part-time antique dealer that the retail value of stolen items was $416 was sufficient to support the court's finding that the property exceeded "$300 in value" for purposes of this section, which provides an increased penalty for theft of property exceeding $300 in value. St. v. Pierce, 255 M 378, 842 P2d 344, 49 St. Rep. 992 (1992).

Sundial Valued at More Than $300: The defendant appealed his felony conviction on the grounds that the sundial he stole and sold for scrap metal was not worth more than $300. The Supreme Court held that it was within the jury's province to choose between the conflicting expert testimony presented and that the verdict would not be overturned absent an abuse of discretion. St. v. Ramstead, 243 M 162, 793 P2d 802, 47 St. Rep. 1101 (1990).

Conviction on Felony Theft of Lottery Tickets and Cigarettes Affirmed: A reasonable trier of fact could have concluded that defendant, in his job cleaning a grocery store, obtained unauthorized control over lottery tickets and cigarettes valued at more than $300 and deprived the store of the property. Even though the value of the tickets was less than $300 and the cigarettes were never found, the conviction for felony theft was affirmed. St. v. Tracy, 233 M 529, 761 P2d 398, 45 St. Rep. 1705 (1988).

Core Value of Rebuilt Engine as Market Value: Defendant asserted a distinction between "core value" as trade-in value for the purpose of exchange discount on a used engine and market value as the purchase price in the open market. The Supreme Court disagreed, noting that if core value is the value of a rebuildable engine normally determined by an engine rebuilder and the market for a rebuildable engine is with an engine rebuilder, then core value is logically identical to market value. St. v. Milhoan, 224 M 505, 730 P2d 1170, 43 St. Rep. 2371 (1986).

Value of Property Years Before Offense Committed: In a prosecution for criminal theft, the value of the property must be established as of the time and place of the crime. When the State presented evidence of the value of the property several years prior to the crime charged, it failed to meet its required burden and the District Court's refusal to instruct the jury on misdemeanor theft was reversible error. St. v. Furlong, 213 M 251, 690 P2d 986, 41 St. Rep. 2096 (1984).

Stealing One Boot Still Felony — No Leg to Stand On: Man who steals one boot is caught with felony loot. It's two boots' worth since there's a dearth of cowboys with just one foot. St. v. Barker, 211 M 452, 685 P2d 357, 41 St. Rep. 1485 (1984).

"Value" — Retail Price as Market Value: In determining the market value of a pair of cowboy boots for the purposes of 45-6-301, it was not error for the court to instruct the jury that the market value of the boots was their retail price. The evidence on the value of the boots was limited to their retail and wholesale price. The wholesale price could not be considered the market value; thus, the jury instruction establishing the market value as the retail price was necessary, even though the retail price is not always the market value and the instruction in this case was mandatory in nature and a comment on the evidence. St. v. Barker, 211 M 452, 685 P2d 357, 41 St. Rep. 1485 (1984).

Reasonableness of Jury Verdict When There Was Conflicting Testimony on Property Value: In a prosecution for felony theft under this section, there was conflicting testimony on whether the value of the property stolen (bicycles) exceeded $150. On appeal, defendants argued that because of the conflicting testimony the evidence did not support beyond a reasonable doubt a valuation in excess of $150. The Supreme Court rejected this claim, ruling that it was not unreasonable, given a well-supported range of values of $115 to $185, that the jury should find the value to be in excess of $150. St. v. Dess, 207 M 396, 674 P2d 501, 41 St. Rep. 81 (1984).

Valuation of Property in Theft: The value of property taken must exceed $150 before a conviction of felony theft will lie. Testimony showed that the value of the rifle involved in this case was between $175 and $280. This was a question of fact for the jury and was supported by substantial evidence, so the Supreme Court will not overturn the verdict. St. v. Harvey, 184 M 423, 603 P2d 661 (1979), followed in St. v. Fox, 212 M 488, 689 P2d 252, 41 St. Rep. 1884 (1984).

Material Element: The value of stolen property is a material element of the offense of theft which must be proved by the state to determine the degree of punishment for the offense. People v. Dell, 52 Ill.2d 393, 288 N.E.2d 459, 461 (1972); People v. Jordan, 115 Ill. App.2d 307, 252 N.E.2d 701, 702 (1969).

Testimony: In the absence of contrary evidence, testimony as to the worth of stolen property is the proper proof of its value. People v. Newton, 117 Ill. App.2d 232, 254 N.E.2d 165, 167 (1969).

Expert Testimony: Ordinarily, expert testimony should be used in ascertaining the value of stolen goods. People v. Dell, 77 Ill. App.2d 318, 222 N.E.2d 357, 361 (1966), certiorari denied 389 US 826 (1967); People v. Webb, 131 Ill. App.2d 206, 268 N.E.2d 161, 164 (1971). See also People v. Nelson, 117 Ill. App.2d 431, 254 N.E.2d 529, 530 (1969); People v. Briseno, 2 Ill. App.3d 814, 277 N.E.2d 743, 744 (1972); People v. Styles, 75 Ill. App.2d 481, 220 N.E.2d 885, 888 (1966). See St. v. Jackson, 180 M 195, 589 P2d 1009 (1979), where evidence of value in excess of $150 was found to be sufficient (see case notes, supra, under category entitled "Admissibility and Sufficiency of Evidence").

45-6-302. Theft of lost or mislaid property.

Criminal Law Commission Comments

Source: Ill. C.C. 1961, Chapter 38, § 16-2.

Subsection (a) provides for the case in which the owner is known or there is a "clue" to his identity. The "clue" provision is designed to eliminate the distinction between lost property and property which has merely been mislaid based on the assertion that in all "mislaid" property cases there is a clue to ownership. Subsection (b) requires only that reasonable measures to restore the property be taken. Subsection (c) specifies the traditional mental state in theft, i.e., to deprive permanently. The three subsections must coincide before the offense is committed.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Annotator's Note: This section restates former Montana law concerning theft of lost property in a manner which should eliminate the common-law distinctions which made enforcement of the statute difficult. The prosecution must establish each of the three elements set forth in the statute: (1) that the finder had some "clue" to the identity of the owner either through actual or constructive knowledge at the time of finding or afterwards; (2) that the finder failed to use reasonable measures to restore the property to the owner; and (3) that the finder had the purpose, with a conscious objective, to permanently deprive the owner of the found property. As written, the statute avoids the traditional requirement of an initial trespassory taking which prevented the honest finder who later misappropriated the goods from being prosecuted. The statute also eliminates the former distinction between lost property and mislaid property which held that mislaid property was presumed to have a clue to ownership, while lost property was the subject of no presumptions. The above difficulties are avoided by subsection (1) which provides, in effect, that the clue to ownership may occur at any time and that the trespassory taking may thus occur whenever the clue is discovered and not acted upon. Subsection (3) retains the traditional mental state of a purpose to permanently deprive. Ordinarily, this mental state may be implied from the offender's use of the property. The wording for the substantive part of this section is identical to the Illinois source, but the penalty provision has been completely changed.

Case Notes

Theft of Lost or Mislaid Property Not Lesser Included Offense of Theft of Stolen Property: Smith was charged with theft of stolen property and subsequently convicted. The District Court refused to give an instruction that theft of lost or mislaid property was a lesser included offense. The Supreme Court used the Blockburger test applied in St. v. Long, 223 M 502, 726 P2d 1364 (1986), and St. v. Arlington, 265 M 127, 875 P2d 307 (1994)—that is, whether proof of the same facts will support a conviction under either charge. The Supreme Court held that because the state would have to prove that the defendant knew that the property was lost or mislaid under one section of law but not under the other, theft of lost or mislaid property was not a lesser included offense of theft of stolen property. St. v. Smith, 276 M 434, 916 P2d 773, 53 St. Rep. 459 (1996).

Attempt to Restore: Where ranch hand changed brand on range livestock and rancher, when he learned of it, attempted to find true owner and make amends but was arrested before he could do so, rancher was not guilty of former offense of larceny. St. v. McClain, 76 M 351, 246 P 956 (1926).

45-6-303. Offender's interest in the property.

Criminal Law Commission Comments

Source: Ill. C.C. 1961, Chapter 38, § 16-4.

Subsection (1) is substantially the same as Model Penal Code, Tent. Draft No. 2, § 206-11(1), (See comment, p. 100). The provision removes any doubt regarding the commission of theft by a co-owner, such as a partner, joint tenant or tenant in common, or any other type of co-owner who exercises unauthorized control with the purpose to permanently deprive a co-owner of his interest in the property.

Subsection (2) recognizes that unless the husband and wife have separated and are living in separate abodes when the supposed theft occurs the criminal law should not intrude into what usually is a civil fight over property, the true ownership of which is dubious at best. The divorce court should be better informed regarding the relationship between the parties and should determine the proper distribution of the property. If, however, the parties have separated and are living in separate abodes and theft occurs, there seems to be no good reason why such conduct should not be punished in the Criminal Code.

Compiler's Comments

Annotator's Note: This section setting forth those instances in which the offender's interest in the property taken will be a defense to a theft-related crime has been taken without significant change from the Illinois source. The section is explained fully in the comment above.

Case Notes

No Authority for Estranged Spouse to Give Permission to Enter Husband's Property — Theft Conviction Affirmed: Ramsey's defense to theft charges was that a wife granted Ramsey permission to enter her husband's residence and retrieve her belongings. Notwithstanding that the wife testified that she never gave Ramsey permission or asked to have her belongings retrieved, Ramsey's permission defense failed as a matter of law. This section provides that it is no defense that the theft was from the offender's spouse. The only exception is for personal effects normally accessible to both spouses, but the personal effects exception does not apply if the parties have ceased living together. In this case, the husband and wife were separated, so the wife had no authority to give Ramsey permission to enter the residence and remove her personal effects. Although Ramsey may have thought that he had permission, the law provided otherwise, and Ramsey's ignorance of the law was no excuse. St. v. Ramsey, 2007 MT 31, 336 M 44, 152 P3d 710 (2007).

Dissolved Corporation's Officer's Use of Corporate Funds for Personal Expenses: Although the Montana Business Corporation Act does not specifically limit a director's use of corporate property to corporate purposes, the limitation is implied by the duties of good faith and care fundamental to a director's relationship to the corporation. Absent shareholders consent, defendant, who was president, director, and majority shareholder of a corporation, was not authorized to use its money for noncorporate purposes, and after it was dissolved, he was required to hold its assets in trust until creditor and shareholder debts were satisfied. Therefore, he was not authorized to write checks on the corporation's account to pay his personal debts to his attorney and former wife. He produced no evidence to support his claim that his need to pay child support to his wife and that his arrest for failure to do so would negatively affect the company's future and therefore justified the checks to her. Furthermore, it was not in the best interests of winding up the dissolved corporation. Moreover, it was not a defense that because of his ownership interest in the company he was spending his own money. The shareholders have a vested equitable interest in a dissolved corporation's property, but do not have a legal ownership interest in the property until the creditors are paid and the winding up is complete, at which point the shareholders have a legal ownership interest deriving from their right to a pro rata share of the assets remaining after the creditors are paid. Because the corporation was insolvent when the checks were written, there would have been no assets left for the shareholders had the creditors been paid off at the time that the checks were written. Therefore, it could not be said that defendant stole their money, and the theft conviction was set aside. St. v. Debus, 2002 MT 307, 313 M 57, 59 P3d 1154 (2002).

No Theft Prosecution for Removal of Funds From Joint Account: Kane was charged with theft for purposely or knowingly obtaining or exerting unauthorized control over funds and other items belonging to Hilger. Kane filed a motion to dismiss, which the District Court granted on grounds that as a joint tenant on a checking account with Hilger, Kane could not, as a matter of law, be prosecuted for theft of funds taken from the joint account. The state contended that 72-6-211 governed the joint account and permitted prosecution for theft in such cases. The Supreme Court affirmed, holding that the statute did not apply to controversies between cotenants. Absent evidence that Kane had threatened or deceived Hilger into establishing the joint tenant arrangement, Kane's actions did not make out the elements of criminal theft. St. v. Kane, 1999 MT 337, 297 M 421, 992 P2d 1283, 56 St. Rep. 1343 (1999), following St. v. Haack, 220 M 141, 713 P2d 1001 (1986), and distinguishing St. v. Curtis, 241 M 288, 787 P2d 306, 47 St. Rep. 277 (1990).

Partnership Interest in Property No Defense to Charge of Theft: Kuntz claimed that he could not be convicted of theft of partnership property because under Montana common law, a partner cannot be guilty of stealing partnership property because a partner's interest extends to every portion of partnership property. He also argued that nothing in the Uniform Partnership Act in effect prior to the 1993 revision superseded the common law. The Supreme Court ruled that Kuntz was entitled only to an interest in the property for partnership purposes and that state criminal law specifically abandoned the common-law theory and made it a crime to steal property in which an individual has an interest but to which the individual is not entitled. St. v. Kuntz, 265 M 253, 875 P2d 1034, 51 St. Rep. 502 (1994).

Property Normally Accessible to Both Spouses: Defendant was convicted of theft of a dividend check belonging to his wife. The dividend checks were normally sent to the wife's attorney's office, but one was inadvertently mailed to a mailbox that was accessible to both defendant and his wife. In this case, the dividend income was not "property normally accessible to both spouses". St. v. Krinitt, 251 M 28, 823 P2d 848, 48 St. Rep. 1088 (1991).

Withdrawal of Funds by Co-Owner From Joint Tenancy Bank Account: This section, concerning the offender's interest in property, requires the owner to have "an interest to which the offender is not entitled". The special relationship between co-owners in a joint tenancy bank account ensures that there is, by a joint tenant, no "interest to which the offender is not entitled". As a matter of law, a co-owner of a joint tenancy bank account cannot be convicted of the crime of theft for withdrawing funds from the joint tenancy account. St. v. Haack, 220 M 141, 713 P2d 1001, 43 St. Rep. 242 (1986), distinguished, with respect to partnership property, in St. v. Kuntz, 265 M 253, 875 P2d 1034, 51 St. Rep. 502 (1994), and followed in St. v. Kane, 1999 MT 337, 297 M 421, 992 P2d 1283, 56 St. Rep. 1343 (1999).

Claim of Interest: Evidence of statements made by defendant indicating his intention to retain money due his principal as a means of protecting his own supposed claim against principal was inadmissible as hearsay and self-serving. St. v. Fairburn, 135 M 449, 340 P2d 157 (1959).

Partnership Property: Where, under an agreement to form a partnership, one party gave money to the other for the purposes of the partnership, the one receiving money was merely a bailee until such time as the partnership had actually been formed, and misappropriation of the money by the bailee fell within the definition of larceny in 94-2701, R.C.M. 1947 (since repealed), despite the fact that a partner could not embezzle partnership property. St. v. Brown, 38 M 309, 99 P 954 (1909), overruled, on different grounds, in St. v. Kuntz, 265 M 253, 875 P2d 1034, 51 St. Rep. 502 (1994).

45-6-305. Theft of labor or services or use of property.

Criminal Law Commission Comments

Source: Ill. C.C. 1961, Chapter 38, § 16-3.

This section is a slight variation of the traditional requirement of theft found in section 94-6-302 [now 45-6-301] which requires permanent deprivation. In this section a temporary taking will suffice to complete the offense.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: While the provisions of the general Theft section (45-6-301) are sufficiently broad to include the theft of labor or services, this section provides a more specific alternative misdemeanor offense which may be charged. The prosecution must establish two elements for conviction: (1) the obtainment (MCA, 45-2-101(38)) of use of the property, labor, or services, (2) by means of threat (MCA, 45-2-101(68)) or deception (MCA, 45-2-101(17)) or with knowledge (MCA, 45-2-101(33)) that the use was without consent. "Without consent" in this section has its ordinary grammatical meaning. As with section 45-6-301, a permanent deprivation is not required. The wording for this provision in Theft of Labor or Services is identical to the substantive subsection of the Illinois source.

Case Notes

Legislative Intent: An Illinois court has held that by enacting this statute, the Legislature intended to protect all types of businesses from the unscrupulous practices of prospective customers. People v. Dillon, 93 Ill. App.2d 151, 236 N.E.2d 411, 412 (1968). (However, it should be noted that such conduct is also effectively prohibited under 45-6-301, which is the general theft statute.)

Restoration of Property: Bank's temporary use of bond to which it held legal title as trustee for a subscriber as collateral to secure a loan to the bank was not, under 94-2717, R.C.M. 1947 (now

45-6-303), larceny without an intent to deprive the owner permanently of his property where the bond was in fact restored before demand for it or before information filed. St. v. Wallin, 60 M 332, 199 P 285 (1921).

45-6-306. Obtaining communication services with intent to defraud.

Criminal Law Commission Comments

Source: New.

Compiler's Comments

Annotator's Note: This section is an evidentiary statement setting forth the means by which deception can be established under 45-6-305 when the services obtained relate to telecommunications. The 1977 amendment deleted subdivision (5) which prohibited aiding in the avoidance of lawful telecommunications charges. But, see MCA, 45-6-307, Aiding the Avoidance of Telecommunications Charges, for the analogous current provision.

45-6-307. Aiding the avoidance of telecommunications charges.

Criminal Law Commission Comments

Source: R.C.M. 1947, § 94-6-304.1(5).

Compiler's Comments

1999 Amendment: Chapter 354 in (3) before "telephone" inserted "computer"; and made minor changes in style. Amendment effective October 1, 1999.

Annotator's Note: This section enacts as a separate statute former subsection (5) of § 94-6-304.1 relating to the avoidance of telecommunications charges. The 1979 amendment added subsection (1)(c) which prohibits the manufacture, assembly, possession, sale, gift or other transfer of any apparatus, instrument, equipment, or device designed or intended to avoid lawful telecommunications charges. A conviction under this subsection requires proof of a "purpose" to avoid telecommunications charges as does conviction under subsection (1)(a). Conviction under (1)(b) can also be obtained by showing "knowledge" or "reason to believe" that the device will be used to avoid payment of lawful charges.

45-6-308. Unauthorized use of motor vehicles.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 223.9.

Common-law larceny did not cover the use of an auto for purposes of a joyride, or where the bailee of a vehicle or animal used the bailed chattel for his own purposes, because larcenous intent was usually found to be absent. This section is intended to deal with that problem.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1985 Amendment: In (1) after "motorcycle", inserted "quadricycle" (effective January 1, 1986).

Annotator's Note: The conduct prohibited in this section is effectively covered by the Theft section 45-6-301. This provision, however, provides an alternative and more advantageous theory for prosecuting such conduct as joyriding and unauthorized use of a vehicle by a bailee. First, the elements which must be proved for conviction place a lesser burden on the state than the Theft section requires. The elements are (1) knowing operation of the vehicle, (2) without the consent of the owner. Secondly, this section permits the prosecutor to charge a misdemeanor for the prohibited conduct, rather than a felony as would be required in most cases under the Theft section. The third advantage to using this section is the affirmative defense of constructive consent, which is especially useful in situations where the vehicle has been used as a necessity in emergency situations. "Knowing" is defined in § 45-2-101; "without consent" has its ordinary meaning. While this section defines most commonly misappropriated motor vehicles, the word "vehicle", as defined in § 45-2-101, provides a broad catchall in the phrase "any other motor propelled vehicle". The wording for this section has been adapted with substantial changes from the Model Penal Code source.

Case Notes

Hearsay Evidence Improperly Admitted — Hearsay Statements Repeated Prior Admissible In-Court Testimony — Right to Fair Trial by Impartial Jury Not Violated by Court's Refusal to Interview Juror Who Talked to Witness — Repeated Playing of Recorded Jail Phone Calls to Jury Encouraged by Defendant — Record Insufficient for Ineffective Assistance of Counsel — Cumulative Error Doctrine. St. v. Oliver, 2022 MT 104, 408 Mont. 519, 510 P.3d 1218.

Lesser Included Offense: When an automobile is taken, the offense described in this section is a lesser included offense in the crime of theft (94-6-302 R.C.M. 1947, now 45-6-301), and the District Court retains jurisdiction to accept a guilty plea on this offense although it is a misdemeanor. St. v. Shults, 169 M 33, 544 P2d 817 (1976).

Amendment of Information: Where first information charged violation of 94-3305, R.C.M. 1947 (since repealed), unauthorized use of vehicle, and second information, based on same taking, charged grand larceny in violation of section 94-2701, R.C.M. 1947, the second information was in effect an amendment of the first information and might have been objected to because filed after arraignment on the first information; however, defendant waived his objection by pleading to the second information and moving to dismiss the first. Gransberry v. St., 149 M 158, 423 P2d 853 (1967).

45-6-309. Failure to return rented or leased personal property.

Compiler's Comments

2017 Amendment: Chapter 321 in (4)(b) substituted current text for former text that read "A person convicted of failure to return rented or leased personal property exceeding $1,500 in value shall be imprisoned in the state prison for a term not to exceed 10 years"; and inserted (4)(c) concerning convictions for failure to return rental or leased personal property exceeding $5,000 in value or part of common scheme; and made minor changes in style. Amendment effective July 1, 2017.

Applicability: Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

2009 Amendment: Chapter 473 in (4)(a) in two places and in (4)(b) near middle increased amount of property value or amount of fine from $1,000 to $1,500. Amendment effective October 1, 2009.

1999 Amendment: Chapter 397 in (4)(a) increased maximum value of property and maximum fine from $500 to $1,000; and in (4)(b) increased minimum value of property from more than $500 to more than $1,000. Amendment effective October 1, 1999.

1993 Amendment: Chapter 616 in (4)(a) and (4)(b) increased rented or leased personal property value from $300 to $500; and made minor changes in style.

1983 Amendment: In (4)(a) and (4)(b), after "exceeding" changed "$150" to "$300".

45-6-310. Definitions — computer use.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 247, L. 2023. Amendment effective October 1, 2023.

45-6-311. Unlawful use of a computer — exceptions.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 247, L. 2023. Amendment effective October 1, 2023.

2009 Amendment: Chapter 473 in (2) in three places increased amount of property value or amount of fine from $1,000 to $1,500. Amendment effective October 1, 2009.

1999 Amendment: Chapter 397 in (2) in first sentence increased maximum value of property and maximum fine from $500 to $1,000 and in second sentence increased minimum value of property from more than $500 to more than $1,000. Amendment effective October 1, 1999.

1993 Amendment: Chapter 616 in two places in (2) increased computer property value from $300 to $500; and made minor changes in style.

1983 Amendment: In (2), in first and second sentences, after "exceeding" changed "$150" to "$300".

45-6-312. Unauthorized acquisition or transfer of food stamps.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 2 in (1) in introductory clause and in (2) in second sentence substituted "food stamp benefits" for "food stamps"; and in (1)(a), (1)(b), and (3) substituted reference to food stamp benefit for "food stamp or coupon". Amendment effective October 1, 2009.

Chapter 473 in (2) in first sentence increased amount of fine from $1,000 to $1,500, and near middle of second sentence increased amount of food stamp value from $1,000 to $1,500. Amendment effective October 1, 2009.

1999 Amendment: Chapter 397 in (2) in first sentence increased maximum fine from $500 to $1,000 and in second sentence increased minimum value of food stamps from more than $500 to more than $1,000. Amendment effective October 1, 1999.

1993 Amendment: Chapter 616 in (2), in second sentence, increased food stamp value from $150 to $500; and made minor changes in style.

45-6-313. Medicaid fraud.

Compiler's Comments

2009 Amendment: Chapter 473 in (4)(a) in four places and in (4)(b) near middle increased amount of property value or amount of fine from $1,000 to $1,500. Amendment effective October 1, 2009.

2005 Amendment: Chapter 185 in (1)(a) near end after "person" deleted "knows or has reason to know that the person", after "statutes" deleted "regulations", and after "rules" substituted "adopted under Title 2, chapter 4" for "or policies to medicaid payment or benefits for the service or item or for the amount of payment requested or claimed; or

(ii) making, submitting, or authorizing the making or submitting of a medicaid claim, statement, representation, application, or document under the medicaid program for a service or item when the person knows or has reason to know that the person is not entitled under applicable statutes, regulations, rules, or policies to medicaid payment or benefit for the service or item or for the amount of payment requested or claimed"; and made minor changes in style. Amendment effective October 1, 2005.

1999 Amendment: Chapter 397 in (4)(a) in first sentence increased maximum value of payments, benefits, or claims and maximum fine from $500 to $1,000 and in second sentence increased mandatory fine for second offense from $500 to $1,000; and in (7)(b) increased minimum value of payments, benefits, or claims from more than $500 to more than $1,000. Amendment effective October 1, 1999.

Effective Date: Section 19(1), Ch. 354, L. 1995, provided that this section was effective on passage and approval. Approved April 11, 1995.

Case Notes

Theft of Medicaid Funds Properly Charged as Felony Theft — Prosecutorial Discretion in Charging Crime When Facts Support More Than One Crime: Podiatrist Daniels billed and received Medicaid reimbursement for a number of custom orthotic shoe inserts that were never provided to Medicaid-eligible patients. Daniels was charged under 45-6-301 with felony theft of public assistance and convicted. On appeal, Daniels contended that he should have been charged with Medicaid fraud under this section instead of felony theft. The Supreme Court disagreed. The language of 45-6-301 is broad enough on its face to encompass obtaining or exerting unauthorized control over Medicaid funds. Although this section specifically covers the crime of Medicaid fraud, the facts of the case supported a possible charge under either statute, so the crime to be charged was a matter of prosecutorial discretion. St. v. Daniels, 2003 MT 30, 314 M 208, 64 P3d 1045 (2003).

Reversal of Conviction for Medicaid Fraud Based on Violation of Improperly Adopted Administrative Policy: Vainio, an optometrist, was charged with three counts of Medicaid fraud under this section. The jury found Vainio guilty, and the District Court concluded as a matter of law that a violation of the administrative policies at issue formed a criminal act. On appeal, Vainio argued that by criminalizing violations of administrative policies that were not formally promulgated as rules, this section contravened the Montana Administrative Procedure Act (MAPA), Title 2, ch. 4, and that policies that were not promulgated according to MAPA lacked the force of law. The state contended that because this section specifically refers to violations of "policies", it was not necessary for those policies to be embodied in a rule promulgated pursuant to MAPA. The Supreme Court agreed with Vainio. The use of the term "policies" in this section is limited to those policies that have been formally adopted as rules pursuant to MAPA. The fact that this section does not expressly reference MAPA does not mean that Medicaid providers can be criminally prosecuted for violating the state's informal policies. Further, this section does not have to expressly reference MAPA for MAPA to apply; rather, MAPA must be followed because this section does not expressly repudiate it. When the Legislature authorizes an agency to adopt rules, the procedures mandated by MAPA apply regardless of whether the authorizing statute refers to MAPA. The practices for which Vainio was convicted were not prohibited by rules adopted in compliance with MAPA and in effect at the time of the alleged offenses and thus were not illegal, so the convictions were reversed. St. v. Vainio, 2001 MT 220, 306 M 439, 35 P3d 948

(2001), following NW. Airlines, Inc. v. St. Tax Appeal Bd., 221 M 441, 720 P2d 676 (1986), and Rosebud County v. Dept. of Revenue, 257 M 306, 849 P2d 177 (1993), and distinguishing Huether v. District Court, 2000 MT 158, 300 M 212, 4 P3d 1193 (2000).

45-6-314. Theft by disposal of stolen property.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

45-6-315. Defrauding creditors.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 224.10.

The states commonly provide criminal penalties for debtors or conditional vendees who dispose of property subject to a security interest to the prejudice of the secured creditor. This is necessary because laws dealing with theft are framed in terms of larceny or embezzlement of goods "of another." Although there is a need for penal legislation in this area, it is possible to go too far in providing penalties for acts such as removing encumbered property from the county or selling the property without the consent of the secured creditor. Such behavior may be evidence of fraud, but it is also quite consistent with innocence, as where the owner-debtor drives his mortgaged car to an out-of-state resort for a weekend without notifying the finance company, or where he trades the car in on a new car without finance company consent, but makes adequate arrangements to discharge the old debt.

The offense is classified as a misdemeanor regardless of the amount involved. This differs from the section on theft, section 94-6-302 [now MCA, 45-6-301] under which stealing amounts over $150 [raised to $300 in 1983] is felonious. The difference seems justified because offenders against this section are less obviously dangerous than outright thieves who take property to which they have no claim. Moreover, sellers can better guard against this kind of criminal behavior in extending credit.

It is no longer a criminal offense to remove mortgaged property from the county as under former Montana law but the section retains the prohibition against removing secured property from the state.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

2005 Amendment: Chapter 575 in (2) at end substituted "30-1-201(2)(jj)" for "30-1-201(37)". Amendment effective October 1, 2005.

Saving Clause: Section 92, Ch. 575, L. 2005, was a saving clause.

Applicability: Section 93, Ch. 575, L. 2005, provided: "[This act] applies to a document of title that is issued or a bailment that arises on or after [the effective date of this act]. [This act] does not apply to a document of title that is issued or a bailment that arises before [the effective date of this act] even if the document of title or bailment would be subject to [this act] if the document of title had been issued or bailment had arisen after [the effective date of this act]. [This act] does not apply to a right of action that has accrued before [the effective date of this act]." Effective October 1, 2005.

Annotator's Note: This section retains criminal penalties for mortgagors and conditional vendees who hinder the enforcement of a security interest by destruction, concealment or removal from the state of property subject to the security interest. Both § 94-1811, R.C.M. 1947, dealing with the removal or concealment of mortgaged property, and § 94-1812, R.C.M. 1947, dealing with the removal or concealment of property encumbered by lease or conditional sales contract, are replaced by this section.

While the basic scope of prior law has been retained, certain changes should be noted. The prior law requirement that the acts be done with the "intent to defraud" (§ 94-1811, R.C.M. 1947) or the "intent to deprive" (§ 94-1812, R.C.M. 1947) has been replaced with the more inclusive "purpose to hinder enforcement" of the security interest. The detailed description contained in each of the prior law sections of the interests protected has been replaced by reference to U.C.C. 1-201 (37) for an inclusive definition of "security interest" which indicates that fundamentally a security interest is "an interest in personal property or fixtures which secures payment or the performance of an obligation". It is no longer a criminal offense, as it was under § 94-1811, R.C.M. 1947, to remove encumbered property from the county but the prohibition on removing encumbered property from the state has been retained. The 1975 amendment added subsection

(4) providing that an offender who deals with property subject to a security interest with the purpose of depriving the owner thereof may be prosecuted under the general theft statute, MCA, 45-6-301.

The penalty imposed by subsection (3) seems to make an offense under this section a misdemeanor regardless of the value of the property or security interest involved and where the purpose established by the evidence is a "purpose to hinder enforcement" of the security interest, that is certainly the effect of the section. Subsection (4), however, which was added by the 1975 amendment, allows possible felony conviction for the offense of defrauding creditors in that it permits the offense to be charged under the theft statute, § 45-6-301, where the offender deals with property subject to a security interest "with the purpose of depriving the owner of the property or of the proceeds and value therefrom". Should the value of the property or security interest involved exceed $150, and the purpose to deprive rather than merely to hinder enforcement be shown, the offense would be charged as a felony under a combination of section 45-6-301 and this section.

Case Notes

Intent: To constitute the crime of removing mortgaged chattels from the county under the forerunner of this section, it was necessary that the removal be made with the intent of depriving the mortgagee of his claim thereto or interest therein. Averill Machinery Co. v. Taylor, 70 M 70, 223 P 918 (1924).

45-6-316. Issuing a bad check.

Criminal Law Commission Comments

Source: Ill. C.C. 1961, Chapter 38, § 17-1(d).

Bad check laws, in addition to eliminating the doubt as to liability on false promises, accomplish two other things which seem worth preserving: (a) they eliminate the requirement of proof of obtaining property by means of false pretense; and (b) they create a presumption of knowledge that the check would not be paid under certain circumstances. The presumption of knowledge is probably the most important practical reason for maintaining special bad check provisions. In the fictitious account case it is possible but highly improbable that the transaction was innocent; the drawer may absent-mindedly have put the name of the wrong bank on a blank check, or he may have intended to open an account before the check was presented. In the case of checks on real but inadequate accounts, the chance of innocent miscalculation by the drawer is much greater but is negatived by a refusal to make the check good.

Compiler's Comments

2017 Amendment: Chapter 321 in (3)(a) substituted current text for former text that read "A person convicted of issuing a bad check shall be fined not to exceed $1,500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. If the offender has engaged in issuing bad checks that are part of a common scheme or if the value of any property, labor, or services obtained or attempted to be obtained exceeds $1,500, the offender shall be fined not to exceed $50,000 or be imprisoned in the state prison for any term not to exceed 10 years, or both"; inserted (3)(b) concerning convictions for bad checks exceeding $500 and not exceeding $5,000; inserted (3)(c) concerning convictions for bad checks exceeding $5,000 or as part of a common scheme; and made minor changes in style. Amendment effective July 1, 2017.

Applicability: Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

2009 Amendment: Chapter 473 in (3) in first sentence increased amount of fine from $1,000 to $1,500, and near end of second sentence increased amount of property value from $1,000 to $1,500. Amendment effective October 1, 2009.

1999 Amendment: Chapter 397 in (3) in first sentence increased maximum fine from $500 to $1,000 and in second sentence increased minimum value of property, labor, or services from more than $500 to more than $1,000. Amendment effective October 1, 1999.

1993 Amendment: Chapter 616 in (3), in second sentence, increased bad check value from $300 to $500; and made minor changes in style.

1985 Amendment: Near middle of (1) after "when", deleted "with the purpose of obtaining control over property or to secure property, labor, or services of another".

1983 Amendment: In (3), in second sentence, after "exceeds" changed "$150" to "$300".

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section replaces R.C.M. 1947, § 94-2007, Making, Passing or Uttering Fictitious Bills, etc., and R.C.M. 1947, § 94-2702, Uttering Fraudulent Checks or Drafts. The principal change is the consolidation of the fictitious depository section (94-2007) and the no funds/insufficient funds section (94-2702). In the consolidation the 5-day notice provision (subsection (2) of the new code) of R.C.M. 1947, § 94-2702 has been carried over. This provision, which is applicable only to those cases in which the accused has an account with the depository on which the check or other order is drawn, does not require that the offender be given 5 days' notice of dishonor but does provide that failure to make the check good within 5 days after receiving notice of dishonor is prima facie evidence of knowledge that it would not be paid. Of course, in cases in which the defendant did not have an account or the depository is nonexistent the inference that he did not expect the check or order to be paid is so overwhelming that no presumption would seem necessary. An exception under prior law would also appear to be continued, although not explicitly, in that there would seem to be no offense if the individual accepting the check knows that it is not valid or will not be paid, in which case the defense of consent could be interposed (see MCA, 45-2-211). Similarly, this section does not change Montana law which held a postdated check did not fall within the bad check provisions of prior law in that it was in the nature of a promissory note and not an order. (See St. v. Patterson, 75 M 315, 243 P 355 (1926).)

It should also be noted that it will be possible in most cases to apply either the provisions of this section or of the general section on Theft, MCA, 45-6-301, to bad check activities. The decision as to which section should be applied is essentially one of prosecutorial discretion and should hinge on both the circumstances surrounding the offense and the character of the accused.

In the event the check is passed as part of a common scheme or the property obtained exceeds $300 in value (raised to $500 in 1993), subsection (3) provides for an increased penalty; in all other cases the punishment has been reduced to a misdemeanor. The term "common scheme" is defined by § 45-2-101 and would allow the imposition of increased penalties whenever it can be established that a series of bad checks was cashed within a limited time frame.

The 1985 amendment makes it clear that the issuer does not have to give the check to someone with the purpose of obtaining property, labor, or services. He is also guilty if he is issuing the check in return for something already received or merely to cash the check and receive money in return.

Case Notes

Probation Condition Banning Alcohol Consumption Unrelated to Crime of Issuing Bad Check Reversed — Condition Prohibiting Gambling Related to Fiscal Irresponsibility Affirmed: Probation conditions on Ashby's bad check conviction included a restriction that Ashby not gamble or consume alcohol or drugs. Ashby contested the conditions under the rule in St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), that there must be a nexus between probation conditions and the offense. The District Court denied Ashby's assertion and imposed the conditions as "stock" or standard. On appeal, the Supreme Court expanded the Ommundson nexus rule to include a nexus either to the offense or to the offender, rather than to the offense alone. In this case, there was no evidence that the bad check offense was related in any way to alcohol or drugs, that Ashby had a drinking or drug problem, or that an alcohol and drug prohibition would protect Ashby from another bout of writing bad checks. Thus, the alcohol and drug restriction was stricken from the sentence. Likewise, there was no evidence that Ashby had a gambling problem. However, citing St. v. Kroll, 2004 MT 203, 322 M 294, 95 P3d 717 (2004), the court found that because of considerable previous fiscal irresponsibility on Ashby's part, it was reasonable for the sentencing court to conclude that a prohibition on gambling was appropriate to rehabilitate Ashby's ability to manage his finances, so the gambling restriction was affirmed. The court also warned against the imposition of alcohol and gambling restrictions as standard or universal because they are not mandated by law. St. v. Ashby, 2008 MT 83, 342 M 187, 179 P3d 1164 (2008), followed in St. v. Corbin, 2008 MT 146, 343 M 211, 184 P3d 287 (2008), St. v. Krueger, 2008 MT 265, 345 M 147, 190 P3d 318 (2008), St. v. Jones, 2008 MT 440, 347 M 512, 199 P3d 216 (2008), and in St. v. Simpson, 2009 MT 43, 349 M 275, 203 P3d 791 (2009), with regard to imposition of a gambling restriction in light of defendant's financial irresponsibility. Krueger was followed in St. v. Smart, 2009 MT 1, 348 M 274, 201 P3d 123 (2009).

Automatic Stay at Beginning of Bankruptcy Proceedings Inapplicable to Criminal Proceedings: Following McWilliams' conviction for issuing bad checks, the trial court ordered McWilliams to pay restitution to two parties to whom the bad checks were issued. McWilliams argued on appeal that he could not be ordered to pay restitution because the debts were discharged in a bankruptcy proceeding. The Supreme Court noted that under 11 U.S.C. 362(a), the commencement of a bankruptcy proceeding stays all judicial proceedings against a debtor that could have been brought before commencement of the case, with some exceptions. As held in In re Gruntz, 202 F3d 1074 (9th Cir. 2000), one exception provides that bankruptcy proceedings do not stay the commencement or continuation of a criminal action against the debtor. Bankruptcy courts were not created as a haven for criminals. Thus, the criminal action against McWilliams for issuing bad checks was not stayed by the initiation of bankruptcy proceedings, and the trial court did not err in requiring McWilliams to pay restitution upon conviction of the criminal offense. St. v. McWilliams, 2008 MT 59, 341 M 517, 178 P3d 121 (2008).

Elements of Issuing Bad Checks Supportive of Information: The County Attorney filed an information against McWilliams for issuing bad checks in connection with a construction business. McWilliams asserted that the information should be dismissed because the series of transactions involving the checks were an illegal series of deferred deposit loans, so McWilliams could not be criminally prosecuted. However, 31-1-723, which prohibits deferred deposit loans, applies only to licensees under Title 31, ch. 1, part 7. None of the parties involved were licensees, so the statute did not apply. McWilliams also contended that the checks did not meet the definition of negotiable instruments in 30-3-104 because they were not payable on demand, but rather were in the nature of a future promise. However, the checks contained no restrictive endorsement, and although the parties to whom the checks were written agreed to refrain from cashing them immediately, the checks were in fact payable on demand and met the statutory definition. McWilliams also cited 45-2-211 in arguing a consent defense because the parties consented to take the checks and hold them, but that argument also failed because even though the parties agreed to hold the checks, they did not consent to nonpayment or to having McWilliams stop payment altogether. McWilliams next asserted that under St. v. Patterson, 75 M 315, 243 P 355 (1926), the information was defective because it contained no assertion of an intent to defraud. The statutory language under which Patterson was charged in 1926 required a showing of intent to defraud, but the current statute, this section, contains no intent to defraud element, so the information was not defective in that regard. There was sufficient evidence to charge McWilliams with issuing bad checks, and the District Court did not err in denying McWilliams' pretrial motion to dismiss the information. St. v. McWilliams, 2008 MT 59, 341 M 517, 178 P3d 121 (2008).

Sufficient Evidence of Issuing Bad Checks to Warrant Submission to Jury: At the close of the state's evidence in McWilliams' trial for issuing bad checks, McWilliams moved to dismiss for lack of sufficient evidence. The trial court denied the motion, and McWilliams appealed, but the Supreme Court affirmed. Evidence showed that McWilliams issued checks upon a real depository but that the checks were not honored either because of insufficient funds or because McWilliams stopped payment. Viewed in the light most favorable to the prosecution, there was sufficient evidence that McWilliams issued bad checks to warrant submitting the issue to the jury, and the trial court did not err in denying the motion to dismiss. St. v. McWilliams, 2008 MT 59, 341 M 517, 178 P3d 121 (2008).

Imposition of Stock Probation Requirements in Written Sentence When Not Mentioned in Oral Sentence Not Error Absent Showing of Prejudice: When Kroll was sentenced orally for a felony bad check scheme, he received a 10-year prison sentence with all but 180 days suspended and was ordered to pay restitution, not possess or consume alcohol, obtain a chemical dependency evaluation, refrain from entering casinos and playing games of chance, and undergo a sexual risk assessment because many of the materials purchased with the bad checks included pornography. The subsequent written judgment deviated from the oral pronouncement in several respects, omitting the sexual risk assessment and including several conditions not addressed at the oral sentencing, including requirements that Kroll conduct himself in a law-abiding manner, submit to reasonable searches, not own or possess firearms or deadly weapons, maintain full-time legitimate employment, have no contact with the victims, and pay a supervision fee. Kroll contested the validity of the added conditions in the written sentence and the imposition of the sexual risk assessment. The Supreme Court affirmed. The added conditions were civil restrictions that were considered stock requirements for probationers and individuals subject to a suspended sentence and did not substantively increase Kroll's loss of liberty or sacrifice of property. Given the standard nature of the sentencing conditions, Kroll suffered no actual prejudice by failure of the District Court to impose the conditions at oral sentencing, and they were therefore upheld as lawful. The state conceded that the alcohol restrictions and the chemical dependency conditions of the oral sentence were not related to the crime, and the Supreme Court ordered that those conditions be removed, leaving only the gambling and sexual risk assessment at issue. The Supreme Court affirmed those conditions because they were related to the bad check crimes and were a reasonable condition to assist Kroll's rehabilitation. St. v. Kroll, 2004 MT 203, 322 M 294, 95 P3d 717 (2004), following St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480 (2000). See also

St. v. Lucero, 2004 MT 248, 323 M 42, 97 P3d 1106 (2004), in which the imposition of significant restrictions and conditions not mentioned in the oral sentence, in addition to stock sentencing conditions authorized in Kroll, was considered prejudicial, reversible error.

Trial Delay of 761 Days on Bad Check Charges — Facts Discharging State's Burden of Disproving Prejudice: Boese's trial for issuing bad checks was delayed 761 days, sufficient to bring about a speedy trial analysis. A total of 176 days was attributable to the state because the arresting officer failed to return the served arrest warrant, and 289 days were institutional delay, also attributable to the state. Boese asserted the right to a speedy trial in a timely manner, so the burden shifted to the state to show that the delay was not prejudicial. Boese contended that the burden was not properly shifted, but the order regarding Boese's motion to dismiss demonstrated otherwise. Thus, the Supreme Court applied the analysis set out in Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), to determine if prejudice occurred, examining pretrial incarceration, anxiety caused by the pretrial delay, and whether Boese's defense was damaged by the delay. Because Boese was incarcerated on other charges for most of the time prior to trial, the pretrial incarceration was not oppressive based on the charges in this case. The likelihood of anxiety from delay was contraindicated by the frequency with which Boese changed his plea, adding to the delay, and any increased anxiety was more likely caused by the other, more serious unrelated charges facing Boese. Finally, the nature of the bad check case was not fact-sensitive and depended primarily on documentary evidence and interpretation of that evidence, which was not evanescent and not likely to change because of the trial delay. These facts were sufficient to discharge the state's burden of disproving prejudice, and the District Court did not err in denying Boese's motion to dismiss for lack of a speedy trial. St. v. Boese, 2001 MT 175, 306 M 169, 30 P3d 1092 (2001).

No Double Jeopardy — Initial Single Count Misdemeanor Charge Converted to Felony Bad Check Common Scheme: Vargas was charged with a single count of misdemeanor issuing a bad check despite the fact that the complaint alleged that he had written 10 bad checks over a 3-week period. He pleaded guilty and was given a 6-month suspended jail sentence. Several months later, the County Attorney was notified that Vargas had written an additional 18 bad checks during the same 3-week period. In light of the new information, Vargas was charged with a felony for issuing all 28 bad checks, common scheme. Vargas moved to dismiss this information, claiming that under double jeopardy protections, his prior misdemeanor conviction prevented additional punishment for the same conduct for which he had been convicted. The District Court denied the motion to dismiss. Vargas changed his plea to guilty but reserved the right to appeal on double jeopardy grounds and, in doing so, maintained that the state violated his right to be free from a second prosecution for the same offense when it charged him with felony common scheme based in part on a check that had formed the basis for a prior misdemeanor conviction. Pursuant to Brown v. Ohio, 432 US 161, 53 L Ed 2d 187, 97 S Ct 2221 (1977), the general rule is that the double jeopardy clause prohibits the state or federal government from trying a defendant for a greater offense after it has convicted that defendant of a lesser included offense. Although Vargas's argument was consistent with Brown, it did not take into account the significant exceptions to the general rule that were set out in Jeffers v. U.S., 432 US 137, 53 L Ed 2d 168, 97 S Ct 2207 (1977). Under Jeffers, a subsequent prosecution for a greater crime is allowed if: (1) all the elements necessary to the greater crime had not taken place at the time prosecution for the lesser crime had begun; or (2) the facts necessary to show the greater crime had not been discovered by the state before the first trial, despite the exercise of due diligence. Pursuant to U.S. v. Stricklin, 591 F2d 1112 (5th Cir. 1979), once the defendant makes a prima facie case of double jeopardy, it is the state's responsibility to demonstrate by a preponderance of the evidence that it exercised due diligence in discovering all relevant facts before the first trial or, as in this case, before the guilty plea. The case was remanded for further proceedings on the question of whether the state exercised due diligence. St. v. Vargas, 279 M 357, 928 P2d 165, 53 St. Rep. 1184 (1996).

Multiple Common Schemes — Conviction in Multiple Counties Not Violative of Double Jeopardy: Stilson was convicted of issuing a bad check, common scheme, in Lewis and Clark County. In April of 1991, he was convicted of the same type of felony in Missoula County. Two months later, he was convicted of the same type of felony in Cascade County. He also wrote bad checks in Yellowstone and Butte-Silver Bow Counties and although he was not prosecuted for those offenses, the Missoula County judgment required him to make restitution for those bad checks as well. Stilson appealed for postconviction relief, alleging that his convictions were for the same common scheme and that the multiple convictions violated his right preventing double jeopardy. He contended that state law does not provide a basis to divide a single common scheme of issuing bad checks into multiple common schemes. Although the Legislature did not provide for multiple common schemes, neither was that possibility foreclosed. Under the circumstances of this case, Stilson was charged in each county for only the checks written in that particular county and the bad checks written in each county were separate and distinct common scheme offenses. The evidence required for proof of the offense in each county was different and specific to each county, and the series of acts or transactions in each county were different from those in other jurisdictions, both individually and as a group. Thus, under appropriate facts and circumstances, double jeopardy protections do not necessarily prevent a defendant who has been convicted of a common scheme in one county from being convicted of a common scheme in a different county. Stilson v. St., 278 M 20, 924 P2d 238, 53 St. Rep. 572 (1996).

Writing Bad Checks as Sufficient Grounds for Denial of Unemployment Benefits: An employee who issued 11 bad checks to his employer over a 3-month period and allowed them to remain unpaid for up to 6 weeks clearly went beyond the conduct an employer may reasonably expect from an employee. The repeated criminal violations, which were directly adverse to the employer's interests, constituted misconduct as a matter of law, affected the employee's ability to perform his duties, and warranted denial of unemployment benefits. Ashland Oil, Inc. v. Dept. of Labor and Industry, 235 M 72, 765 P2d 727, 45 St. Rep. 2169 (1988).

Withdrawal Slip Not Considered Check or Order: On appeal from a conviction of issuing a bad check for writing savings withdrawal forms as checks, the Supreme Court found that withdrawal slips negotiated through deception did not meet the definition of check found in 30-3-104 or the definition of order found in 30-3-102. Conviction under this section was reversed because defendant should properly have been charged with theft. St. v. Taylor, 229 M 138, 745 P2d 337, 44 St. Rep. 1843 (1987).

Common Scheme:

Defendant was convicted of issuing bad checks, common scheme, a felony, after issuing or delivering a total of nine checks to various businesses and individuals over the course of a year, knowing the checks would not be paid by his bank. The court held that the repeated issuance of one bad check after another fits the definition of common scheme as found in 45-2-101. St. v. Fleming, 225 M 48, 730 P2d 1178, 44 St. Rep. 31 (1987).

Acts alleged to be a common scheme must be either individually incomplete, such that they show a single crime has been committed, or they must be acts which closely follow one another, evidencing a criminal design. The writing of bad checks on one bank in April and May of 1983 and on another bank in the fall of 1983 were acts which closely followed one another and thus established a common scheme. The fact that the banks paid some checks and dishonored other checks was irrelevant to the finding of a continuing criminal design in this case. St. v. McHugh, 215 M 296, 697 P2d 466, 42 St. Rep. 371 (1985).

No Requirement of Actual Knowledge That Checks Will Not Be Paid by Bank: Section 45-6-316 does not require actual knowledge that checks will not be paid by the bank but rather that the defendant act "knowingly" as that term is defined in 45-2-101. St. v. McHugh, 215 M 296, 697 P2d 466, 42 St. Rep. 371 (1985).

Prima Facie Showing of Knowledge of Insufficient Funds in Checking Account: Sufficient evidence was presented in the prosecution's case in chief to indicate that defendant was aware that it was highly probable that his checks would not be paid by the banks upon which they were written. This evidence included bank statements showing significant negative balances, numerous overdraft notices mailed to the defendant, numerous certified letters sent to defendant notifying him of the overdrafts and requesting payment, and the fact that numerous checks remained unpaid at the time of the trial. St. v. McHugh, 215 M 296, 697 P2d 466, 42 St. Rep. 371 (1985).

Knowing Check Will Not Be Paid by Bank — Sufficient Evidence: The defendant, a livestock buyer charged with felony of issuing bad checks, claimed the evidence was insufficient to support a jury finding that he knew when he issued the checks that they would not be honored by the bank. Evidence showed that he purchased sheep with two checks written on an account he opened the day before. He had previously arranged to sell half of the sheep and deposited his advance payment into the account but made no further deposits, nor did he make further arrangements to sell the rest of the sheep. The checks were returned to the sheep raiser unpaid, and efforts to have defendant honor the checks were unsuccessful. This was sufficient evidence to convict the defendant under jury instructions requiring the jury to find that he knew at the time he wrote the checks that they would not be paid by the bank and also find that he had made no arrangement with the bank to pay the checks when presented. St. v. DeSilva, 209 M 169, 679 P2d 1237, 41 St. Rep. 620 (1984).

Apprehension of Felony Suspects — Compelling State Interest: Defendant issued 13 bad checks totaling $231.76 between July 17, 1981, and October 30, 1981. On November 23, 1981, a Justice of the Peace issued an arrest warrant on the charge of issuing a bad check. There were no previous efforts to secure defendant's presence to answer the charge or post bond. On December 4, 1981, a Sheriff arrested defendant at his home. During booking, a full search of defendant was conducted and a gram of hashish was discovered. Defendant pleaded guilty to the bad check charge. The District Court granted his motion to suppress the contraband as an invasion of privacy under St. v. Carlson, 198 M 113, 644 P2d 498 (1982). The State appealed, and the Supreme Court vacated and remanded, stating that Carlson was clearly limited to traffic-related misdemeanors. The court held that full custodial arrests supported by a warrant for felonies are proper, and that the apprehension of felony suspects is a compelling state interest which justifies a full custodial arrest pursuant to warrant. The right of privacy must yield to a compelling state interest. St. v. Wood, 205 M 141, 666 P2d 753, 40 St. Rep. 1173 (1983).

Five-Day Notice Provision: In prosecution under 94-2702, R.C.M. 1947 (now 45-6-316), trial court did not err in refusing to instruct jury there could be no conviction in absence of any showing that the 5-day notice specified in the statute had been given. St. v. Skinner, 163 M 58, 515 P2d 81 (1973).

Restitution: The crime of uttering fraudulent checks under 94-2702, R.C.M. 1947 (now 45-6-316), was one of property. Defense was not available where no restitution on any of the counts is made until after the informations are filed against defendant. St. v. Skinner, 163 M 58, 515 P2d 81 (1973).

In General: Caution should be used in considering the elements of this offense as set out in the Illinois decisions. While the Montana provisions are drawn directly from Illinois, the Illinois bad check provisions are a part of a general statute dealing with deceptive practices (Chapter 38, § 17-1) which is prefaced with the general requirement that each of the acts proscribed in the subsections be done with the intent to defraud. Montana has adopted for its bad check provision only subsection (d) of Ill. C.C. 1961, Chapter 38, § 17-1, and did not include the preliminary requirement that the acts be done with the intent or purpose to defraud. Accordingly, in Montana there is no need to either allege or prove that the check was drawn with intent to defraud. It is only necessary to allege and prove that the accused knew that it would not be paid. See People v. Lanners, 122 Ill. App.2d 290, 258 N.E.2d 390 (1970); First Nat'l Bank of Decatur v. Insurance Co. of North America, 424 F2d 312 (7th Cir.), certiorari denied 398 US 939 (1970); People v. Tenen, 132 Ill. App.2d 786, 270 N.E.2d 179 (1971).

False Pretenses: Fact that defendant might have been charged with a misdemeanor under the fraudulent check statute did not prevent his conviction of felony under 94-1805, R.C.M. 1947 (now 45-6-317), the false pretense section. St. v. Evans, 153 M 303, 456 P2d 842 (1969).

Other Offenses: In prosecution for uttering and delivering a fraudulent check under 94-2702, R.C.M. 1947 (now 45-6-316), evidence was properly received as to other checks drawn on prior occasions on banks in which defendant had no account. St. v. Tully, 148 M 166, 418 P2d 549 (1966).

Fictitious Account: The offense was complete when defendant passed a check, knowing that no one by the name signed as maker had an account with the bank, and it was no defense that defendant had no notice of nonpayment or that he later made restitution. St. v. Johnston, 140 M 111, 367 P2d 891 (1962).

Postdated Check: Defendant who gave a postdated check, stating that he did not then have sufficient funds but that the bank would honor the check by the time of its date, did not misrepresent present facts but merely made a promise as to the future; this did not constitute a violation of 94-2702, R.C.M. 1947 (now 45-6-316), even though the check was dishonored when presented. St. v. Patterson, 75 M 315, 243 P 355 (1926).

45-6-317. Deceptive practices.

Criminal Law Commission Comments

Source: Ill. C.C. 1961, Chapter 38, § 17-1.

This section supplements section 94-6-302(2)(b) [MCA, 45-6-310(2)(b)]. Most outright swindles with no pretext of legitimacy will fall within section 94-6-302(2) [MCA, 45-6-301(2)] and be prosecuted thereunder because of the greater penalty. Section 94-6-307 [MCA, 45-6-317] is designed to cover a greater variety of deceptive practices than were formerly proscribed by Montana law (See Title 94, chapter 18, which contains such offenses as: obtaining property or services by false pretenses; confidence games; sale without consent of holder; deception in the sale of land; etc.; and chapter 21, fraudulent conveyances). See also R.C.M. 1947, section

94-1803 (False statement respecting financial condition) and section 94-35-256 (Workmen—false representation to procure punishable).

The four (4) subsections of this section are intended to cover deceptive practices which might not fall under the prohibition of section 94-6-302 [45-6-301], Theft.

Compiler's Comments

2017 Amendment: Chapter 321 in (2) substituted current text for former text that read "(2) A person convicted of the offense of deceptive practices shall be fined not to exceed $1,500 or imprisoned in the county jail for a term not to exceed 6 months, or both. If the deceptive practices are part of a common scheme or the value of any property, labor, or services obtained or attempted to be obtained exceeds $1,500, the offender shall be fined not to exceed $50,000 or be imprisoned in the state prison for a term not to exceed 10 years, or both." Amendment effective July 1, 2017.

Applicability: Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

2009 Amendment: Chapter 473 in (2) in first sentence increased amount of fine from $1,000 to $1,500, and near end of second sentence increased amount of property value from $1,000 to $1,500. Amendment effective October 1, 2009.

1999 Amendment: Chapter 397 in (2) in first sentence increased maximum fine from $500 to $1,000 and in second sentence increased minimum value of property, labor, or services from more than $500 to more than $1,000; and made minor changes in style. Amendment effective October 1, 1999.

1993 Amendment: Chapter 616 in (2), in second sentence, increased deceptive practice value from $300 to $500; and made minor changes in style.

1983 Amendment: In (2), in second sentence after "exceeds" changed "$150" to "$300".

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: The purpose of this section is the punishment of a wide variety of deceptive conduct in which either the act or the mental state does not fall within § 45-6-301. As such this section should be considered supplementary to § 45-6-301. Perhaps the most significant difference between this section and § 45-6-301 is that § 45-6-301 requires, in addition to the purposeful or knowing act, that there be a purpose to deprive the owner of the property.

Subsection (1)(a) requires that the state show only that the defendant by "deception or threat" caused the execution of a document disposing of property or incurring an obligation. The defendant's purpose in causing the execution is irrelevant, i.e., he need not have a purpose to deprive. It should be noted that this subsection is applicable to salesmen who go beyond a mere "puffing" of their wares.

Subsection (1)(b) is essentially a ban on false or misleading advertising, replacing R.C.M. 1947, §§ 94-1818, 94-1819 and 94-1821. The gist of the offense is a statement made purposely or knowingly for "the purpose of promoting or procuring" a sale. This section is directed to the public statement. It should be noted that there need be no proof of "purpose to deprive" or an actual sale to support a conviction under this subsection.

Subsection (1)(c) replaces prior law, R.C.M. 1947, § 94-1803, and continues the prohibition of false statements to obtain a loan or credit. It should be noted under this subsection that there is no requirement of "purpose to deprive" and it is not necessary that the individual charged with making the false statement actually obtain credit or a loan.

Subsection (1)(d) makes the wrongful use of a credit card which belongs to another or which is forged or expired specifically punishable. While in most instances the conduct which this subsection covers will also be punishable as theft, this section will offer an answer to those situations in which it is not possible to show a purpose to deprive, as for example, when a credit card is used by an individual who claims he planned to repay the holder prior to the billing date on the credit account. It also offers an alternative to the invocation of the higher penalties of the theft section for those situations which do not merit felony treatment.

The 1977 amendment deleted "or knowingly accepts" after "make" in subsection (1)(c); added "or accepts a false or deceptive statement from any person who is attempting to procure a loan or credit regarding that person's financial condition" to subsection (1)(c); and made minor stylistic changes.

Case Notes

Evidence That Stolen Truck Was Sold for Approximately $600-$800 Insufficient to Meet Statutory Felony Threshold of $1,500 — Acquittal of Felony Deceptive Practices Charge Proper. St. v. Craft, 2023 MT 129, 413 Mont. 1, 532 P.3d 461.

Revocation of Suspended Sentence Based on Failure to Pay Restitution — Additional Sentence Unauthorized: Striplin was convicted of deceptive credit card practices and was given a suspended sentence conditioned upon payment of restitution and maintaining employment. About 3 years after sentencing, Striplin was charged with violating the terms of the suspended sentence because no restitution payments had been made to the Department of Corrections as ordered and because Striplin did not ever contact the credit card companies to see if the debts had been paid or seek and maintain employment. The District Court revoked Striplin's sentence, and because Striplin did not have the means to pay restitution, the court did not reimpose restitution but instead sentenced Striplin to 30 days in the county jail. Striplin appealed. The Supreme Court agreed that Striplin's sentence should be revoked because of the violations of the sentencing terms. However, the court reversed the 30-day jail sentence on grounds that the sentence was an additional, more burdensome condition that the District Court was without authority to impose pursuant to the version of 46-18-203(7)(a)(ii) that was in effect at the time of sentencing. St. v. Striplin, 2009 MT 76, 349 M 466, 204 P3d 687 (2009), following St. v. Tracy, 2005 MT 128, 327 M 220, 113 P3d 297 (2005).

Sufficient Evidence of Theft and Deceptive Practices to Warrant Dismissal of Motion for Directed Verdict: Landis contended that the District Court abused its discretion in denying his motion for a directed verdict on charges of theft and deceptive practices. The Supreme Court noted that as long as sufficient evidence existed upon which a rational jury could find the elements of the charged offenses beyond a reasonable doubt, denial of the directed verdict was not an abuse of discretion. Landis did not present a meritorious challenge to the sufficiency of any essential element of the theft charge. The evidence of deceptive practices, although circumstantial, was sufficient for the jury to find that Landis made statements to persons over a period of months, that the statements were made for the purpose of promoting Landis's training and sales program, and that the statements were purposely or knowingly false or deceptive. The District Court was affirmed. St. v. Landis, 2002 MT 45, 308 M 354, 43 P3d 298 (2002).

Signing Another's Name Without That Person's Knowledge and With Intent to Defraud: When an agent exceeds the agent's authority with respect to an instrument in writing, with intent to defraud, the offense of forgery is committed. Defendant's inserting of a pastor's name on money orders, with the knowledge that the pastor had not given authority for the use of the pastor's name and with an intent to defraud the parish, constitutes forgery. The offense of deceptive practices is complete upon the knowing or purposeful making of a false financial statement. There was sufficient evidence to support the convictions. St. v. Richards, 274 M 180, 906 P2d 222, 52 St. Rep. 1176 (1995).

Elements to Be Proved for Conviction: To convict a defendant of violating 45-6-317, the State is not required to prove the elements necessary for a conviction under section 94-1805, R.C.M. 1947 (repealed 1973). To sustain a conviction under 45-6-317, the State need only prove that defendant acted purposely or knowingly or made or directed another to make a false or deceptive statement addressed to the public or any person for the purpose of promoting or procuring the sale of property or service. In this case the State carried its burden of proof. St. v. Duncan, 181 M 382, 593 P2d 1026 (1979).

Prosecution When Conduct Violates Two Statutes: Where defendant argues that he should have been charged under 30-10-301, the specific fraudulent securities practice statute, rather than 45-6-317, the general deceptive practices statute, the Supreme Court said that the rule of statutory construction that a more specific statute controls over an inconsistent general statute does not apply to criminal prosecutions where defendant's conduct violated two or more criminal statutes. The fact that two statutes overlap does not mean that the defendant can only be prosecuted under the statute providing the lesser penalty. St. v. Duncan, 181 M 382, 593 P2d 1026 (1979).

Sufficiency of Evidence: Evidence of representations made by defendant that he had secured large contracts for the purchase of his products when in fact he had not and evidence of promises made by defendant (1) to set up a trust account to guarantee repayment of security deposits, (2) that a limited number of contracts would be issued in the area, and (3) that the contracting parties were guaranteed a set quota of products, coupled with evidence that defendant never set up the trust account, that more than the specified number of contracts were issued, and that defendant frequently delivered less than the guaranteed quota held to lead inescapably to the conclusion that defendant deliberately made false statements to induce others to enter into contracts with him. St. v. Duncan, 181 M 382, 593 P2d 1026 (1979).

Welfare Code — Not Preempting Felony Offense: A misdemeanor statute and a felony statute proscribing similar acts are to be construed in pari materia giving effect to both. The Supreme Court declined to give sole effect to a misdemeanor statute to the exclusion of a felony statute addressing similar subject matter. St. v. Moore, 174 M 292, 570 P2d 580 (1977).

Welfare Fraud: Despite the fact that section 71-226, R.C.M. 1947 (now 53-2-107), makes welfare fraud a misdemeanor, the State may prosecute welfare fraud under this provision making the offense a felony. St. v. Moore, 174 M 292, 570 P2d 580 (1977).

Use of Credit Cards: This section has been generally applied to fraudulent acquisitions of property by use of credit cards, while 45-6-301 has been used for more traditional forms of theft. See People v. Enright, 1 Ill. App.3d 654, 275 N.E.2d 294 (1971); People v. Adornetto, 3 Ill. App.3d 647, 279 N.E.2d 421 (1972).

Intent to Defraud: As with the general section on theft, 45-6-301, which overlaps with the provisions of this section, it has been held that absolute liability is not provided for the conduct described herein. To impose liability, an intent to defraud is necessary. People v. Billingsley, 64 Ill. App.2d 292, 213 N.E.2d 765 (1966).

False Financial Statement: Defendant who obtained a bank loan by misrepresenting his ownership of ranchland, livestock, and feed was guilty of obtaining property under false pretenses under 94-1805, R.C.M. 1947 (since repealed), and it did not matter that the bank credited defendant's account rather than paying him money directly. St. v. Mason, 62 M 180, 204 P 358 (1922).

45-6-318. Deceptive business practices.

Criminal Law Commission Comments

Source: Proposed Michigan Criminal Code 1967, § 4105.

This section replaces a large number of statutes in the old code which provided for the content of goods, marks which they are to bear and the use of false weights and measures. The purpose of this section is to provide a single, simple definition for false weights and measures, short weight sales and purchases, adulteration, mislabeling of commodities, and false advertising.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This provision derives from the Proposed Michigan Criminal Code of 1967 which was never adopted by the Michigan legislature. There is, therefore, no Michigan case law interpreting the section. The purpose of this section is the punishment of a wide variety of deceptive conduct which might not be within the purview of the general section on theft. This section replaces a number of sections of the prior law dealing with the contents of goods, labeling, and the use of false weights and measures. This section provides a single, simple definition for false weights and measures, short weight sales and purchases, adulteration, mislabeling of commodities, and false advertising.

It should also be noted that under this section there need be no showing of a "purpose to deprive" state of mind. All that need be shown is the knowing or purposeful doing of one of the prohibited acts. Subsections (3) and (4) provide definitions of "adulterated" and "mislabeled" for use when applicable with the subparagraphs of subsection (1).

Case Notes

False Weights: An act which constituted a misdemeanor under 90-602, R.C.M. 1947 (since repealed), the weights and measures statute, and at the same time a felony under 94-1805 (now 45-6-317), the false pretenses statute, could be prosecuted under either in the state's discretion, and when it was prosecuted as a felony, defendant was not entitled to an instruction on the other offense as a lesser and included offense since 90-602 required a sale but 94-1805 did not. St. v. Lagerquist, 152 M 21, 445 P2d 910 (1968).

45-6-319. Chain distributor schemes.

Criminal Law Commission Comments

Source: §§ 94-1832 to 94-1834, R.C.M. 1947.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This section was derived from a separate 1973 act not originally part of the criminal code. It imposes sanctions upon the promotion or encouragement of a chain distributorship scheme by any person. As "person" is defined by subsection (1)(a) it includes any entity directly involved and any entity which controls the entity directly involved, even though the controlling entity has no direct involvement. The sanctions of the act extend also to the individuals who control the activities of the entities which are not natural persons.

The 1977 amendment eliminated the possibility that the first violation of this section would be a felony by deleting a provision in subsection (3) that a person violating this section will be deemed guilty of a felony. However, a second offense under this section is an automatic felony offense.

45-6-320. Theft of nonferrous metal.

Compiler's Comments

Effective Date: This section is effective October 1, 2013.

Applicability: Section 4, Ch. 174, L. 2013, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective October 1, 2013.

45-6-321. Illegal transportation of catalytic converters.

Compiler's Comments

Effective Date: Section 6, Ch. 372, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 3, 2023.

45-6-325. Forgery.

Criminal Law Commission Comments

Source: Ill. C.C. 1961, Chapter 38, § 17-3.

There is doubt that a specific forgery law is necessary because the provisions dealing with false pretense and fraud should be adequate to cover forgery. Forgery is retained as a distinct offense partly because the concept is so embedded in popular understanding that it would be unlikely that any legislature would completely abandon it, and partially in recognition of the special effectiveness of forgery as a means of undermining public confidence in important symbols of commerce, perpetrating large-scale frauds.

Compiler's Comments

2017 Amendment: Chapter 321 in (4) substituted current text for former text that read: "(4) A person convicted of the offense of forgery shall be fined not to exceed $1,500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. If the forgery is part of a common scheme or if the value of the property, labor, or services obtained or attempted to be obtained exceeds $1,500, the offender shall be fined not to exceed $50,000 or be imprisoned in the state prison for any term not to exceed 20 years, or both." Amendment effective July 1, 2017.

Applicability: Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

2009 Amendment: Chapter 473 in (4) in first sentence increased amount of fine from $1,000 to $1,500, and near end of second sentence increased amount of property value from $1,000 to $1,500. Amendment effective October 1, 2009.

1999 Amendment: Chapter 397 in (4) in first sentence increased maximum fine from $500 to $1,000 and in second sentence increased minimum value of property, labor, or services from more than $500 to more than $1,000; and made minor changes in style. Amendment effective October 1, 1999.

1993 Amendment: Chapter 616 in (4), in second sentence, increased forgery value from $300 to $500; and made minor changes in style.

1983 Amendment: In (4), in second sentence after "exceeds" changed "$150" to "$300".

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section replaces a number of prior provisions proscribing various forms of forgery, including § 94-2001, Forgery of Wills; § 94-2002, Making False Entries in Records or Returns; § 94-2003, Forgery of Public or Corporate Seal; § 94-2005, Forging Telegraphic Messages; § 94-2006, Possessing or Receiving Forged or Counterfeit Bills or Notes With Intent to Defraud; and various sections dealing with trademarks, §§ 94-35-226 through 94-35-236. To avoid one of the sources of trouble under prior forgery laws "a purpose to defraud" is broadly defined in subsection (2) and subsection (3) gives a broad definition of "document or other subject capable of being used to defraud" which is illustrative but not limited to any object which affects any right.

Transactions covered by this section are also largely covered by the section on Theft, § 45-6-301. However, subsections (1)(c) and (1)(d) extend the prohibition to possession of such documents and devices with the purpose of issuance or use. The offense has been reduced to a misdemeanor although an increased penalty has been retained for those cases involving either a common scheme or property having value in excess of $300 (raised from $300 to $500 in 1993).

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IN GENERAL

Elements: The essential element of forgery is false writing or an alteration of an instrument which, as written, is apparently capable of defrauding coupled with an intent to defraud. People v. Dauphin, 53 Ill. App.2d 433, 203 N.E.2d 166 (1965). A common instance of forgery is the use by an offender of a fictitious person as a purported maker of a bank draft. People v. Lanners, 122 Ill. App.2d 290, 258 N.E.2d 390 (1970). However, this section is broad enough to incorporate all forms of forgery within its coverage. People v. Merchant, 5 Ill. App.3d 636, 283 N.E.2d 724 (1972). Despite the fact that technically an instrument is void or not payable, it may still be the subject of a forgery prosecution if the necessary elements of culpability are present. See, for example, People v. Marks, 63 Ill. App.2d 384, 211 N.E.2d 548, certiorari denied 385 US 876 (1965); People v. Dauphin, 53 Ill. App.2d 433, 203 N.E.2d 166 (1965); People ex rel. Miller v. Pate, 42 Ill.2d 283, 246 N.E.2d 225 (1969).

JURISDICTION

Forgery Offense Actionable in Either State or Federal Court: Forgery is prohibited by both federal and state laws, and therefore the defendant may be tried in either a state or federal court. Conviction of defendant in state court was overturned because of a failure to follow proper procedures in disqualification and substitution of judges, not because the State could not prosecute defendant for forgery. St. v. Daugherty, 184 M 474, 603 P2d 1041 (1979).

Indians:

State court had jurisdiction of prosecution of Indian for passing a forged check outside the reservation even though the check originated within the reservation and belonged to another Indian. Petition of Fox, 141 M 189, 376 P2d 726 (1962).

State court had no jurisdiction of prosecution of an enrolled and allotted Indian for forgery and attempted passing of a check within the exterior boundaries of an Indian reservation, even on patented land. State ex rel. Bokas v. District Court, 128 M 37, 270 P2d 396 (1954).

INDICTMENT AND INFORMATION

Common Scheme Forgery — Affidavit to Support Information: The District Court held that the affidavit accompanying an information charging common scheme forgery was insufficient. An affidavit must include sufficient facts to convince a judge that there is probable cause to believe the named defendant may have committed the crime described in the information. Proof of "common scheme" requires proof that the suspect series of acts constitute a common criminal scheme. These acts must be either individually incomplete, such that they show that a single crime had been committed, or be acts which follow one another evidencing a continuing criminal design. In this case, the affidavit had an insufficient connection between activities. There was no showing of continuous design between the money orders, building permits, forgery activity, and defendant's other activities described in the affidavits. St. v. Renz, 192 M 306, 628 P2d 644, 38 St. Rep. 720 (1981).

Discussion: For discussions of various indictments and informations based on this section attention is directed to the following decisions: People v. Marks, 63 Ill. App.2d 384, 211 N.E.2d 548, certiorari denied 385 US 876 (1965); People v. Broverman, 4 Ill. App.3d 929, 282 N.E.2d 279 (1972); People v. Moyer, 1 Ill. App.3d 245, 273 N.E.2d 210 (1971); People v. Dzielski, 130 Ill. App.2d 581, 264 N.E.2d 426 (1970); People v. Merchant, 5 Ill. App.3d 636, 283 N.E.2d 724 (1972);

People v. White, 130 Ill. App.2d 775, 267 N.E.2d 129 (1971), appeal after remand, 3 Ill. App.3d 792, 279 N.E.2d 87 (1972); People v. Meeks, 55 Ill. App.2d 437, 205 N.E.2d 62 (1965).

Apparatus for Counterfeiting: Information charging possession of "apparatus, paper and other things" for use in counterfeiting was sufficient under section 94-2011, R.C.M. 1947 (a forerunner of this section), and it was not necessary that the apparatus be described with greater particularity. St. v. Shannon, 95 M 280, 26 P2d 360 (1933), overruled on other grounds in St. v. Bosch, 125 M 566, 242 P2d 477 (1952).

Means of Forging: Information charging that defendant knowingly passed a forged instrument need not specify the means by which the forgery was done. St. v. Mitton, 37 M 366, 96 P 926 (1908).

TYPES OF ALTERATIONS OR FALSE WRITINGS

Signing Another's Name Without That Person's Knowledge and With Intent to Defraud: When an agent exceeds the agent's authority with respect to an instrument in writing, with intent to defraud, the offense of forgery is committed. Defendant's inserting of a pastor's name on money orders, with the knowledge that the pastor had not given authority for the use of the pastor's name and with an intent to defraud the parish, constitutes forgery. The offense of deceptive practices is complete upon the knowing or purposeful making of a false financial statement. There was sufficient evidence to support the convictions. St. v. Richards, 274 M 180, 906 P2d 222, 52 St. Rep. 1176 (1995).

Document Forged or Counterfeited:

It is not necessary that the instrument be negotiable for its false making or endorsement to constitute forgery. St. v. Phillips, 127 M 381, 264 P2d 1009 (1953); Ex parte Solway, 82 M 89, 265 P 21 (1928).

Juror's fee certificate which did not bear the District Court seal required by statute was void on its face and counterfeiting thereof was not forgery. In re Farrell, 36 M 254, 92 P 785 (1907).

Where an instrument appeared on its face to be the obligation of a bank, it was not necessary to allege or prove by extrinsic evidence that such a bank existed in order to convict for forgery of an endorsement in violation of 94-2001, R.C.M. 1947 (a forerunner of this section). St. v. Patch, 21 M 534, 55 P 108 (1898).

A warrant for payment out of a particular city fund was protected by 94-2001, R.C.M. 1947 (a forerunner of this section), and alteration thereof was forgery. St. v. Brett, 16 M 360, 40 P 873 (1895).

There was no violation of 94-2001, R.C.M. 1947 (a forerunner of this section), where the instrument forged did not purport to impose any liability on the purported maker but merely directed the addressee to charge an advance to the defendant's account. St. v. Evans, 15 M 539, 39 P 850 (1895).

Authority to Sign Document:

Where executor of estate signed blank checks on the estate's account and authorized attorney to use them by filling in names of creditors and distributees of the estate, attorney's unauthorized filling in of his own name or that of his creditor constituted forgery within the meaning of 94-2011 (a forerunner of this section). St. v. Daems, 97 M 486, 37 P2d 322 (1934).

Bank officers who were authorized to issue travelers' checks, on condition that they collect and remit the amount thereof to the drawee bank, did not commit forgery in issuing such checks without collecting or remitting the amount. St. v. Alexander, 73 M 329, 236 P 542 (1925).

Endorsement of Instrument: The offense of forgery was complete when defendant, with intent to defraud, wrote a check to himself and forged the name of another as maker, and it was immaterial that the check was later passed without being endorsed. Ex parte Solway, 82 M 89, 265 P 21 (1928).

Promissory Note Severed From Purchase Order: Severance of a promissory note from a purchase order, thus making the note negotiable instead of nonnegotiable, constituted material alteration of the instrument. St. v. Mitton, 37 M 366, 96 P 926 (1908), explained in First Nat'l Bank v. Barrett, 52 M 359, 157 P 951 (1916).

DESCRIPTION OF INSTRUMENT

Instrument's Purport or Tenor: In a forgery indictment, the instrument may be described in two ways, either by its purport description or by its tenor description. If both descriptions are used, however, they must be compatible. People v. Addison, 75 Ill. App.2d 358, 220 N.E.2d 511 (1966).

EVIDENCE

Prejudicial Prior Arrest Testimony Ordered Excluded in Pretrial Order — Weak Case Against Defendant — New Trial Granted: In a prosecution for forgery, a detective's testimony concerning defendant's handwriting samples obtained during a prior arrest was inadmissible because it violated a pretrial order not to give such testimony. No eyewitness tied defendant to the offense, and the detective's handwriting testimony was the only link between defendant and the offense. There were weaknesses and conflicts in the detective's testimony and handwriting analysis. Defendant denied committing the offense and offered a plausible explanation of who committed the offense. The testimony of the prior arrest was inherently prejudicial, which the prosecutor conceded when the pretrial motion was made to exclude the testimony. The trial judge's cautionary instruction that the prior arrest handwriting samples testimony was improper and should be disregarded did not overcome the prejudice. There was a reasonable possibility that the reference to the prior arrest might have contributed to the conviction; therefore, defendant was denied a fair and impartial trial, it was an abuse of discretion to deny defendant's motion for a new trial, the conviction was reversed, and the case was remanded for a new trial. St. v. Partin, 287 M 12, 951 P2d 1002, 54 St. Rep. 1474 (1997).

Sufficiency of Evidence — No Inconsistency in Verdicts — No Evidence of Signature by Offender Required: Robert was found guilty of two counts of forgery, count one being for the forgery of his wife's signature on a loan application from Whitefish Credit Union and count two involving a check presented to the same credit union. Robert alleged that the verdicts were inconsistent because the proof required for each was the same. The Supreme Court found that each of the counts involved testimony from different witnesses and that the verdicts were therefore not inconsistent. The Supreme Court also held that in order for Robert to be convicted, no proof was required under this section that Robert actually forged the check, only that he presented the check for payment knowing that it had not been signed by his wife. St. v. Lane, 279 M 128, 927 P2d 989, 53 St. Rep. 1082 (1996).

Subsequent Forgeries: Evidence concerning subsequent forgeries may be properly admitted in a prosecution under this section for the purpose of establishing identity, intent, knowledge, or a common scheme or plan. People v. Clark, 104 Ill. App.2d 12, 244 N.E.2d 842 (1969).

Intent:

In the absence of evidence that he knew the checks were forged or that the person giving him the checks was a convicted forger, defendant who passed forged checks should have been acquitted. St. v. Phillips, 147 M 334, 412 P2d 205 (1966).

Where defendant cashed a check found in his pocket without any recollection of having seen the purported maker and the check was apparently made to him as payee under a different name than that previously used for him by the same purported maker, he had the requisite criminal intent despite intoxication and, the maker's signature having been forged, he was guilty of forgery under 94-2001, R.C.M. 1947 (a forerunner of this section). St. v. Cooper, 146 M 336, 406 P2d 691 (1965).

In prosecution for knowingly passing altered instrument, evidence of other similar acts by defendant about the same time was admissible as bearing on intent. St. v. Phillips, 127 M 381, 264 P2d 1009 (1953); St. v. Daems, 97 M 486, 37 P2d 322 (1934); St. v. Mitton, 37 M 366, 96 P 926 (1908).

Circumstantial: In forgery prosecutions, proof must often be by circumstantial evidence. People v. Dauphin, 53 Ill. App.2d 433, 203 N.E.2d 166 (1965).

Presumption: Where proof of a forged instrument is established, an intent to defraud is presumed. People v. Dauphin, supra; People v. Bailey, 15 Ill.2d 18, 153 N.E.2d 548 (1958).

Accomplices: Making a false endorsement and passing the instrument with knowledge of the falsity of the endorsement are separate offenses, and the person who makes the endorsement is not necessarily an accomplice to the offense of passing it, so that his testimony did not require corroboration as would that of an accomplice. St. v. Phillips, 127 M 381, 264 P2d 1009 (1953).

Person Defrauded: Forgery of a payee's signature and delivery to the obligor showed intent to defraud the payee as well as the obligor. St. v. Patch, 21 M 534, 55 P 108 (1898).

JURY INSTRUCTIONS

Alteration of Document: Information alleging alteration of a document in violation of section 94-2001 (a forerunner of this section) was required to set forth the particulars of the alteration since only material alterations are in violation; and where information alleged forgery by making of a document but not by alteration, it was prejudicial error to give an instruction on alteration. St. v. Mitton, 36 M 376, 92 P 969 (1907).

SENTENCE AND PUNISHMENT

Inclusion in Restitution of Costs Related to Pecuniary Loss — Wages Paid to Embezzler Not Recoverable as Pecuniary Loss: Under 46-18-241, a sentencing court may include in restitution costs paid by the victim as a result of defendant's criminal act as long as the costs are considered pecuniary loss, as defined by 46-18-243. This loss may include economic loss as a result of the crime, out-of-pocket losses, such as medical expenses, and reasonable out-of-pocket expenses incurred by the victim in filing charges or in cooperating in the investigation and prosecution of the offense. Here, Brewer embezzled over $96,000 and was ordered to pay restitution, but argued that the fact that 46-18-241 excludes general damages militated against the inclusion in the restitution obligation of amounts beyond the total stolen from the employer. Brewer improperly characterized the employer's out-of-pocket losses as general damages. The employer paid accounting firms, employees, labor contractors, a software company, and a locksmith more than $15,000 in an attempt to reconstruct books and repair damage resulting from Brewer's crime. Those expenses were all considered out-of-pocket losses within the context of 46-18-241 and were properly includable in the restitution calculation. However, wages paid to Brewer over the course of employment did not constitute pecuniary loss and were not recoverable as restitution. St. v. Brewer, 1999 MT 269, 296 M 453, 989 P2d 407, 56 St. Rep. 1090 (1999). See also St. v. Morgan, 198 M 391, 646 P2d 1177 (1982), and St. v. Korang, 237 M 390, 773 P2d 326, 46 St. Rep. 892 (1989).

Forgery and Theft: Forgery and theft are separate offenses. When a conviction for both crimes arises out of the same transaction, however, only the greater of the two sentences should be imposed, the lesser to run concurrently. People v. Rose, 7 Ill. App.3d 374, 287 N.E.2d 195 (1972).

Purpose of Forgery: The purpose of the forgery may be examined to determine the seriousness of the offense. People v. Palmer, 2 Ill. App.3d 934, 274 N.E.2d 658 (1971).

45-6-326. Obscuring identity of machine.

Criminal Law Commission Comments

Source: Substantially the same as New York Penal Law 1965, § 170.65.

This section is directed at a specialized class of criminals who deal in machinery and motor vehicles. The citizen is given the opportunity to avoid criminal liability by reporting the fact of the obscured identity to the proper agency.

Vehicles and certain kinds of machinery are particularly vulnerable to organized rings who steal, attempt to render unidentifiable, and resell them. Under the old law only farm machinery was protected from such alteration. (See R.C.M. 1947, section 94-35-262.)

Possession of a vehicle or machine with obscured identity is also a violation, but there must be a purpose to misrepresent and knowledge that the identification number or mark has been obscured or altered. The burden of proving purpose and knowledge rests with the state.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This section as originally enacted was aimed at the professional automobile thief and those who deal in stolen machinery and equipment. The 1977 amendment included the person who deals in stolen firearms. It should be noted that the conduct specifically condemned by this section is characteristic of organized criminal activity and accordingly, when possible, prosecution should be brought under the general section on theft with its higher penalties.

Possession of a vehicle, machine, electrical device or firearm with an obscured or altered identification mark with the purpose to conceal, misrepresent or transfer is a violation of this provision. The 1977 amendment established a presumption of knowledge whenever possession is established. The state still has the burden of proving possession and a purpose to conceal, misrepresent or transfer.

This section also represents an expansion of prior law which had offered protection to farm machinery only (see R.C.M. 1947, § 94-35-262). The offense is punishable as a misdemeanor as it was under prior law.

45-6-327. Illegal branding or altering or obscuring of brand.

Criminal Law Commission Comments

Source: Derived from Revised Codes of Montana 1947, §§ 94-3504, 94-3514.

This section is merely a recodification of old Montana law. Although the offense of forgery would seem to make the same acts punishable, the commission deemed it necessary to have this specific statute included in the code in light of the special problems that Montana law enforcement authorities face in the area of cattle rustling.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 400 in (2) near end of first sentence substituted "amount of not less than $5,000 or more than $50,000" for "amount not to exceed $50,000" and inserted second and third sentences pertaining to deferred prison term and criminal forfeiture; and made minor changes in style. Amendment effective April 28, 2009.

Applicability: Section 8, Ch. 400, L. 2009, provided: "[This act] applies to proceedings begun on or after [the effective date of this act]." Effective April 28, 2009.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section is essentially a recodification of the prior law contained in R.C.M. 1947, § 94-3504 and 94-3514. While situations which would give rise to this offense will also fall within the general provisions of the forgery and theft sections, it was felt advisable to retain this as a separate offense in view of the special problems faced by Montana law enforcement officers in this area. Since there is no purpose to alter existing law, prior Montana cases should still be considered applicable.

Case Notes

Liability of Illegal Branding Defendant for Cost of Boarding Confiscated Livestock With Livestock Commission: When Mikesell was investigated for illegal branding of livestock on his property, the cattle were seized and taken to the Miles City Livestock Commission. Mikesell pleaded guilty to three counts of illegal branding, and the cost of the feed bill at the Livestock Commission was assessed as restitution. Mikesell contended that the feed cost should not be assessed because the cattle remained at the Livestock Commission long after he had requested that the cattle be released to him. However, the prosecution did not allow release of the cattle to Mikesell because they did not belong to him. Because the cost was associated with the illegal branding charges, Mikesell was responsible for the cost of feeding the cattle until the parties came to an agreement on the cattle's disposition. St. v. Mikesell, 2004 MT 146, 321 M 462, 91 P3d 1273 (2004).

No Restitution Owing for Loss of Cattle Unassociated With Criminal Illegal Branding Charge: Mikesell pleaded guilty to three counts of illegal branding of cattle pastured on his property. As part of restitution, the trial court also found that Mikesell owed $30,000 for 55 cattle that were missing after being pastured on Mikesell's land. On appeal, the Supreme Court reversed. The loss of the 55 cattle from possible drowning or other untimely demise was a civil matter and was not associated with the illegal branding for which Mikesell was guilty. Because the loss did not arise from Mikesell's criminal activity, he was not responsible for restitution for the lost cattle. St. v. Mikesell, 2004 MT 146, 321 M 462, 91 P3d 1273 (2004).

Unauthorized Brand: An unauthorized brand or mark did not have to touch, alter, or deface a former brand on an animal to be in violation of 94-3504, R.C.M. 1947 (a forerunner of this section). St. v. Johnson, 155 M 351, 472 P2d 287 (1970).

45-6-328. Forfeiture for theft of commonly domesticated hoofed animal or illegal branding or altering or obscuring of brand.

Compiler's Comments

2015 Amendment: Chapter 421 deleted former (3) that read: "(3) Criminal forfeiture under this section of property that is encumbered by a bona fide security interest is subject to that interest if the secured party did not use or consent to the use of the property in connection with the theft of a commonly domesticated hoofed animal or illegal branding or altering or obscuring a brand in violation of 45-6-301 or 45-6-327"; in (5) substituted "44-12-207 through 44-12-211" for "44-12-201 through 44-12-204"; and made minor changes in style. Amendment effective July 1, 2015.

Saving Clause: Section 15, Ch. 421, L. 2015, was a saving clause.

Severability: Section 16, Ch. 421, L. 2015, was a severability clause.

Applicability: Section 17, Ch. 421, L. 2015, provided: "[This act] applies to forfeiture proceedings begun on or after [the effective date of this act]." Effective July 1, 2015.

Effective Date: Section 7, Ch. 400, L. 2009, provided that this section is effective April 28, 2009.

Applicability: Section 8, Ch. 400, L. 2009, provided: "[This act] applies to proceedings begun on or after [the effective date of this act]." Effective April 28, 2009.

45-6-329. Disposition of property and proceeds of sale.

Compiler's Comments

Effective Date: Section 7, Ch. 400, L. 2009, provided that this section is effective April 28, 2009.

Applicability: Section 8, Ch. 400, L. 2009, provided: "[This act] applies to proceedings begun on or after [the effective date of this act]." Effective April 28, 2009.

45-6-332. Theft of identity.

Compiler's Comments

2017 Amendment: Chapter 321 in (2)(a) in the first sentence substituted "an amount not to exceed $500" for "an amount not to exceed $1,500, imprisoned in the county jail for a term not to exceed 6 months, or both", inserted third sentence concerning a second offense, and inserted fourth sentence concerning a third or subsequent offense; in (2)(b) in first sentence substituted "an economic benefit that exceeds $1,500 and does not exceed $5,000" for "an economic benefit of $1,500 or more", substituted "an amount not to exceed $5,000" for "an amount not to exceed $10,000", inserted third sentence concerning a second offense, and inserted fourth sentence concerning a third or subsequent offense; inserted (2)(c) concerning convictions involving an economic benefit exceeding $5,000 in value; and made minor changes in style. Amendment effective July 1, 2017.

Applicability: Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

2015 Amendment: Chapter 175 in (2)(a) and (2)(b) inserted last sentence concerning increased punishment when victim is a minor; and made minor changes in style. Amendment effective October 1, 2015.

Applicability: Section 2, Ch. 175, L. 2015, provided: "[This act] applies to proceedings begun on or after October 1, 2015."

2009 Amendment: Chapter 473 in (2)(a) increased amount of property value and amount of fine from $1,000 to $1,500; in (2)(b) near beginning increased amount of economic benefit from $1,000 to $1,500. Amendment effective October 1, 2009.

2007 Amendment: Chapter 180 in (3) near middle inserted "tribal identification card number"; and made minor changes in style. Amendment effective October 1, 2007.

Effective Date: This section is effective October 1, 2001.

45-6-333. Exploitation of incapacitated person or vulnerable adult.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 7, Ch. 12, L. 2023. Amendment effective October 1, 2023.

2019 Amendment: Chapter 99 in (1)(a) at end inserted "by means of deception, duress, menace, fraud, undue influence, or intimidation". Amendment effective October 1, 2019.

Effective Date: This section is effective October 1, 2015.

45-6-341. Money laundering.

Compiler's Comments

2009 Amendment: Chapter 473 in (2) in first sentence increased amount of fine from $1,000 to $1,500, and near end of second sentence increased amount of item value from $1,000 to $1,500. Amendment effective October 1, 2009.

Effective Date: This section is effective October 1, 2005.

45-6-345. Determination of number of convictions.

Compiler's Comments

Effective Date: Section 43, Ch. 321, L. 2017, provided: "[This act] is effective July 1, 2017."

Applicability: Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

CHAPTER 7
OFFENSES AGAINST PUBLIC ADMINISTRATION

Chapter Compiler's Comments

Annotator's Note — Source: The compiler's comments entitled "Annotator's Note" are taken from the Montana Criminal Code of 1973 Annotated (1980 rev. ed.) produced by the Montana Criminal Law Information Research Center (MONTCLIRC) and printed under cosponsorship of the State Bar of Montana. Minor revisions have been made to conform to the style and format of the annotations.

Part 1
Bribery and Corrupt Influence

45-7-101. Bribery in official and political matters.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 240.1.

Subsection (a) prohibits the giving or receiving of any pecuniary benefit to influence official or political discretion. Offers of nonpecuniary gain, e.g., political support, honorific appointments, are penalized under subsection (b) but limited to judicial and administrative proceedings. "Administrative proceedings" is defined in section 94-2-101 [now MCA, 45-2-101] and includes some actions that might be called "executive" or "administrative", where the official action applies a general rule to an individual, e.g., in granting or revoking a license, awarding veteran's disability compensation or social security payments. Gifts to officials are covered by section 94-7-105 [now MCA, 45-7-104].

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: The purpose of this section on Bribery is to prohibit and provide punishment for the improper influencing of any official or governmental action. To this end the section replaces a number of repetitive, overlapping statutes which created numerous narrow offenses with sweeping provisions designed to deal with all situations involving improper influence of official or public actions. This section is applicable both to the individual who "offers, confers, or agrees to confer" and to the individual who "solicits, accepts or agrees to accept" a bribe. Subsection (1)(a) prohibits the giving or receiving of pecuniary benefit to influence official or political discretion. As far as it concerns elections, this section may overlap with Title 13, chapter 35, on Election and Campaign Practices and Criminal Provisions. Offers of nonpecuniary gain, e.g., political support, honorific appointments, are penalized under subsection (1)(b) but limited to judicial and administrative proceedings.

Subsection (1)(c) deals with the known duty situations and punishes the offer or acceptance of any benefit as consideration for the duty's violation by a public servant or party official.

The defense of lack of jurisdiction or of lack of qualification to act in the desired manner is expressly eliminated by subsection (1). This represents an apparent change from current Montana law which indicates that it is a defense that the person attempted to be improperly influenced is no longer capable of action (see St. v. Porter, 125 M 503, 242 P2d 984, 987 (1952)).

It should be noted that subsection (3) which provides for permanent disqualification from public office on conviction may be in conflict with Art. II, sec. 28, Mont. Const. which mandates full restoration of rights on discharge from supervision for "any offense against the state".

Case Notes

"Judicial Officer": Defendant who offered a bribe to a Deputy County Attorney was properly convicted under 94-7-102, R.C.M. 1947 (a forerunner of this section), making it an offense to offer bribes to a "judicial officer". St. v. Hensley, 171 M 38, 554 P2d 745 (1976).

Jurors:

On prosecution for attempt to influence grand juror, evidence of transactions after juror had been discharged by operation of law was inadmissible even though defendant did not know that juror had been discharged. St. v. Porter, 125 M 503, 242 P2d 984 (1952).

Section 94-801, R.C.M. 1947 (a forerunner of this section), covering bribery of judicial officials, applied to members of the jury panel who might be selected to try a case, not just to those who had been selected and sworn. State ex rel. Webb v. District Court, 37 M 191, 95 P 593 (1908).

Intent: Allegation that sheriff received a bribe did not charge a violation of 94-3904, R.C.M. 1947 (a forerunner of this section), without an allegation of agreement that his official action would be influenced; sheriff may have intended entrapment or some other lawful purpose. State ex rel. Beazley v. District Court, 75 M 116, 241 P 1075 (1925).

Disbarment: Bribery of members of the Legislature was a felony under 94-2905, R.C.M. 1947 (a forerunner of this section), and would furnish ample ground for disbarment even though the acts were not in the attorney's official capacity, but the Supreme Court would not, as a matter of policy, act on disbarment until after criminal prosecution. In re Wellcome, 23 M 140, 58 P 45 (1899).

Attorney General's Opinions

Sheriffs Not to Receive Pecuniary Gifts: Section 45-7-104 prohibits the receipt by a Sheriff's Department of pecuniary gifts from individuals or organizations within the Sheriff's regulatory or investigative jurisdiction. 38 A.G. Op. 76 (1980).

45-7-102. Threats and other improper influence in official and political matters.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 240.2.

Penal legislation against the use of intimidation to influence the behavior of public officials is much rarer than legislation against bribery, although there are many statutes relating to jurors, legislators, and law enforcement officers.

Compiler's Comments

1995 Amendment: Chapter 351 in (1)(a)(i) at beginning after "threatens", deleted "unlawful" and after "any person" inserted "the person's spouse, child, parent, or sibling, or the person's property"; in (1)(a)(ii), after "any public servant", inserted "to the public servant's spouse, child, parent, or sibling, or to the public servant's property"; in (1)(a)(iii), after "party official", inserted "the person's spouse, child, parent, or sibling, or the person's property" and at end inserted "or to prevent the public servant or party official from accepting or holding any public office"; inserted (1)(b) regarding injury caused because of a public servant's lawful duties or to prevent the discharge of a public servant's lawful duties; in (3), after "section", deleted "shall be fined not to exceed $500 or imprisoned in the county jail for any term not to exceed 6 months, or both, unless the offender threatened to commit an offense or made a threat with the purpose to influence a judicial or administrative proceeding, in which case the offender"; adjusted subsection references; and made minor changes in style. Amendment effective April 11, 1995.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section concerning improper influencing of official matters prohibits conduct not covered by the preceding section on Bribery and is directed toward the improper influencing of public servants, party officials, jurors or voters by threat or private communication. The effect of this section is to broaden prior law to cover classes of persons who were not previously clearly protected against attempts to exert improper influence by these means. Subsection (1)(a) is all-inclusive in prohibiting the use of threats to influence the exercise of discretion by any public servant or party official or to influence a private citizen in the exercise of his franchise. Subsection (1)(b) is a narrower class drawn from those included in subsection (1)(a) for the imposition of additional penalties as provided under subsection (2) for those who use threats to influence judicial or administrative proceedings. Subsections (1)(d) and (1)(e) provide criminal sanctions for unauthorized private communications with the purpose of influencing the decision of a public servant having official discretion in a matter or a juror with regard to a matter pending before the jury.

The 1977 amendment made the former second sentence of subsection (1)(d) the separate subsection (2) and made the punishment subsection (3). Subsection (2) establishes that it is not a defense to charges brought under this provision that the person sought to be influenced could not have acted. Thus, the offender will not benefit from a mistaken belief that an official could have acted so as to bring about the offender's desired result.

The offenses under this section are generally punished as misdemeanors but if the threat is to commit an offense or the threat is intended to influence a judicial or administrative proceeding the punishment may be any term up to ten years. It should be noted that the facts justifying the increased penalty would have to be found by the jury. It should be also noted that many, if not all, of the situations involving threats which are punishable under this section are also punishable under MCA, 45-5-203, Intimidation. Consideration should be given to charging under that section in those situations since the penalties are heavier and elements of proof required are no greater.

Case Notes

Reference to Defendant's Prior Sexual Offenses Inextricably Intertwined With Improper Threats in Official and Political Matters — Evidence Probative of Defendant's Mental State in Threatening Police Officer — Prior Offenses Properly Admitted Under Transaction Rule. St. v. Hardin, 2023 MT 132, 413 Mont. 26, 532 P.3d 466.

Evidence of Earlier Encounter With Arresting Officer Allowed — Reliance on Evidence by Both Parties — No Abuse of Discretion: The defendant was charged with and convicted of improper influence of an official for threatening to kill a police officer and his family as he was being taken to jail by the officer for disorderly conduct. The defendant had been arrested by the same officer earlier, and the state was allowed to introduce evidence of the previous encounter. On appeal, the defendant argued that the District Court had abused its discretion in allowing evidence of that encounter. The Supreme Court disagreed and affirmed, ruling that the defendant had not demonstrated that the danger of unfair prejudice had outweighed the evidence's probative value. St. v. Spottedbear, 2016 MT 243, 385 Mont. 68, 380 P.3d 810.

Sufficient Evidence of Defendant's Intent to Influence Discretion: The defendant was charged with and convicted of improper influence of an official for threatening to kill a police officer and his family as he was being taken to jail by the officer for disorderly conduct. On appeal, the defendant claimed that the prosecution had not presented evidence sufficient to show that he had made the threats with the purpose of influencing the officer's discretion. The Supreme Court disagreed and affirmed, holding that the state had presented sufficient evidence to demonstrate that the defendant had made the threats so that the officer would not charge him with criminal trespass. St. v. Spottedbear, 2016 MT 243, 385 Mont. 68, 380 P.3d 810.

Unsuccessful Challenge to Constitutionality of Improper Influence Criminal Statute: The defendant was charged with and convicted of improper influence of an official for threatening to kill a police officer and his family as he was being taken to jail by the officer for disorderly conduct. On appeal, the defendant contended that 45-7-102 is unconstitutionally overbroad because it prohibits a substantial amount of protected speech. The Supreme Court affirmed, holding that the defendant did not demonstrate a "realistic danger" or a "significant possibility" that the statute could be applied unconstitutionally. St. v. Spottedbear, 2016 MT 243, 385 Mont. 68, 380 P.3d 810.

Circumstantial Evidence Sufficient to Affirm Conviction for Threats and Improper Influence in Official and Political Matters: After a confrontation with state highway crew members, the Heffners were convicted of threats and other improper influence in official and political matters, a felony under this section. They appealed on grounds that the convictions were based on mere suspicion or conjecture. Although the evidence presented was circumstantial, a rational jury could nevertheless infer that the Heffners were upset that their swift travel on the road was impeded by the duties of the road grader operator and that the Heffners took out their anger and frustration on the grader operator. The circumstantial evidence was sufficient to support the convictions. St. v. Heffner, 1998 MT 181, 290 M 114, 964 P2d 736, 55 St. Rep. 732 (1998).

Threats and Improper Influence in Official and Political Matters — Use of Force Unjustified: After a confrontation with state highway crew members, the Heffners were convicted of threats and other improper influence in official and political matters, a felony under this section. They appealed on grounds that their actions were made in self-defense. Their theory was wholly dependent on their version of the facts, which the jury was entitled to reject. The jury weighed the evidence, assessed the credibility of the witnesses, and found the state's version more credible. Viewing the evidence in the light most favorable to the prosecution, the Supreme Court held that there existed sufficient evidence from which a rational jury could find that the Heffners injured a road grader operator because of the discharge of his duties or to prevent him from discharging his duties and that the Heffners were not justified in their use of force against the grader operator. St. v. Heffner, 1998 MT 181, 290 M 114, 964 P2d 736, 55 St. Rep. 732 (1998).

Service of Process as Exercise of Discretion in Charge of Threat in Official Matters: Deputies attempted to serve civil process on Keating at his home. Keating threatened the officers and was convicted of threats in official matters under this section. On appeal, Keating contended that service of process was not a discretionary function that could serve as the basis of a charge of threats in official matters. The Supreme Court noted that the statutory definition of threats in official matters speaks to a threat made for the purpose of influencing an exercise of discretion by a public servant but does not speak to a discretionary function. The fact that service of process is a statutory duty under 7-32-2121, rather than a discretionary function, does not relate to the issue of whether service of process involves an exercise of discretion under this section. Under former Rule 4D, M.R.Civ.P. (now superseded), personal service of process can be accomplished wherever and whenever the person to be served can be found. The Sheriff's Department uses a variety of discretionary methods of serving process. Thus, service of process clearly involves the power of choice among several courses of action, constituting a sufficient exercise of discretion to form a basis for charges of threats in official matters. St. v. Keating, 285 M 463, 949 P2d 251, 54 St. Rep. 1250 (1997).

Jurors: On prosecution for attempt to influence grand juror, evidence of transactions after juror had been discharged by operation of law was inadmissible even though defendant did not know that juror had been discharged. St. v. Porter, 125 M 503, 242 P2d 984 (1952).

45-7-103. Criminal use of office or position.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 240.3.

There is little legislative precedent for this section, but it obviates the difficulty occasionally encountered in a bribery prosecution when the defendant contends that he did not solicit or receive anything until after the official transaction had been completed. This behavior should be discouraged because it undermines the integrity of government. Compensation for past action implies a promise of similar compensation for future favor.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 98 substituted first sentence relating to offense of criminal use of office or position for "A person commits an offense under this section if he knowingly solicits, accepts, or agrees to accept any pecuniary benefit as compensation for having, as a public servant, given a decision, opinion, recommendation, or vote favorable to another, for having otherwise exercised a discretion in another's favor, or for having violated his duty"; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: The purpose of this section on Compensation for Past Official Behavior is the elimination of a problem occasionally encountered in bribery prosecution when the defendant claims he did not solicit or receive anything until after the transaction in question had been completed. It should be noted that, while this section is limited to pecuniary benefits to public servants, it punishes both the public servant who "solicits, accepts or agrees to accept" and the individual who "offers, confers or agrees to confer" such benefits.

Compensation for past action which implies a promise of similar compensation for future favor undermines public confidence in the integrity of government quite as effectively as the payment in advance. It is made punishable by the new code on those grounds.

The 1977 amendment changed the wording of subsection (1) slightly from "having otherwise exercised discretion in his favor" to read "having otherwise exercised a discretion in another's favor". As originally enacted it was unclear whether "his" referred to the public servant or to the person offering the compensation—as amended it is now clear that the phrase refers to the person making the offer of compensation.

45-7-104. Gifts to public servants by persons subject to their jurisdiction.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 240.5.

This section covers gifts by businessmen to government inspectors or by carriers and utilities to regulatory authorities. In some cases a noncriminal sanction against a public servant would be preferred, but there is difficulty in arriving at satisfactory generalizations for all classes of persons and conduct covered by this section. This section is broader than the old law.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This section on Gifts to Public Servants proscribes conduct which, while suspect, was beyond the scope of prior law. Prior law provisions dealing with bribery required an element of showing of purpose to affect as well as to transfer or offer to transfer property or other consideration. Under this section, all that need be shown is the jurisdiction or probable jurisdiction and the transfer, offer to transfer, agreement to transfer, or solicitation of a pecuniary benefit. The section is limited in that the benefit must be pecuniary in nature. "Pecuniary benefit" is defined as being a "benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain" (MCA, 45-2-101). This would seem to exclude from the scope of this section such gifts as the traditional Christmas bottle of Scotch or advertising gifts such as pens, note pads, or calendars.

The various subsections are broadly inclusive as to what public servants are barred from the acceptance of pecuniary benefits. Subsection (1) bars those engaged in regulatory functions or legal representation from the acceptance of gifts from persons known to be subject to regulation or likely to be involved in a legal struggle with the state. Subsection (2) bars purchasing agents and others dealing in claims or other similar transactions from accepting gifts offered by other parties interested in the transaction. Subsection (3) is aimed at the protection of the judiciary and its employees and subsection (4) prohibits gifts to legislators and legislative employees when the donor is either involved or likely to be involved in a matter pending before the court or Legislature, respectively. Subsection (5) offers as exceptions to the foregoing such benefits as are allowed by law and trivial benefits which involve no substantial risk of undermining official impartiality.

It should be noted that this section makes it an offense to either "solicit, accept or agree to accept" or to "confer, offer or agree to confer" a prohibited gift. Accordingly, either party to the transaction can be subject to criminal sanction.

Attorney General's Opinions

Sheriffs Not to Receive Pecuniary Gifts: Section 45-7-104 prohibits the receipt by a Sheriffs' Department of pecuniary gifts from individuals or organizations within the Sheriff's regulatory or investigative jurisdiction. 38 A.G. Op. 76 (1980).

Fundraising Programs: Section 45-7-104 does not prohibit the use by Sheriff's Departments of fundraising programs involving the sale of goods or services. 38 A.G. Op. 76 (1980).

Part 2
Perjury and Other Falsification in Official Matters

45-7-201. Perjury.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 241.1.

The proposed definition of "materiality" in subsection (3) does not differ substantially from that given by prior law. The question of materiality in a perjury trial is not governed by the rules of evidence applicable in the proceeding. It would be against public policy to immunize false swearing merely because the testimony might have been excluded on objection which was not made. The result would be that an unqualified expert witness could not be punished for consciously falsifying an opinion which he did in fact give to the jury. It should be noted that this section applies to grand jury proceedings, legislative investigations, and administrative hearings, as well as to court trials, each with its own peculiar rules of evidence. Technical irregularities in the administration of the oath are of no concern to the defendant as provided in subsection (4). This is not a change from prior law. Subsection (5) making a retraction a defense is new. It is included in many state code revisions since it attempts to preserve incentive to correct falsehoods, without impairing the compulsion to tell the truth in the first place. The danger that witnesses might be encouraged to take a chance on perjury is limited by the requirement that recantation must take place before the falsity becomes manifest. The distinctive feature of subsection (6) is that accusation and proof in the alternative is authorized, without relieving the prosecution of the burden of proving mens rea. The defendant would not be able to escape conviction because the state cannot prove which of the contradictory statements was false and known to be so. The rule that proof of falsity be by at least two witnesses with corroborating circumstances was adopted at common law because of the problem created by an oath against an oath. The policy question to be decided is whether the protection of witnesses counterbalances the occasional inability to convict an apparent perjurer. The majority of jurisdictions still require at least one witness and corroborating circumstances.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: Under the common law perjury was narrowly defined as a false oath in a judicial proceeding in regard to a material matter. A companion crime, false swearing, prohibited conduct similar to perjury occurring in official proceedings in which an oath was required but which were not classed as judicial proceedings. Prior Montana law followed a fairly common pattern in extending the scope of perjury until it covered the entire field, including "any case in which an oath may by law be administered". The prior Montana provisions also reflect a divergence from the common-law offense of perjury in that the gist of the offense was knowing the falseness of the information given under oath. The common law made the gist of the offense a false oath for which criminal sanctions could be imposed even though the information given turned out to be accurate.

This section of the new code represents a partial retreat to the common-law concept of perjury. Subsection (1) limits perjury to false statements made under oath in official proceedings. A false statement within the meaning of subsection (1) may be made either by giving a statement or by swearing that a statement previously made is true, when the person so doing does not believe the statement to be true. The second phrase in subsection (1) which penalizes a person for swearing that a statement previously made is true will provide punishment when either the statement was untrue when made and is still untrue or the statement was true when made but has since become untrue and the declarant is aware of the fact. It should be noted that this represents a change from the prior law which provided punishment for a statement made when the declarant did not know whether the statement was true or false even when the statement was shown to be true (§ 94-3810). Under the new code an unknowing statement is punishable only if it is shown to be false.

Subsection (3) continues the prior law requirement that materiality be determined by reference to the possible effect on the proceedings. Inadmissibility and the defendant's belief of immateriality are expressly eliminated as possible defenses. The determination of materiality in any given fact situation is expressly made a matter of law.

Subsection (4) continues the prior law position that an irregularity in the administration of the oath or defendant's incompetence to take an oath is not a defense to a perjury charge. This subsection also provides that presentation of a document which is purportedly verified by oath is sufficient to establish the oath or affirmation element of perjury.

Subsection (5), which makes retraction a defense, is new. It should be noted that to establish an effective defense of retraction the defendant would have to show that the retraction was made before it became manifest, that the falsehood would be exposed, and that the retraction occurred before the proceedings had been substantially affected by the falsehood. The section was included as an incentive to correct falsehoods without impairing the compulsion to tell the truth.

Subsection (6) is also new in allowing both accusation and proof in the alternative. The effect of this provision is to allow conviction without requiring proof of falsehood in one of the specific statements. In these situations the state still has the burden of showing that the defendant at the time he made one of the statements could not have believed it to be true.

The common-law rule that falsehood be established by two witnesses is adopted in part by subsection (7). At the common law this rule was adopted to deal with the problem of an oath against an oath. The modern rationale is a policy determination based on a balancing of the need for protection of witnesses and the need to maintain the sanctions for false testimony. In adopting the requirement of more than one witness Montana has followed the majority of states in affording additional protection to the witness at the possible cost of being unable to convict an apparent perjurer. This section requires that at a minimum there be circumstances which will serve to corroborate the testimony of the prosecuting witness.

Case Notes

Perjury Conviction Upheld — Defendant's Testimony at Dependency and Neglect Hearing, Jail Phone Call Between Defendant and Her Father, and Trial Testimony of Witness and Defendant Constituted Sufficient Evidence to Support Conviction. St. v. Burnett, 2022 MT 10, 407 Mont. 189, 502 P.3d 703.

No Perjury Based on Inconsistent Testimony in Aggravated Assault Trial: Trull struck Shaw and injured Shaw's eye. Prior to trial, Shaw complained of blurred vision, but at trial, Shaw testified that he experienced double vision accompanied by sharp shooting pain and that attempts to correct the vision problem were unsuccessful. Trull asserted that Shaw lied about the severity of the injury and that Shaw's trial testimony constituted perjury. The Supreme Court disagreed. The jury was faced with conflicting evidence, inconsistent testimony, and allegations of perjury and poor character, but nevertheless concluded that there was sufficient evidence to support a guilty verdict. Much of the evidence that Trull relied on to show perjury was immaterial as to whether Shaw suffered protracted loss or impairment of his eyesight as a result of the injury. Although conflicting, the evidence was adequate to prove aggravated assault, and Trull's conviction was affirmed. St. v. Trull, 2006 MT 119, 332 M 233, 136 P3d 551 (2006).

Failure to Establish Falsity of Trial Testimony — When False Evidence Considered Material: Gollehon contended that Armstrong obviously perjured himself when testifying for the state in Gollehon's murder trial. To prevail on a perjury claim, it must be established that: (1) the witness's testimony was actually false; (2) the testimony was material to the verdict; and (3) the prosecutor knew or believed the testimony to be false. Further, false evidence is material only if there is any reasonable likelihood that the false testimony could have affected the verdict. Gollehon failed to show the testimony to be false. The fact that Armstrong's efforts at rehabilitation were not successful was insufficient to demonstrate that he lied at trial. Gollehon v. St., 1999 MT 210, 296 M 6, 986 P2d 395, 56 St. Rep. 811 (1999). See also Westley v. Johnson, 83 F3d 714 (5th Cir. 1996), and Fuller v. Johnson, 114 F3d 491 (5th Cir. 1997).

Perjury Conviction Not Invalid Because of Reversal of Trial in Which Perjured Testimony Given: After Dahlin was convicted of perjury for giving false testimony at the DUI trial of his brother, the Supreme Court reversed his brother's conviction on grounds of failure to provide a jury trial, which right Dahlin's brother had not waived. Dahlin argued that the evidence from his brother's trial was no longer usable against Dahlin and that without that evidence, the state could not support the elements of the perjury conviction beyond a reasonable doubt. Dahlin never argued that the testimony given at his brother's trial was inadmissible. The Supreme Court held that Dahlin's perjury conviction was not invalid because of the reliance on testimony given at his brother's trial, the result of which was later overturned. St. v. Dahlin, 1998 MT 299, 292 M 49, 971 P2d 763, 55 St. Rep. 1226 (1998).

Statute of Limitation to Begin Running Upon Making of Second Statement: Defendant contended that because 17 years elapsed between his perjurious statements, the 5-year statute of limitations set out in this section had run before the prosecution filed its information against him. However, commission of the crime of perjury requires at a minimum that the accused has made two conflicting statements, and the crime is complete only when the inconsistent testimony occurs. Therefore, the statute of limitations cannot begin to run at least until the defendant has made the indispensable second statement. St. v. Stillings, 238 M 478, 778 P2d 406, 46 St. Rep. 1431 (1989).

Credibility of Witnesses: The jury is to be the sole judge of both the credibility of witnesses and the weight to be given their testimony. St. v. Azure, 181 M 47, 591 P2d 1125, 36 St. Rep. 514 (1979).

Witness' Testimony: Use by the State of testimony given by a witness that is inconsistent with the witness' prior statements in police reports does not amount to false or perjured testimony when the inconsistencies are explained by the witness during his testimony. St. v. Azure, 181 M 47, 591 P2d 1125, 36 St. Rep. 514 (1979).

Materiality: Because defendant's sworn statement as the prosecution's principal witness in a homicide trial was material and could have affected the outcome, the court was correct in denying defendant's motion to dismiss Count II of the amended information charging perjury. The essential elements of a retraction were also lacking. St. v. Thompson, 176 M 150, 576 P2d 1105 (1978).

Evidentiary Standard: The evidentiary standard for the proof of perjury was not met, resulting in dismissal of the charges, when the State failed to: (1) produce the direct testimony of two witnesses, or one witness and admissible corroborating circumstances, and (2) establish that the alleged perjured statement was material. St. v. Scanlon, 174 M 139, 569 P2d 368 (1977), replacing opinion in 33 St. Rep. 1355 (1976).

Venue: Where the acts constituting the crime of conspiracy to commit perjury were committed in Missoula County but were related to a pending criminal prosecution in Powell County, venue would properly lie in either county. However, since charges were initially brought in Powell County there was no basis for changing venue. St. v. Bretz, 169 M 505, 548 P2d 949 (1976).

Knowledge of Falsity:

Even though one can be guilty of perjury in making an unqualified statement when he does not have knowledge as to its truth, it is not perjury to make a statement in good faith and in the belief of its truth even though the statement later proves false. St. v. Jackson, 88 M 420, 293 P 309 (1930).

Attorney's statement that a note had been delivered to a corporation was not perjury justifying disbarment where the evidence showed that the attorney had endorsed the note and given it to his partner, who was an agent for the corporation, with instructions to deliver it to the corporation, so that the attorney had reason to believe his statement true. In re McCue, 80 M 537, 261 P 341 (1927).

Pleadings: An information charging perjury in swearing that a certain event happened at 11 o'clock, without stating whether it was in the morning or at night, was sufficient, where no person of ordinary intelligence could, from a reading of other portions of the pleading, have arrived at any other conclusion than that it meant 11 o'clock in the forenoon. St. v. Jackson, 88 M 420, 293 P 309 (1930).

Materiality: Statement by witness at murder trial that he arrived at a certain town at a certain time the day after the homicide, which statement related indirectly to a trip during which the homicide weapon was allegedly disposed of, was not a material statement, so was not perjury, even though it contradicted the testimony and might have reflected on the credibility of another witness. St. v. Hall, 88 M 297, 292 P 734 (1930).

45-7-202. False swearing.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 241.2.

This section makes it a misdemeanor to swear falsely in cases not amounting to perjury under section 94-7-202 [now MCA 45-7-201]. Thus, if the false statement is made in an official proceeding, but is not material, it falls within subdivision (a) of subsection (1). If it is material, but is not made in an official proceeding involving a hearing, subdivision (b) applies. Subdivision (c) applies where an affidavit is sworn to before a notary public, but is restricted to affidavits required by law. The possibility of abuse where there is criminal liability for falsification in private affidavits has occurred where such law exists. For example, small loan companies have been known to obtain oaths from debtors and threaten criminal charges to collect on their loans.

Compiler's Comments

2021 Amendment: Chapter 565 in (3) at beginning deleted "Except as provided in 13-35-240"; and made minor changes in style. Amendment effective May 14, 2021.

Severability: Section 12, Ch. 565, L. 2021, was a severability clause.

2007 Amendment: Chapter 407 in (3) at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2007.

Annotator's Note: False swearing was the common-law crime of giving a false oath in an official proceeding other than a judicial proceeding or in a matter in which an oath is required by law. As such it had no precise counterpart in prior Montana law but was, in general, treated as a species of perjury. Accordingly, the addition of this section marks in some measure a return to the common law. The area covered by this section is, however, broader than the area covered by the common-law crime of false swearing and deals with those situations not amounting to perjury under the preceding section.

Thus, a false statement made in an official proceeding, which is not material, is punishable under subsection (1)(a). A material false statement not made in an official proceeding but under oath and made with the purpose of misleading a public servant in performing his official function is punishable under subsection (1)(b). Subsection (1)(c) allows the application of sanctions for falsification of any statement required by law to be under oath. It should be noted that subsection (1)(c) does not apply to statements which while made under oath are not required by law to be so made.

Subsection (2) adopts the requirements of MCA, 45-7-201, subsections (4), (5), (6) and (7), thus eliminating irregularities in the oath as defense, providing for a defense of retraction, allowing pleading and proof in the alternative and requiring proof by at least one witness and corroborating circumstances.

Case Notes

Declaratory Judgment, Mandamus, and Judicial Review Inappropriate Remedies for Discretionary Decision of Commissioner of Political Practices: Doty, a political candidate, filed a complaint with the Commissioner of Political Practices, alleging that an opponent violated Montana's political civil libel statute and the false swearing statute when the opponent filed a complaint with the Commissioner, alleging that Doty was unqualified for office. The Commissioner found insufficient evidence that the opponent violated the law and decided not to prosecute the opponent, so Doty sought a declaratory judgment, mandamus, and judicial review in District Court challenging the Commissioner's decision. The Commissioner moved to dismiss on grounds that: (1) Doty lacked standing to request a declaratory judgment because Doty's rights, status, or other legal relations were not affected by the Commissioner's decision not to pursue legal action; (2) the decision was not subject to mandamus because it was discretionary; and (3) the decision was not subject to judicial review because it was not a contested case and because Doty's rights were not prejudiced. The District Court agreed and dismissed the complaint, and Doty appealed, but the Supreme Court affirmed. The court first noted that the Commissioner's authority to enforce campaign laws is discretionary and that the laws are for the benefit of the public at large. Pursuant to Jeppeson v. St., 205 M 282, 667 P2d 428 (1983), a writ of mandamus will not issue to compel performance of a discretionary function. Also, Doty himself was not prosecuted or threatened with prosecution for violating campaign laws, so his legal rights were unaffected by the Commissioner's decision. Thus, neither a declaratory judgment action nor judicial review was appropriate. Doty v. Comm'r of Political Practices, 2007 MT 341, 340 M 276, 173 P3d 700 (2007).

Venue of Prosecution: Where defendant swore to a false statement before a notary public in one county in a document to be filed in another county, the offense was complete when the document was placed in the mail or was handed to some other person with instructions to deliver it to be filed and the District Court of the latter county did not have jurisdiction in the absence of evidence that defendant personally delivered the document. St. v. Rother, 130 M 357, 303 P2d 393 (1956).

45-7-203. Unsworn falsification to authorities.

Criminal Law Commission Comments

Source: M.P.C., 1962, § 241.3.

This section was suggested by 18 U.S.C. Sec. 1001, which authorizes imprisonment up to five (5) years for knowing misstatement of material fact in "any matter within the jurisdiction of any department or agency of the United States." There is no parallel in the Montana law. There is a requirement of writing and purpose to mislead in this section, as well as the extension of liability to misleading omissions, in subdivision (1)(b), and to things other than writings, e.g., false samples, etc., in subdivision (1)(d). If there is a pecuniary benefit from misleading omissions, the code provisions on theft by deception would apply.

Compiler's Comments

2023 Amendment — Coordination: See 2023 Session Law for amendment made by sec. 3, Ch. 656, L. 2023. Amendment effective May 19, 2023.

The amendment to this section made by sec. 4, Ch. 382, L. 2023, was rendered void by sec. 4, Ch. 656, L. 2023, a coordination section.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This section is almost entirely new. The only similar provision of prior law was limited to false statements made with regard to taxes. While this section is directly based on the Model Penal Code, its ultimate source is 18 U.S.C., § 1001 which provides penalties for knowing misstatements of material fact in "any matter within the jurisdiction of any agency of the U.S.". The section requires that there be a purpose to mislead a public servant in the performance of his official duties. It is also required, to establish an offense under three of the subsections, that there be a writing. Subsection (1)(d) extends the section's coverage to nonwritten matters involving samples, boundary marks, or other objects. It should be noted that, in addition to punishing the submission of writings either known to be false or forged, sanctions are provided for the submission of a writing which, because of omission, is misleading.

If pecuniary benefits or other property are obtained as a result of the false or misleading statements, the conduct may also be punishable under the provisions of § 45-6-301(2) relating to theft by deception.

Case Notes

Medicaid Provider Reenrollment — Conviction of Unsworn Falsification to Authorities Reversed on Grounds of Insufficient Evidence of Intent to Mislead: Vainio, an optometrist, was convicted of one count of unsworn falsification to authorities under this section in connection with information omitted on a Medicaid provider reenrollment form. The state claimed that Vainio should have listed his sister and wife as managing employees, his brother as a co-owner of the business, and all of the counties in which he owned optometric stores. Vainio had a longstanding relationship with the Medicaid program by the time that he filled out the reenrollment form, and maintained that he merely filled out the reenrollment form as he had the previous enrollment form. This section requires proof that information was omitted from the form with the conscious objective of misleading a public servant in the performance of official duties. The state never presented any evidence of Vainio's intent to mislead, and absent sufficient evidence of that intent, the conviction was reversed. St. v. Vainio, 2001 MT 220, 306 M 439, 35 P3d 948 (2001).

Not Lesser Included Offense of Criminal Mischief by Destroying Property to Defraud Insurer: In trial for criminal mischief for knowingly or purposely damaging or destroying property with the intent to defraud an insurer, it was not error to refuse to give defendant's requested instruction on the alleged lesser included offense of unsworn falsification to authorities. The elements of the two offenses were separate and distinct and had little in common, and the elements of unsworn falsification to authorities do not have to be proved to establish criminal mischief. St. v. Gray, 207 M 261, 673 P2d 1262, 40 St. Rep. 2023 (1983).

45-7-204. False alarms to agencies of public safety.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 241.4.

This section covers all dangerous emergency alarms, e.g., floods, hurricanes, landslides, civil defense. The police force would qualify as an emergency organization. The provision is justifiable on the ground of waste of government resources and the likelihood that the actor will cause personnel or equipment to be unavailable to deal with real emergencies.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This section is new and offers a remedy for the recurring problem of nuisance alarms which pose a danger that equipment needed to deal with a true emergency will be unavailable and which result in a waste of government resources. To establish an offense under this section it is necessary to prove knowing communication of a report or alarm, known to be false, to an organization which deals with emergencies. It should be noted that this section overlaps with MCA, 45-5-203(2), Intimidation. The offense of Intimidation, which requires knowing communication of a threat or false report of pending disaster, is aimed at the far more socially destructive conduct involved in terrorist threats. Accordingly, despite the overlap between the sections, it is urged that care be taken in making the determination under which section to charge, particularly since Intimidation is a felony while this section provides only for misdemeanor penalties. It should also be noted that this section cannot be treated as a lesser included offense under Intimidation since to establish this offense there must be proof of communication to an organization whose purpose it is to deal with emergencies, whereas in Intimidation, the requirement is one of mere communication.

45-7-205. False reports to peace officers.

Criminal Law Commission Comments

Source: M.P.C., 1962, § 241.5.

Few state statutes now deal with this offense. The recent Wisconsin Code, section 346.30(a) requires that the officer act in reliance upon such false information, but such behavior is likely to have antisocial consequences regardless of any action in reliance.

Compiler's Comments

2021 Amendment: Chapter 280 in (1)(a) substituted "peace officer" for "law enforcement officer"; in (1)(b) after "offense or other incident within" substituted "the officer's" for "their"; in (1)(b) in one place and (1)(c) in one place substituted "a peace officer" for "law enforcement authorities"; and in (2) substituted current language providing for separate maximum penalties for misdemeanor and felony offenses for former text that read: "A person convicted under this section shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both." Amendment effective October 1, 2021.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This section deals with a problem area in which there has been little legislation. The purpose of the section is to deter and punish the giving of false information to law enforcement authorities. To this end, subsection (1)(a) prohibits the giving of false information with the purpose of implicating another; subsection (1)(b) prohibits the report of an incident known not to have occurred and subsection (1)(c) deals with the problem of an individual supplying information which he does not really possess. It should be noted that knowingly giving false information is sufficient to complete the offense; there need be no action taken in reliance on it. While perhaps not a common problem, the purposeful giving of false information merits the imposition of sanction because such behavior creates a probability of asocial consequences both in terms of the individual against whom the information is supplied and the public which must foot the bill for the fruitless investigation which may follow.

45-7-206. Tampering with witnesses and informants.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 241.6.

This section covers "informants" and "witnesses." Under prior law most such offenses were misdemeanors. This section gives the judge discretion to impose a sentence of up to ten (10) years if the circumstances justify it.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section on Tampering with Witnesses replaces a number of prior provisions and is directed toward the prevention of any interference with testimonial evidence. The section is broad in scope and penalizes any attempt to induce by any means a witness or potential witness to testify falsely, to withhold testimony, to elude service of process or to fail to attend any proceeding to which he has been summoned. It should be noted that all that is required to complete this offense is purposely or knowingly attempting to influence the witness. There need be no showing of success in altering the witness' testimony or conduct. Also any inducement is sufficient, whether an offer of pecuniary benefit or an appeal to friendship, if it is offered with the purpose of influencing the witness' testimony or availability.

The 1977 amendment made minor changes in phraseology, punctuation, and style.

Case Notes

Conviction of Witness Tampering Upheld — Sufficient Evidence Presented at Trial. St. v. Palafox, 2023 MT 26, 411 Mont. 233, 524 P.3d 461.

Hearsay Evidence Improperly Admitted — Hearsay Statements Repeated Prior Admissible In-Court Testimony — Right to Fair Trial by Impartial Jury Not Violated by Court's Refusal to Interview Juror Who Talked to Witness — Repeated Playing of Recorded Jail Phone Calls to Jury Encouraged by Defendant — Record Insufficient for Ineffective Assistance of Counsel — Cumulative Error Doctrine. St. v. Oliver, 2022 MT 104, 408 Mont. 519, 510 P.3d 1218.

Jury Improperly Exposed to Evidence of Underlying Offenses in Tampering Charge — Cumulative Error Preventing Fair Trial and Requiring Reversal: A defendant was charged with partner or family member assault and stalking, as well as solicitation and witness tampering charges resulting from the defendant allegedly requesting that his family members convince the alleged victim not to testify against him. The victim did not appear in court at the trial, leading the state to dismiss the partner or family member assault and stalking charges and move forward with only the tampering charge. However, prior to making the motion to dismiss, the state concentrated its voir dire questioning on the jurors' experiences with domestic violence and stalking, including inviting jurors to discuss reasons why a victim would not want to testify in a trial. The state again discussed the dismissed charges during the opening statement. Throughout the trial, the District Court overruled various objections made by the defendant when the state sought to bring in testimony and extrinsic evidence related to the dismissed charges. On review, the Supreme Court found that while limited evidence of an underlying offense may be introduced if necessary to provide context for an element of the offense of tampering, this allowance is narrow and did not apply to the case at hand. Therefore, the evidence did not meet the requirements of relevance under Rule 404, M.R.Ev. (Title 26, ch. 10). The Supreme Court found that the District Court should have declared a pre-empanelment mistrial after the jurors were exposed to the priming regarding domestic violence, that introduction of multiple alleged bad acts in the opening statement prejudiced the defendant, and that the District Court ruled erroneously on multiple evidentiary objections related to introduction of evidence regarding the defendant's character and prior bad acts. Together, the errors were sufficiently prejudicial to require reversal under the doctrine of cumulative error. St. v. Smith, 2020 MT 304, 402 Mont. 206, 476 P.3d 1178.

No Ineffective Assistance Provided — Jury Fully and Fairly Instructed: Following a conviction for violating a permanent order of protection and tampering with a witness, the defendant alleged his counsel rendered ineffective assistance by offering instructions that included the standard definitions of "purposely" and "knowingly" in 45-2-101 and by failing to move to conform the written sentence to the oral sentence. The Supreme Court, however, found that the defendant suffered no prejudice as a result of the instructions but that remand was appropriate to provide the defendant with an opportunity to respond to the additional terms and conditions in the written sentence. St. v. Andress, 2013 MT 12, 368 Mont. 248, 299 P.3d 316, followed in St. v. Tellegen, 2013 MT 337, 372 Mont. 454, 314 P.3d 902, and in St. v. Daniels, 2019 MT 214, 397 Mont. 204, 448 P.3d 511.

Element of Crime Revealed Through Stipulation Entered for Strategic Reasons — No Ineffective Assistance of Counsel: At Auld's trial for witness tampering, defense counsel entered a stipulation revealing that Auld's parole officer, who was designated as a government employee, had or was about to engage in an investigation to determine if Auld had violated a rule by consuming alcohol. Auld asserted that counsel provided ineffective assistance by entering the stipulation and conceding an element of the offense of witness tampering. The Supreme Court found Auld's argument unavailing. Counsel entered the stipulation for strategic reasons so that the jury would not hear that Auld was on parole at the time that the offense took place, and Auld could not use trial tactics and strategic decisions as a basis for an ineffective assistance of counsel claim. St. v. Auld, 2006 MT 189, 333 M 125, 142 P3d 753 (2006). See also St. v. Grixti, 2005 MT 296, 329 M 330, 124 P3d 177 (2005), and St. v. Worthan, 2006 MT 147, 332 M 401, 138 P3d 805 (2006).

Defendant Called Complainant and Said He Was Dead and Wouldn't Live Until His Next Birthday — Directed Verdict Properly Denied Defendant: Iverson reported Motarie for alleged elk poaching. Within a month, Motarie called Iverson and said, "You're a dead mother fucker, you'll never live to see your next birthday", and the next day, he called Iverson again but said nothing. In a prosecution for intimidation and tampering with a witness, the lower court did not err when it denied Motarie's motion for a directed verdict. Motarie's intent could be inferred from his conduct. St. v. Motarie, 2004 MT 285, 323 M 304, 100 P3d 135 (2004).

Expert Testimony Not Targeting Defendant's State of Mind During Crimes Properly Admitted: In Sandrock's trial for sexual intercourse without consent, incest, and witness tampering, Sandrock maintained that he was suffering from a mental disease or defect and could not have committed the crimes because he could not have formed the requisite mental state. A medical expert testified that although Sandrock was an oddball, he knew right from wrong when he wrote several letters to his wife outlining his intended actions. Sandrock moved for a mistrial because the expert's testimony violated the prohibition on ultimate issue testimony. The motion was denied, and on appeal, the Supreme Court affirmed. Although a medical expert may not offer an opinion on the ultimate issue of whether a defendant had a particular state of mind that is an element of an offense, the expert may state the nature of a medical examination and the medical or psychological diagnosis of the defendant's mental condition, and testimony in the form of an opinion or inference that would otherwise be admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact. Here, the expert's testimony did not target the ultimate issue of whether Sandrock actually possessed the requisite mental states at the time that the crimes were committed, so the mistrial motion was properly denied. St. v. Sandrock, 2004 MT 195, 322 M 231, 95 P3d 153 (2004). See also St. v. Santos, 273 M 125, 902 P2d 510 (1995).

Generalized Expert Testimony Regarding Sexual Abuse and Religious Manipulation and Control Properly Admitted in Sexual Intercourse Without Consent, Incest, and Witness Tampering Case: In Sandrock's trial for sexual intercourse without consent, incest, and witness tampering, an expert testified regarding sexual abuse and religious manipulation and control based on experiences in a Christian sect. Sandrock moved for mistrial on grounds that the testimony was irrelevant and tended to supplant the state's need to prove Sandrock's mental state. The motion was denied, and on appeal, the Supreme Court affirmed. The expert did not provide any testimony specific to Sandrock, but rather provided the jury a context within which to understand the intricacies of religious groups in general, so the court concluded that the testimony was relevant. Further, the testimony did not prejudice Sandrock because Sandrock himself admitted to controlling his wife and daughters, and the expert never stated that Sandrock exhibited or performed the beliefs that were typical of the religious groups about which the expert testified in general. The mistrial motion was properly denied. St. v. Sandrock, 2004 MT 195, 322 M 231, 95 P3d 153 (2004).

Defense of Abandonment Inapplicable When Criminal Elements Already Accomplished: Defendant was convicted of tampering with a witness. She contended that the crime is an attempt crime and that under 45-4-103, she could not be liable if she abandoned her criminal effort. However, defendant was not charged with attempted tampering with a witness; therefore, the statutory defense to attempt would by its own terms be inapplicable to the charge of a completed offense. When the essential elements of a criminal enterprise have already been accomplished, the defense of abandonment is not applicable. St. v. Williams-Rusch, 279 M 437, 928 P2d 169, 53 St. Rep. 1224 (1996).

Sufficient Evidence for Jury to Return Guilty Verdict: The defendant argued that there was insufficient evidence to support a guilty verdict for witness tampering. The Supreme Court held that the evidence that the defendant knew he was charged with two counts of domestic abuse and that he threatened his girlfriend that he or his friends would get her if she testified was sufficient to support the jury's findings. St. v. Matt, 245 M 208, 799 P2d 1085, 47 St. Rep. 1988 (1990).

Statute Prohibiting Solicitation of False Testimony Not Violative of Right to Freedom of Speech: Defendant Woods, while under arrest for suspected burglary, wrote two notes to his codefendants that were interpreted by the jury as attempts to elicit false testimony which would exculpate him. On appeal, Woods argued that 45-7-206 was so vague that it violated his right to free speech under the first amendment to the U.S. Constitution and Art. II, sec. 7, Mont. Const. The Supreme Court noted that the right to freedom of speech is not absolute and may be regulated if the regulating statutes are narrowly and precisely drawn. Section 45-7-206 has been precisely drawn to prohibit only speech designed to induce false testimony, and the state's interest in prohibiting such testimony must be balanced with the defendant's right to speak his mind. The court held that because witness tampering presents an imminent threat to the trial process, an aspect central to a democratic society, and because 45-7-206 was narrowly drawn to address that threat, 45-7-206 does not violate either the U.S. or Montana constitutional guarantees of the right to free speech. St. v. Woods, 221 M 17, 716 P2d 624, 43 St. Rep. 601 (1986).

Tampering With Witnesses — Statute Not Unconstitutionally Vague: Defendant Woods, while under arrest for suspected burglary, wrote two notes to his codefendants that were interpreted by the jury as attempts to elicit false testimony which would exculpate him. On appeal, Woods argued that the language of 45-7-206 was so vague that it violated his right to due process under the 14th amendment to the U.S. Constitution and Art. II, sec. 17, Mont. Const. The Supreme Court found that when 45-7-206 is read as a whole, the meaning is evident. As applied to the present case, the court found that Woods knew that the testimony he sought would be false, as evidenced by the opening statement of one note which stated: "If the kid goes for it here's the story". Section 45-7-206, as applied, was not unconstitutionally vague. St. v. Woods, 221 M 17, 716 P2d 624, 43 St. Rep. 601 (1986).

Failure to Include Reasons for Sentence — Abuse of Discretion: Failure of trial court to specify the reasons behind the determination of the defendant's sentence is an abuse of discretion. It is not enough that the sentence be within the statutory maximum. The defendant is entitled to know why the sentencing judge chose the particular sentence involved. St. v. Stumpf, 187 M 225, 609 P2d 298, 37 St. Rep. 673 (1980), cited in St. v. Johnson, 221 M 503, 719 P2d 1248, 43 St. Rep. 1010 (1986).

Sentencing Guidelines: A criminal statute need not contain sentencing guidelines. St. v. Stumpf, 187 M 225, 609 P2d 298, 37 St. Rep. 673 (1980).

Venue — Amended Charges — Effect: Court erred in granting motion for change of venue when information was amended to allege witness tampering in a county in which the action was not brought. The charges cannot stand independent of the original charges, and venue remains in the county where the action was brought. St. v. Bretz, 169 M 505, 548 P2d 949, 33 St. Rep. 408 (1976).

Secreting Witness:

Accused's attempt to hide state's witness against him in a criminal prosecution and to intimidate her could have been grounds for prosecution under 94-1705, R.C.M. 1947 (a forerunner of this section). St. v. Crockett, 148 M 402, 421 P2d 722 (1966).

The action of a party to a civil action in secreting and forcibly keeping in hiding a material witness of his adversary until the trial was concluded and thus suppressing material testimony constituted a misdemeanor under 94-1705, R.C.M. 1947 (a forerunner of this section), and was an offense so odious and so utterly at war with every intelligent notion of the due administration of justice as to require a new trial after a verdict for the party who tampered. Buntin v. Chicago, Mil. & St. P. Ry., 54 M 495, 172 P 330 (1918).

45-7-207. Tampering with or fabricating physical evidence.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 241.7.

This section is broader than prior law since it covers investigations as well as trials and other formal proceedings.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section is a necessary companion to the preceding section on Tampering with Witnesses. The purpose of this section is the protection of physical evidence. To this end, the section prohibits the alteration, destruction, concealment or removal of physical evidence and the making or presentation of physical evidence known to be false. To establish the offense, it must be shown that the accused believed an official proceeding or investigation was pending or imminent and that he acted either with the purpose of impairing the availability or verity of physical evidence or that he knowingly presented false evidence with the purpose of misleading. It should be noted that to complete the offense the accused need merely do the proscribed acts with the requisite mental state—he need not succeed in making the evidence unavailable or in misleading the investigation. The most significant differences between this section and prior law are the increase in scope to include investigations as well as trials and other formal proceedings and the increase in penalties from punishment as a misdemeanor to punishment by up to ten years.

Case Notes

Circumstantial Evidence Sufficient to Support Conviction of Evidence Tampering: The defendant broke into a cabin and later shot at its owners when they arrived. He then ran off into the woods. When he was arrested later that day, he was no longer carrying a gun. After the police attempted to locate the weapon without success, the defendant was charged with evidence tampering. Following his conviction, the defendant appealed, arguing that his conviction was not supported by sufficient evidence. The state countered that there was overwhelming circumstantial evidence to support the conviction. The Supreme Court affirmed. St. v. Daniels, 2019 MT 214, 397 Mont. 204, 448 P.3d 511.

Defendant Fled Hospital Prior to Blood Draw — Blood Not Physical Evidence Until Collected — Conviction of Tampering With Evidence Improper: The defendant was taken to the hospital for a blood draw after being arrested for DUI. Before the blood draw, the defendant escaped from the hospital and was not located until the next day. She was charged with tampering with evidence. At trial, she claimed that her blood, while still in her body, did not constitute evidence until such time as the blood had been drawn and therefore could not be subject to tampering. The District Court disagreed, and the defendant was convicted. On appeal, the Supreme Court reversed and remanded, agreeing that until the defendant's blood was obtained it could not be considered physical evidence. St. v. Harrison, 2017 MT 60, 387 Mont. 47, 390 P.3d 954.

False Statements to Police Alleging Rape — Dismissal of Fabrication Charge Improperly Granted: The defendant reported to police that a former boyfriend had raped her. She was interviewed by police, sought medical treatment, and submitted to a rape exam. After video footage revealed that the former boyfriend was out of state on the day of the alleged rape, the defendant was charged under this section. The District Court dismissed the charge because no actual rape had occurred and granted the state additional time to file alternative charges against her. The state appealed to the Supreme Court, which reversed the dismissal of the fabrication charge. The Supreme Court concluded that while the defendant's oral statements to police may not have constituted "physical evidence" under this section, they led to the collection of physical evidence. Accordingly, it determined that a jury could find that each element of the charge under this section was met and remanded the matter to the District Court for further proceedings. St. v. Nelson, 2014 MT 135, 375 Mont. 164, 334 P.3d 345.

Acquittal of Sexual Intercourse Without Consent Not Requiring Dismissal of Charge of Attempted Evidence Tampering: Scheffer was charged with sexual intercourse without consent and with attempting to tamper with physical evidence related to the sexual intercourse without consent charge. Scheffer was acquitted of the sexual intercourse without consent charge but convicted of attempted evidence tampering. On appeal, Scheffer contended that the attempted evidence tampering charge should be vacated because it was irrationally inconsistent with acquittal of the sexual intercourse without consent charge, inasmuch as acquittal of sexual intercourse without consent meant that the alleged rape never occurred. The Supreme Court disagreed. Even if an actual rape never occurred, it was not a practical impossibility for Scheffer to attempt to tamper with evidence related to the events and acts in question. Scheffer's conviction of attempting to alter, destroy, conceal, or remove physical evidence related to the pending official proceeding or investigation into sexual intercourse without consent was not irrationally inconsistent with the ultimate acquittal of the underlying charge. The conviction for attempted evidence tampering was affirmed. St. v. Scheffer, 2010 MT 73, 355 Mont. 523, 230 P.3d 462.

Attempted Tampering With Physical Evidence — Amendment of Information to Conform Charge to Evidence Not Error: When Scheffer was interrogated for possible sexual intercourse without consent, officers requested a DNA sample from Scheffer's fingers. Scheffer agreed to give a sample, but when officers left the room to get the sample kit, Scheffer put his fingers in his mouth in an attempt to destroy DNA evidence on his fingers. The DNA sample was taken anyway, and Scheffer was charged with tampering with or fabricating physical evidence. When the lab returned the sample, it indicated Scheffer's victim's DNA, so the information was amended to attempted tampering with or fabricating physical evidence. Scheffer's motion to dismiss the amended information was denied, and the Supreme Court affirmed. The amendment was one of form rather than substance, because no additional or different offense was charged, the elements of the crime and the required proof remained the same, and Scheffer was informed of the charges. Scheffer's rights were not prejudiced, and the trial court did not abuse its discretion by denying Scheffer's motion to dismiss the amended information. St. v. Scheffer, 2010 MT 73, 355 Mont. 523, 230 P.3d 462.

Sufficient Connection Between Victim of Vehicle Accident and Evidence Tampering to Warrant Defendant's Payment of Victim's Funeral Expenses as Restitution: Sherman was thrown from her car in a vehicle accident, and as she lay in the road, she was struck and killed by Ness's vehicle. Ness did not stop and subsequently repaired and washed his car in an effort to conceal evidence of the accident. Ness was convicted of tampering with evidence and ordered to pay $3,500 for Sherman's funeral expenses as restitution. Ness challenged the restitution on grounds that because Sherman was not a victim of the evidence tampering conviction, there was no nexus between the crime and the restitution. The Supreme Court disagreed. Pursuant to St. v. LaTray, 2000 MT 262, 302 M 11, 11 P3d 116 (2000), classification of a person as a victim for purposes of ordering restitution does not depend on the person's relationship to the elements of the crime for which the defendant is convicted. In this case, restitution for Sherman's funeral expenses was not wholly unrelated to Ness's crime, and the expenses were based on Ness's involvement, which created a nexus between restitution and the crime. Because the funeral expenses were paid to Sherman's estate directly out of the crime victims compensation account, that account was entitled to $3,500 restitution. St. v. Ness, 2009 MT 300, 352 M 317, 216 P3d 773 (2009).

Sufficient Circumstantial Evidence to Show Essential Elements of Deliberate Homicide, Burglary, and Evidence Tampering to Warrant Jury Consideration: At the close of the state's case, Rosling moved for dismissal of deliberate homicide, burglary, and evidence tampering charges on grounds that the evidence was insufficient to send the case to the jury. The motion was denied, and on appeal, the Supreme Court affirmed. Rosling was with the victim the night of her death and was apparently the last person to see the victim alive. The victim was murdered at home, and a neighbor saw Rosling's car and a person matching Rosling's description at the home around the time of the murder. Footprints found at the home matched Rosling's shoes. The victim's father found the victim and discovered burning magazines beneath the victim, apparently left in an attempt to cover up the crime. A spot of the victim's blood was found on Rosling's coat, and other blood stains on the coat could not be ruled out as belonging to the victim. Rosling was unable to account for his whereabouts at the time of the murder and gave police inconsistent statements concerning his actions the night before and day of the murder. Although the evidence was circumstantial, it was sufficient the send the case to the jury, and the trial court did not err in denying Rosling's motion to dismiss on grounds of insufficient evidence. St. v. Rosling, 2008 MT 62, 342 M 1, 180 P3d 1102 (2008). See also St. v. Daniels, 2019 MT 214, 397 Mont. 204, 448 P.3d 511.

Admissibility of Evidence Related to Tampering Charge Not Considered Improper Amendment of Information on Day of Trial: On the morning of Wilson's trial on charges of tampering with evidence in a vehicle suspected to have been used in a homicide, the state announced that part of the tampering charge would concern Wilson's concealing or tampering with a gun allegedly used in the homicide. Wilson objected because neither the information nor the affidavit used in support of the information contained any allegation that Wilson had tampered with a gun. The trial court noted that the information charged Wilson with tampering with the vehicle and its contents, so if the gun was in the vehicle, the evidence was admissible. Following conviction, Wilson argued on appeal that the trial court abused its discretion by allowing a de facto amendment of substance to the information on the day of trial by allowing the state to argue that Wilson tampered with the gun. The Supreme Court disagreed. Although amendments of substance are prohibited within

5 days of trial, amendments of form are allowed any time before a verdict. In this case, raising the issue of tampering with the gun was not an amendment of substance or form and in fact was not an amendment at all. Based on the charging document itself, Wilson should not have been surprised that the state would argue that contents of the vehicle were tampered with, including the murder weapon, and allowing argument regarding the gun was not an abuse of discretion. In addition, denial of Wilson's motion for a directed verdict based on the fact that the gun evidence was based on the uncorroborated testimony of a coconspirator also was not error because there was sufficient testimony and circumstantial evidence from sources other than the coconspirator to support the charge of tampering with the vehicle and its contents. St. v. Wilson, 2007 MT 327, 340 M 191, 172 P3d 1264 (2007), distinguishing Red Lodge v. Kennedy, 2002 MT 89, 309 M 330, 46 P3d 602 (2002).

Limitation on Opening Statement on Issue Unrelated to Charged Offense Not Abuse of Discretion: At Wilson's trial for tampering with evidence in a vehicle allegedly used in a homicide, the trial court prohibited Wilson from referring in opening statements to evidence concerning a coconspirator's motives to kill the victim. The court did not address any similar limits on cross-examination, and Wilson did not bring up the subject of motivation on cross-examination of the coconspirator. Nevertheless, because of the limitation on opening statements, on appeal, Wilson argued an inability to develop evidence regarding the coconspirator's prior false statements and motive to cover up the homicide and to tamper with evidence of the homicide, which purportedly violated Wilson's right to confront the witness. The Supreme Court disagreed. The main purpose of the right to confront a witness is to secure an opportunity for cross-examination, including the opportunity to expose the witness's motivation for testifying. However, this does not mean that a defendant may cross-examine a witness on any subject in any manner whatsoever without limitations imposed by the trial judge. Rather, trial judges retain wide latitude to impose limits on cross-examination based on various concerns, including confusion of the issues. In this case, the trial court limited opening comments regarding motivation for murder because the trial was not a homicide trial, but rather a trial for tampering with evidence, and motive was outside the scope of the tampering charge and would confuse the jury. Thus, the court did not abuse its discretion by limiting opening comments, and Wilson suffered no prejudice. Wilson's conviction was affirmed. St. v. Wilson, 2007 MT 327, 340 M 191, 172 P3d 1264 (2007).

Defendant Present in Apartment Where Methamphetamine Lab Found — Totality of Circumstances Justifying Warrantless Arrest: Officers raided Savage's apartment, identified by an anonymous tip as a suspected methamphetamine laboratory. Nalder was also present, and although officers had no previous suspicions regarding Nalder, they arrested her after hearing a toilet running and observing her standing in the kitchen, which was adjacent to the bathroom, near what appeared to be a jar filled with a substance in the first stage of the methamphetamine-producing process. During an interview, Nalder admitted to flushing substances used to make methamphetamine down the toilet when she heard the officers announce themselves. Nalder was charged with tampering with physical evidence, but Nalder moved to suppress the statements and the charge on grounds that probable cause did not exist for her warrantless arrest. The motion was denied, and Nalder was convicted and appealed, contending error in denial of the motion to suppress based on certain findings that were allegedly incorrect. The Supreme Court affirmed. The trial court's finding that the officers announced their presence twice before entering the apartment, contrary to Nalder's claim that she did not hear any knocking, was supported by the evidence and not clearly erroneous because failure to hear did not constitute evidence contradicting the officers' testimony that they announced themselves. The trial court's finding that the officers broke down the door was not supported by substantial evidence and was thus erroneous, but the error was not prejudicial in light of the totality of the circumstances. Nalder correctly asserted that her mere presence at the scene did not justify arrest and that there must be some connection with criminal activity before her warrantless arrest was justified. However, considered in light of the totality of the circumstances and the trained officers' knowledge, there was sufficient probable cause for Nalder's arrest. The officers received extensive training in what to reasonably expect while raiding a methamphetamine laboratory, and evaluated in accordance with the officers' perceptions, they could reasonably believe that Nalder was committing, and had just committed, a crime. St. v. Nalder, 2001 MT 270, 307 M 280, 37 P3d 661 (2001).

Consumption of Alcohol Following Accident Not Considered Tampering With Evidence: Peplow drove his truck off of a country road, then got a ride home, where he consumed three double shots of whiskey, allegedly for pain from the accident. After walking his dog, he went to a nearby bar and ordered a beer. He was found at the bar by the highway patrol officer who was investigating the accident. Peplow failed all sobriety tests and was charged with and convicted of DUI, driving with a suspended or revoked license, driving without insurance, failing to report an accident, and tampering with evidence. Following the state's case at trial, Peplow moved for a directed verdict on the tampering charge, arguing that a person's blood alcohol content does not fit the definition of a record, document, or thing, as required in this section, and also that the state failed to present evidence that Peplow knew or had reason to believe that an official proceeding or an investigation was pending or about to be instituted, as required by the statute. The motion was denied, and Peplow appealed. The Supreme Court noted that under 61-8-404 (now repealed and content reorganized in Title 61, chapter 8, part 10), evidence of a person's blood alcohol content must be shown by an analysis of blood or breath for it to be admissible, but the section does not contemplate that potentially measurable amounts of alcohol, still within the body, constitute evidence. Until one's breath or blood has been collected for analysis, it cannot be considered physical evidence. Thus, the court held that a person's blood alcohol content, as it exists within the person's body and control, does not constitute physical evidence, as required in this section, or a thing presented to the senses, as explained in 26-1-101, so a person who consumes alcohol following a motor vehicle accident cannot be convicted of tampering with physical evidence under this section, with respect to that person's blood, breath, or urine still within the person's body. Peplow's tampering conviction was reversed. St. v. Peplow, 2001 MT 253, 307 M 172, 36 P3d 922 (2001).

Tampering With Evidence — Impairment of Pending Investigation: Despite knowledge of an impending investigation, defendant did not notify police that he had destroyed a note found with the victim's body. In upholding defendant's conviction for tampering with evidence, the Supreme Court ruled that sufficient evidence existed for the jury to find that defendant consciously acted with the purpose of impairing a homicide investigation beyond a reasonable doubt. St. v. Staat, 251 M 1, 822 P2d 643, 48 St. Rep. 1041 (1991).

Burglary, Theft, and Tampering Convictions Affirmed: Defendant forcefully entered a neighbor's apartment at night without consent and purposely removed a rifle and ammunition. After shooting his wife with the rifle, defendant concealed it beside the road, impairing its availability as evidence and causing its condition to change. These circumstances, coupled with defendant's own admissions of the actions, justified convictions for burglary, theft, and tampering with evidence. St. v. McKimmie, 232 M 227, 756 P2d 1135, 45 St. Rep. 1011 (1988).

Submission of Fraudulent Petition for Workers' Compensation Settlements: Under the language of the former statute dealing with the preparation of false evidence, preparation of a petition for lump-sum and compromise settlements prepared after the death of the claimant and submitted to the Workers' Compensation Division for the purpose of obtaining money that defendant knew he was not entitled to constituted preparation of false evidence in violation of the statute. The petitions were a statutory prerequisite to the awarding of settlements. St. v. Bretz, 185 M 253, 605 P2d 974, 36 St. Rep. 1037 (1979).

45-7-208. Tampering with public records or information.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 241.8.

It is common to penalize falsification, destruction or concealment of public records. The only innovation in this section is the explicit provision of subdivision (1) (b) as to fabrication of false records. This section would not cover records of private persons; however, records maintained at the behest of government, such as legislative bills or enactments would fall within this section.

Compiler's Comments

2001 Amendment: Chapter 363 inserted (1)(d) concerning misrepresentation to obtain personal information from motor vehicle record; and made minor changes in style. Amendment effective April 23, 2001.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: The purpose of this section on Tampering with Public Records is the protection of the integrity of government records and of records required by the government to be kept by private individuals. This section consolidates a number of prior law provisions into one unitary statute which prohibits false entries and alterations in presentations, as genuine, of records or documents known to be false for inclusion in, and destruction of "any record, document, legislative bill or enactment, or thing belonging to, or received or issued or kept by the government for information or record, or required by law to be kept by others for information of government".

The only addition to prior law appears to be subsection (1)(b) which prohibits the presentation or fabrication of records for inclusion as genuine and even this may have been a part of the more general prohibitions contained in prior law. It should be noted that this section does not protect private records unless such private records are required to be kept by the government.

Case Notes

Conflicting Evidence Regarding Falsification of Prison Payroll Records — Denial of Directed Verdict Proper: Struble was charged with falsifying payroll records at the state prison where he was employed. After the state presented its case, Struble moved for a directed verdict on grounds that: (1) no evidence was presented to show that he was not entitled to the payroll and benefits that he received; (2) there was no direct evidence linking him to the offense; (3) no witnesses testified that he was not working or engaged in employment at the times reported on his time cards; and (4) the logbooks on which the state relied were inaccurate, untrustworthy, and unreliable. The District Court denied the motion, and the Supreme Court affirmed. A directed verdict is proper only if reasonable persons could not conclude from the evidence taken in a light most favorable to the prosecution that guilt has been proved beyond a reasonable doubt. Here, the jury had considerable evidence that was susceptible to differing interpretations, and it was within the province of the jury to decide which interpretation would prevail, so the standard for granting a directed verdict was not satisfied. St. v. Struble, 2004 MT 107, 321 M 89, 90 P3d 971 (2004).

Motion to Introduce Letter Unrelated to Payment for Work Hours Properly Denied: Struble was charged with falsifying work records at the state prison where he was employed. Struble made a motion in limine to introduce a letter from the County Attorney to the Department of Corrections outlining the County Attorney's concern that there was insufficient evidence to prosecute six other employees on similar charges. The motion was denied, and Struble appealed, but the Supreme Court affirmed. The letter did not directly concern Struble, was unrelated to the charges against him, was irrelevant to the state's case against Struble, and thus was properly not admitted into evidence. St. v. Struble, 2004 MT 107, 321 M 89, 90 P3d 971 (2004).

Petition for Postconviction Relief Denied — No Due Process Violation — No Abuse of Discretion in Refusing New Trial Because All Factors Not Fulfilled — No New Trial: Sullivan, the director of the Parks and Recreation Department for the city of Great Falls, was convicted of three counts of felony theft of various city recreational fees and one count of tampering with public records. Later, the employee who replaced him found in a budget file an envelope containing $1,300 of city recreation funds. Sullivan brought a petition for postconviction relief, arguing that his constitutional rights under Brady v. Md., 373 US 83 (1963) (granting postconviction relief on the basis of evidence suppressed by the prosecution), had been violated and that the newly discovered evidence entitled him to a new trial. The Supreme Court held Brady inapplicable because the new evidence was not known to the prosecution at the time of the trial and therefore could not have been wrongfully withheld. In connection with the Brady claim, the Supreme Court also noted that Sullivan had not attached an affidavit or other evidence in support of his allegations, as required by 46-21-104, and concluded that Sullivan's assertions were not sufficient under 46-21-201 to allow him to conduct discovery or to entitle him to an evidentiary hearing. Because theft is not an element of tampering under 45-2-302 and this section, the Supreme Court concluded that Sullivan's conviction for tampering by making another employee alter official city records would not have been changed had the newly discovered evidence been available at trial. The Supreme Court also concluded that Sullivan had not fulfilled all of the six factors discussed in St. v. Cline, 275 M 46, 909 P2d 1171 (1996), required for grant of a new trial based upon newly discovered evidence because he had not shown that the new evidence would probably produce a different result at trial and that the new evidence was not merely cumulative evidence. Concerning Sullivan's final claim, the Supreme Court noted that in St. v. Perry, 232 M 455, 758 P2d 268 (1988), the defendant obtained newly discovered evidence but that neither a motion for a new trial nor postconviction relief was available to the defendant, so the Supreme Court created a "window" for review of the claim that otherwise would have been procedurally barred. The Supreme Court contrasted Perry and pointed out that in Sullivan's case, he was not barred from bringing a petition for postconviction relief. For all of these reasons, the Supreme Court affirmed the District Court's denial for postconviction relief and denial of Sullivan's motion for a new trial. St. v. Sullivan, 285 M 235, 948 P2d 215, 54 St. Rep. 1128 (1997).

Failure to Disclose Noninstitutional Loan — Sufficient Evidence for Conviction: Kelman discussed a partnership with Ransome, a resident of Louisiana, for the development and operation of a casino. Ransome sent Kelman $70,000 for various expenses in connection with the opening of the casino. As part of his application for a gambling license, Kelman completed a noninstitutional loan (NIL) form, provided by the Gambling Control Division of the Montana Department of Justice, on which Kelman failed to disclose the $70,000 loan from Ransome. Despite his statements that the money from Ransome was personal in nature and that he had no formal partnership agreement with Ransome, Kelman was convicted by a jury of violating this section. After reviewing the trial evidence surrounding Kelman's failure to disclose the NIL funds, the Supreme Court held that there was sufficient evidence from which the jury could have found the essential elements of the crime beyond a reasonable doubt. St. v. Kelman, 276 M 253, 915 P2d 854, 53 St. Rep. 372 (1996).

Restitution Allowed for Period Longer Than Charged Offense: Defendant was charged with theft and tampering with public records over a 2-year period. All but 6 months of her 20-year sentence were suspended on the condition that she repay the money she stole at work over a 5-year period. She argued the amount was not substantiated by evidence because she was not being tried for her activities during the first 3 years and that in essence, she was sentenced for criminal activity for which she was not convicted. There was evidence in the sentencing hearing that her crimes were spread out over a 5-year period. The restitution order was proper. St. v. Korang, 237 M 390, 773 P2d 326, 46 St. Rep. 892 (1989).

Sufficient Evidence of Theft of Public Money and Tampering With Public Records by Public Employee: Evidence was sufficient to support convictions of theft and tampering with public records. Seven witnesses, including defendant's boss and co-workers and a CPA hired to do an audit, testified to defendant's behavior at work and how it fit the pattern of missing money. There was testimony of direct observation of her voiding entries on the cash register and making other unusual entries. There was also direct observation of unusual calculations in balancing the books and in working with cash register tapes and deposit slips. The testimony was accompanied by exhibits of books and records. St. v. Korang, 237 M 390, 773 P2d 326, 46 St. Rep. 892 (1989).

Indexing: Section 94-2722, R.C.M. 1947 (a forerunner of this section), had no reference to and did not prevent indexing of public records. State ex rel. Coad v. District Court, 23 M 171, 57 P 1095 (1899).

Concealment: The willful act of an officer of the Senate in failing to send a legislative bill to the clerk to receive it next in the normal course of procedure constituted "secreting" within the meaning of 94-2722, R.C.M. 1947 (a forerunner of this section). St. v. Bloor, 20 M 574, 52 P 611 (1898).

45-7-209. Impersonation of public servant.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 241.9.

Legislation prohibiting impersonation of some or all public officials is found in most penal codes. The object is to prevent imposition on people by the pretense of authority, and partly to ensure proper respect for genuine authority by suppressing discreditable imitations. These objectives are regarded as especially important in relation to law enforcement officers.

Compiler's Comments

1995 Amendment: Chapter 351 in (2) increased maximum fine from $500 to $5,000, changed place of imprisonment from the county jail to the state prison, and increased maximum prison term from 6 months to 5 years; and made minor changes in style. Amendment effective April 11, 1995.

Annotator's Note: This section on Impersonating a Public Servant consolidates a number of prior law provisions including § 94-35-149, Impersonating an Officer, § 94-35-253, Wearing Certain Uniforms Prohibited, § 94-3901, Acting in A Public Capacity Without Having Qualified, and § 94-3911, Exercising Functions of Office Wrongfully. This section represents an improvement over prior law in that it is specifically directed toward harmful conduct. To establish an offense under this section it is necessary to show that the accused falsely pretended to be a public servant and that he did so with the purpose of causing another to act on that basis. It should be noted that these provisions apply to all public offices and would include any actions made under color of that office by a pretender.

Case Notes

Investigatory Stop Based on Suspicion of Impersonation of Police Officer: Police stopped Bar-Jonah in the early hours of the morning near a school wearing a police-style jacket and stocking cap. The officer had prior knowledge of Bar-Jonah's history of crimes against children. Bar-Jonah asserted that he was simply walking a few blocks from his home, minding his own business, that the officer lacked a particularized suspicion of criminal activity to warrant the investigatory stop in violation of Bar-Jonah's right against unreasonable search and seizure, and that any evidence should thus be suppressed. The District Court denied the motion to suppress, and the Supreme Court affirmed. Relying on Fla. v. Bostick, 501 US 429 (1991), the District Court found that the initial stop was not an investigatory stop but merely a police-citizen encounter, but the Supreme Court held that the stop was not a mere police-citizen encounter because Bar-Jonah had no reason to believe that he could leave. Nevertheless, the officer reasonably suspected that Bar-Jonah had impersonated or was about to impersonate a police officer, and coupled with the officer's knowledge of Bar-Jonah's criminal history, the officer had a particularized suspicion of criminal activity warranting the investigative stop. Once Bar-Jonah was lawfully detained, a search of Bar-Jonah's person was justified based on Bar-Jonah's statement that he was carrying a stun gun. St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

Statute Prohibiting Impersonation of Public Servant Not Unconstitutionally Vague: In connection with his activities with the Montana "Freemen", Clay Taylor held himself out to be a Garfield County Justice of the Peace, signing numerous documents with that title, and was charged with impersonating a public servant. His wife, Karen, aided Clay in the offense, and she was charged with impersonating a public servant by accountability. Both were convicted and appealed on grounds that this section requires proof that an actual person was impersonated, claiming that otherwise the section is unconstitutionally vague. Presuming pursuant to 1-2-101 that the statute is constitutional, the Supreme Court disagreed, affirming the conviction. The statute clearly sets forth that anyone who pretends to hold a position in public service with the purpose to induce others to submit to the pretended official authority or act in reliance on that pretense is within the proscribed conduct. It is not necessary that a person falsely pretend to hold a specific position in public service. The statutory language is sufficient to give a person of ordinary intelligence fair notice of the conduct that is forbidden and is not unconstitutionally vague. The Taylors failed to meet the burden of proving vagueness or unconstitutionality beyond a reasonable doubt, so any doubt was resolved in favor of the statute. St. v. Taylor, 2000 MT 202, 300 M 499, 5 P3d 1019, 57 St. Rep. 794 (2000).

45-7-210. False claim to public agency.

Compiler's Comments

2009 Amendment: Chapter 473 in (2)(a) increased amount of fine from $1,000 to $1,500; and in (2)(b) near middle increased aggregate value of claim from $1,000 to $1,500. Amendment effective October 1, 2009.

2005 Amendment: Chapter 312 in (1) near beginning after "person" deleted "purposely and", after "payment" substituted "or for the purpose of concealing, avoiding, or decreasing an obligation to pay a" for "any", before "claims" inserted "valid", and at end substituted "agency" for "agencies if genuine"; in (2)(b) near beginning after "fraudulent" substituted "claim is knowingly submitted" for "claims are submitted purposely and knowingly" and near middle after "value of" substituted "one or more" for "all"; and made minor changes in style. Amendment effective April 21, 2005.

1999 Amendment: Chapter 397 in (2)(a) increased maximum fine from $500 to $1,000; and in (2)(b) increased minimum value of claims from more than $500 to more than $1,000. Amendment effective October 1, 1999.

1993 Amendment: Chapter 616 in (2)(b) increased false or fraudulent claim aggregate value from $300 to $500; and made minor changes in style.

1983 Amendment: In (2)(b), after "exceeds" changed "$150" to "$300".

Part 3

Obstructing Governmental Operations

Part Case Notes

Instruction on Flight Proper When Based on Evidence: A jury instruction allowing consideration of testimony showing flight or concealment by the defendant as a circumstance tending to prove consciousness of guilt was proper in light of defendant's admission that he left the scene of the crime. St. v. Hurlbert, 232 M 115, 756 P2d 1110, 45 St. Rep. 923 (1988), citing St. v. Walker, 148 M 216, 419 P2d 300 (1966). Walker was followed in St. v. Patton, 280 M 278, 930 P2d 635, 53 St. Rep. 1402 (1996). Patton was followed in St. v. Johnson, 1998 MT 289, 291 M 501, 969 P2d 925, 55 St. Rep. 1186 (1998), in which it was held that even in the limited environment of prison, a defendant may fly to wherever the defendant thinks is safe to dispose of evidence, but that only some departure from a crime scene is necessary to support giving an instruction on flight, and followed in St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999). See also St. v. Hall, 1999 MT 297, 297 M 111, 991 P2d 929, 56 St. Rep. 1190 (1999), in which the Supreme

Court reconsidered the probative value of the flight instruction and directed that the better policy in future cases when evidence of flight has been properly admitted is to reserve comment on the significance of flight to counsel, rather than to the court through jury instructions. However, in Hall's case, no prejudice attached because the instruction included the qualification that evidence of flight was not, by itself, sufficient evidence of guilt, but rather only one circumstance to be considered by the jury. Hall was followed in St. v. Hatten, 1999 MT 298, 297 M 127, 991 P2d 939, 56 St. Rep. 1198 (1999).

45-7-301. Resisting arrest.

Criminal Law Commission Comments

Source: Proposed Mich. C.C. 1967, § 4625.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: Until the passage of this section, Montana had no provision dealing specifically with resistance to an arrest. The proposed Michigan Criminal Code of 1967 was never adopted by the Michigan legislature. There is, therefore, no Michigan case law interpreting this statute. Subsection (1) is narrower than the repealed statute which concerned resistance to the discharge by public officers of their duties (§ 94-35-169, R.C.M. 1947). The old law specifically applied not only to interference with arrest made by a peace officer, but to the discharge by any public officer of any duty of his office. Also, this subsection unlike the repealed statute, requires the use of threat of force or the risk of injury in connection with the interference with the peace officer. "Peace officer" is defined at MCA, 45-2-101.

Subsection (2) was not a part of the repealed law. This subsection is in opposition to the common-law theory that an officer undertaking an unlawful arrest was deemed to be not acting in the line of duty. Under this theory the intended arrestee had the privilege to use reasonable force to prevent the unlawful deprivation of his liberty. Subsection (2) takes the often complicated decision as to the lawfulness of the arrest away from the arrestee, thereby allowing such decision to be decided ultimately in court rather than by force. This is also the position taken by the Model Penal Code, § 3.04(2)(a)(l), and establishes the policy basis for both this section and 45-3-108 which handles another aspect of the same problem in removing the defense of justifiable use of force in resisting an arrest even if the arrest is unlawful. These two sections work together to deal with the problems posed by citizen efforts to counter what they believe to be unlawful arrest by officers of the law and are intended to discourage self-help and require resort to the courts for relief.

Subsection (3) reduces the maximum penalty allowed under the prior law.

Case Notes

Denial of In Camera Review Request of Officer's Personnel File for Instances of Excessive Force — Excessive Force No Defense to Resisting Arrest — No Abuse of Discretion: The Municipal Court did not abuse its discretion in finding that the defendant failed to present a substantial need justifying an in camera review of the arresting officer's personnel file for instances of excessive force because the defendant did not present any evidence that the arresting officer had a motive to testify falsely and the defendant failed to demonstrate that the nonexculpatory impeachment information was constitutionally material and that failure to make it available would undermine confidence in the fairness of the trial, especially since 45-3-108 and 45-7-301 prohibit the use of force as a defense to resisting arrest. Bozeman v. Howard, 2021 MT 230, 405 Mont. 321, 495 P.3d 72.

Knowingly Resisting Arrest — Defendant's Awareness of Arrest Attempt — Totality of Circumstances: Despite the defendant's argument that he could not have knowingly resisted arrest because he was unaware that the officer was attempting to arrest him and he believed that he was acting to prevent an unjustified physical assault, the District Court correctly determined that sufficient evidence supported the defendant's conviction for resisting arrest. At the time of his arrest, the defendant was aware that his ex-girlfriend may have called law enforcement, and an officer exited a patrol car and shouted commands at the defendant. Because the totality of the circumstances indicated that the arresting individual was clearly a police officer and the defendant's awareness of the reason for his presence, the defendant acted knowingly when he resisted the officer's commands. Bozeman v. Howard, 2021 MT 230, 405 Mont. 321, 495 P.3d 72.

Alleged Use of Excessive Force by Arresting Officers — Request for Officers' Preincident Personnel Files Properly Denied: The defendant alleged that he was injured by police officers as he was being arrested and filed a discovery request for the preincident personnel records of the arresting officers. The Municipal Court denied the defendant's motion because the defendant had not shown a substantial need for the information that would have outweighed the officers' privacy rights. Following his conviction, the defendant appealed to the District Court, which affirmed. On further appeal, the Supreme Court also affirmed, ruling that the defendant had not provided a particularized explanation for needing the personnel files. Bozeman v. McCarthy, 2019 MT 209, 397 Mont. 134, 447 P.3d 1048.

Conviction for Resisting Arrest Supported by Sufficient Evidence: The defendant was convicted of resisting arrest and appealed to the Supreme Court, arguing that making her body rigid, being insufficiently cooperative, and resisting pain was not enough evidence to support her conviction. The defendant also argued that she did not understand she was being placed under arrest. The Supreme Court disagreed and upheld the conviction, holding that the arresting officers testified the defendant was warned she would be placed under arrest and then advised she was being placed under arrest. The Supreme Court further held that the evidence that the defendant forcefully resisted the officers' attempts to restrain and arrest her, resisted the placement of handcuffs and pulled away after the handcuffs were placed, and loudly yelled abusive language and profanities was sufficient for the jury to find the defendant resisted arrest by physical force or violence. St. v. Sutton, 2018 MT 143, 391 Mont. 485, 419 P.3d 1201. See also Bozeman v. Howard, 2021 MT 230, 405 Mont. 321, 495 P.3d 72.

Motion to Dismiss for Lack of Evidence Properly Denied: Tuomala moved to dismiss a charge of resisting arrest on grounds that there was insufficient evidence to sustain the charge. The motion was denied, and on appeal Tuomala asserted that the state failed to show how her actions placed the officers at risk of physical injury. Citing St. v. Carter, 245 M 449, 948 P2d 1173, 54 St. Rep. 1235 (1997), the state contended that once an officer has to engage in a physical struggle with an arrestee, a risk is created that the officer or another person might be physically injured. In this case, Tuomala's actions forced arresting officers to engage in a physical struggle to replace Tuomala's handcuffs and to carry her to the patrol car. Viewed in a light most favorable to the state, the evidence was sufficient for a rational trier of fact to find that Tuomala resisted arrest by creating a risk of physical harm to the officers. The Supreme Court affirmed. St. v. Tuomala, 2008 MT 330, 346 M 167, 194 P3d 82 (2008).

Lesser Included Offense Instruction on Resisting Arrest Not Warranted When Defendant Under Arrest at Time of Assault: Pittman was arrested for disorderly conduct, and Pittman assaulted an officer and attempted to assault other officers while at the detention center. At the trial for felony assault and felony attempted assault, Pittman contended that the jury should be given an instruction on the lesser included offense of resisting arrest, but the instruction was denied. On appeal, the Supreme Court affirmed. Pittman was already under arrest when the felony assaults took place. Absent evidence in the record that would permit the jury to find Pittman guilty of resisting arrest and acquit on the felony charges, it was not error to deny Pittman's request for the lesser included offense instruction. St. v. Pittman, 2005 MT 70, 326 M 324, 109 P3d 237 (2005).

Admission by Counsel That Defendant Resisted Arrest When Defendant Charged With Assaulting Peace Officer — Not Ineffective Assistance of Counsel: Audet was charged with assaulting a peace officer and resisting arrest. At the time of trial, Audet told the court that he wished to plead guilty to the resisting arrest charge but to go to trial on the assault charge, even though his attorney had advised otherwise. The court entered not guilty pleas for both counts. Counsel informed the jury in opening and closing statements that Audet was not contesting the resisting arrest charge, but lacked the purposeful and knowing elements required to commit officer assault. The prosecutor then convinced the jury that Audet had essentially conceded the mental state by conceding guilt for resisting arrest, and Audet was convicted on both counts. On appeal, Audet contended that counsel's conduct constituted ineffective assistance, warranting reversal. The Supreme Court applied the Strickland test and dismissed the claim. The record did not reveal why counsel chose to concede the resisting arrest charge to the jury, so the court was unable to determine whether the decision constituted an unreasonable defense strategy that would overcome the presumption that counsel's actions fell within the range of reasonable professional conduct. Pursuant to St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), Audet's direct appeal was dismissed without prejudice to the ineffective assistance issue being raised in a postconviction relief proceeding. St. v. Audet, 2004 MT 224, 322 M 415, 96 P3d 1144 (2004). See also St. v. Hendricks, 2003 MT 223, 317 M 177, 75 P3d 1268 (2003), and St. v. Greene, 2015 MT 1, 378 Mont. 1, 340 P.3d 551.

Risk of Injury to Arresting Officer Sufficient to Warrant Finding of Resisting Arrest: Following his arrest for DUI, Carter stated his intent to drive home. When the arresting officer attempted to prevent Carter from leaving, Carter grabbed onto the car mirror and would not let go. Finally, the officer was forced to pry Carter's hand off the mirror and wrestle him into handcuffs to effectuate the arrest. Carter contended that he could not be guilty of resisting arrest because he never used or threatened physical violence against the officer. However, Carter's conduct created a risk of causing physical injury to the officer and thus was sufficient evidence from which the jury could have found that he resisted arrest. St. v. Carter, 285 M 449, 948 P2d 1173, 54 St. Rep. 1235 (1997).

Aggravated Assault — Assault and Resisting Arrest Co-Equal Lesser Included Offenses Under the Facts: When a Department of Highways (now Department of Transportation) enforcement officer stopped a truck to weigh it, the passenger unloaded it against officer's orders, threatened the officer with a chain binder, and drove away after being told he was under arrest. In light of these facts, it was not reversible error to instruct the jury that if the defendant was not found guilty of aggravated assault he could be found guilty of the lesser offense of assault, instead of instructing the jury that he could be found guilty of the lesser included offense of resisting arrest. The instruction amply covered defendant's version of the event as well as the instruction he requested would have done. St. v. Thornton, 218 M 317, 708 P2d 273, 42 St. Rep. 1614 (1985).

Resisting Arrest as Included in Aggravated Assault: The defendant, convicted of aggravated assault, argued that the refusal of an offered jury instruction on resisting arrest was reversible error. The Supreme Court rejected the contention that resisting arrest could not possibly be a lesser included offense of aggravated assault. St. v. Gopher, 194 M 227, 633 P2d 1195, 38 St. Rep. 1521 (1981).

Prosecutor's Quasi-Judicial Immunity From Prosecution: Plaintiff's civil action against a County Attorney, based upon alleged unlawful arrest by certain policemen and challenging the legality of the criminal prosecution against him, must be dismissed because the County Attorney enjoys absolute immunity for prosecutorial actions done in a quasi-judicial capacity. Hall v. Lympus, 478 F. Supp. 644, 36 St. Rep. 1692 (D.C. Mont. 1979).

45-7-302. Obstructing peace officer or other public servant.

Criminal Law Commission Comments

Source: Proposed Mich. C.C. 1967, § 4506.

This section is designed to deal generally with the knowing obstruction of governmental activities. It protects both peace officers and public servants in the administration of their respective duties. Generally, the section seeks to retain the coverage of the old law to encompass protection of all governmental functions. It imposes a uniform mens rea requirement for all illegal obstruction, i.e., knowingly.

The section requires a person to "knowingly" obstruct, impair or hinder government administration. The old law required a "willful" obstruction. Subsection (2) of this section makes a distinction between the obstruction of illegal activity by a peace officer and a public servant. The commission has followed the basic premise that a person should not take the law into his own hands when faced with illegal police activity.

Compiler's Comments

1997 Amendment: Chapter 69 at end of (1) inserted "including service of process"; in (3), after "servant", inserted "including a person serving process"; and made minor changes in style. Amendment effective March 17, 1997.

Case Notes

Defendant's Right to Speedy Trial Not Violated — No Showing of Prejudice — Remanded for Resentencing Based on Inaccurate Information at Time of Sentencing. St. v. Kirn, 2023 MT 98, 412 Mont. 309, 530 P.3d 1.

Negative Return on Name Check in Campus and State Databases Gave Rise to Additional Particularized Suspicion of Commission of Additional Offense: The defendant was stopped at a University of Montana football game by a campus police officer who suspected the defendant of underage drinking. When questioned, the defendant gave the officer a misspelled name and a false birth date. The officer queried the databases of the University of Montana and the Criminal Justice Information Network and found no record for the name and date of birth the defendant gave. Based on the officer's experience and knowledge that negative returns on the database name checks of young people present on the university campus usually indicate a false name or birth date, the Supreme Court held that the negative return gave rise to additional particularized suspicion that the defendant committed the additional offense of obstructing a peace officer, justifying the defendant's continued detention while the officer continued to investigate. Missoula v. Kroschel, 2018 MT 142, 391 Mont. 457, 419 P.3d 1208.

Obstruction of Peace Officer — Failure to Follow Officer's Instructions — Summary Judgment Inappropriate: During a buffalo herding operation, Reed declined to follow instructions issued by a deputy sheriff to relocate his car to a different area while viewing the buffalo, and a deputy issued a citation for obstructing a peace officer. The state prosecutor voluntarily dismissed the charge, and Reed filed a lawsuit asserting that the deputy violated his rights under the fourth amendment of the U.S. Constitution and under Art. II, sec. 11, Mont. Const. The District Court ruled that the deputy had probable cause to arrest and cite Reed for the obstruction and granted summary judgment to the defendants on Reed's claim of unreasonable seizure, but the District Court improperly invaded the province of the jury by resolving factual disputes material to the question of probable cause, such as whether the deputy had probable cause to believe that Reed's presence would likely obstruct the buffalo operation, whether Reed lacked the specific intent to impede the buffalo operation, and whether the deputy issued the citation for reasons that did not satisfy the fourth amendment such as merely failing to follow the officer's instructions. Because the District Court failed to draw all reasonable inferences in Reed's favor, the defendants were not entitled to summary judgment on Reed's claim. Reed v. Lieurance, 863 F.3d 1196 (9th Cir. 2017). See also Kalispell v. Cameron, 2002 MT 78, 309 Mont. 248, 46 P.3d 46.

Traffic Stop Bystander — Repeated Warnings — Officer Impeded: The defendant approached an officer engaged in a traffic stop and repeatedly asked for a ride. The officer repeatedly asked the defendant to leave and was prevented from carrying out the traffic stop during this time. The defendant was arrested and eventually convicted of obstructing a peace officer. On appeal, the Supreme Court held that sufficient evidence supported the conviction because it was highly probable that the defendant was aware he was impeding the officer. St. v. Eisenzimer, 2014 MT 208, 376 Mont. 157, 330 P.3d 1166.

Deficient Representation Established for Failure to Object to Erroneous Instruction on What "Knowingly" Means: A jury instruction for the offense of obstructing a police officer that instructed the jury that "[a] person acts knowingly when the person is aware of his or her conduct" was erroneous since an obstruction charge could be established by merely proving that a person gave a dishonest answer. When a criminal offense requires that a defendant act "knowingly", a court must instruct the jury on what the term "knowingly" means in the context of the particular crime. In an obstruction charge, the prosecution must show that the defendant was aware that the conduct would impede the performance of the officer's lawful duty. St. v. Johnston, 2010 MT 152, 357 Mont. 46, 237 P.3d 70.

Improper Admissibility of Evidence Concerning Defendant's Sexual Relationship in Obstruction Case — Reversible Error — Relevant Evidence Admissible: Miller was convicted in Justice's Court of obstructing a police officer. Following a call to Kalispell police regarding the welfare of her partner, Miller, a probation officer, had called the Kalispell police to report that her partner was with her at the bar and that the call was a prank, when in fact the partner had left the bar and was subsequently involved in an auto accident. During trial, the court allowed multiple references to Miller's lesbian relationship and allowed evidence related to the accident. Miller appealed on grounds that the references to her sexual orientation were unrelated to the charge, irrelevant, and highly prejudicial. Miller also asserted that evidence of the accident was an abuse of discretion. The Supreme Court reversed the admission of references to Miller's sexual orientation. Society does not view homosexuality or bisexuality in the same manner as it views heterosexuality, so there was a strong potential that a juror would be prejudiced against a homosexual or bisexual person, so it was prejudicial to allow references to Miller's relationship because it was not probative or relevant to the crime with which Miller was charged. However, evidence of the accident was relevant to Miller's crime because it proved that Miller provided untruthful information to the police, so the court affirmed admission of the accident evidence. A new trial was ordered with directions to exclude references to Miller's homosexuality. Kalispell v. Miller, 2010 MT 62, 355 Mont. 379, 230 P.3d 792. See also St. v. Ford, 278 Mont. 353, 929 P.2d 245 (1996).

Sufficient Evidence of Attempted Obstruction of Peace Officer — Jury Properly Instructed Regarding Mental Standards of Offense: When she saw heavily armed officers approaching a neighbor's residence, Baker called the neighbor and left a recorded message that it would be in the neighbor's interests to peek out the window. The message was subsequently confiscated, and Baker was charged with and convicted of attempted obstruction of a police officer. On appeal, Baker challenged the use of evidence regarding the neighbor's history and arrest, the purpose and use of the high-risk unit in arresting the neighbor, and an officer's outrage at Baker's interference with the police, contending that the evidence was irrelevant and unfairly prejudicial. The Supreme Court disagreed. Under the transaction rule set out in St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371 (1999), the trial court did not err in allowing the evidence because it enabled the jury to understand the circumstances surrounding the police activity and how Baker's interference could have affected the outcome. Baker also contested the jury instructions. Under this section, a person obstructs an officer when the person knowingly hinders the enforcement of the criminal law, so for a person to commit the offense of attempted obstruction, the person need only perform any act toward the commission of obstruction while aware of the fact that the person is performing the act. The instructions to the jury contained an explanation of the "knowingly" standard and multiple instructions on Baker's purpose for making the call and thus were a fair and full instruction on the law. The conviction was affirmed. St. v. Baker, 2004 MT 393, 325 M 229, 104 P3d 491 (2004).

Lack of Exigent Circumstances Justifying Warrantless Search of Fanny Pack — Motion to Suppress Evidence Properly Granted: After Lanegan was arrested for obstructing a peace officer and handcuffed, the officer proceeded to conduct a warrantless search of Lanegan's fanny pack and discovered drugs and drug paraphernalia. Lanegan was then charged with drug crimes. Lanegan moved to suppress the evidence, and the motion was granted. The state appealed, but the Supreme Court affirmed. A search incident to arrest may be conducted under the conditions in 46-5-102, but in this case, none of the conditions were present. The search would not have protected the officer or prevented Lanegan's escape because Lanegan was already handcuffed, nor would the search have resulted in discovery of anything that could have been used in or fruits of the crime of obstructing a peace officer. Warrantless searches are per se unreasonable, but one exception is when there are exigent circumstances that would cause a reasonable person to believe that prompt action is necessary to prevent physical harm, destruction of relevant evidence, escape, or some other consequence improperly frustrating legitimate law enforcement efforts. However, the search in this case did not rise to the level of exigent circumstances to allow a warrantless search, and the motion to suppress was properly granted. St. v. Lanegan, 2004 MT 134, 321 M 349, 91 P3d 578 (2004).

Lack of Physical Description Not Precluding Particularized Suspicion Warranting Investigatory Stop — Defendant in Proximity to Suspects at Crime Scene: A convenience store clerk called police to report a possible theft and gave physical descriptions of two suspects. When a police officer arrived at the scene, he observed three people nearby, two of whom matched the physical description. Niles did not match the description, but was standing with those who did. The officer cornered one of the persons described by the clerk, after which Niles and the other person began walking away. When ordered to stop, the two tried to flee but were apprehended and arrested. Niles was charged with obstructing a peace officer and with possession of alcohol by a minor. During criminal proceedings, Niles moved to suppress evidence based on the contention that the officer lacked a particularized suspicion to detain. The motion was denied. On appeal, the Supreme Court affirmed. Although Niles was not physically described in the police report, he nevertheless was clearly associated with the two described suspects near the area of the crime, and although Niles did not initially run away from the officer, he did walk away in the presence of a suspect and in a manner that, under the totality of the circumstances, the officer could form a particularized suspicion that Niles was engaged in or had been engaged in criminal wrongdoing. St. v. Niles, 2002 MT 282, 312 M 453, 59 P3d 1129 (2002), distinguishing St. v. Broken Rope, 278 M 427, 925 P2d 1157 (1996), and St. v. Bauer, 2001 MT 248, 307 M 105, 36 P3d 892 (2001). See also St. v. Zeimer, 2022 MT 96, 408 Mont. 433, 510 P.3d 100.

Failure to Follow Officer's Instructions — No Evidence of Impairment of Police Investigation to Warrant Charge of Obstructing Peace Officer: Cameron was a passenger in Swartzenberger's truck when the vehicle was observed by two Kalispell police officers, who decided to investigate Swartzenberger's erratic driving. Swartzenberger parked the vehicle at a restaurant, and both he and Cameron had exited the truck when the officers approached. One officer approached Cameron as he was walking into the restaurant, and directed him to get back into the truck. Cameron refused, saying he was going to get something to eat. When the officer repeated the command, Cameron swore at the officer and turned to go into the restaurant. While the other officer was arresting Swartzenberger unassisted, Cameron was also arrested for obstructing a peace officer. At trial, Cameron moved for a directed verdict, but the motion was denied, and the jury found Cameron guilty as charged. Cameron appealed, contending that failure to follow an officer's instructions does not constitute obstructing a peace officer. The Supreme Court agreed and reversed. There was no evidence that Cameron knew that the officers were investigating the possibility that Swartzenberger was impaired, or that Cameron in any way impaired the investigation, which was successfully concluded without incident. Thus, the city failed to prove the elements of the crime by showing that Cameron knowingly impeded the performance of a peace officer's lawful duty. Cameron did not interfere with Swartzenberger's arrest, and there was no reason to arrest Cameron. Cameron's motion for a directed verdict should have been granted, and the Supreme Court directed that a verdict acquitting Cameron be entered. Kalispell v. Cameron, 2002 MT 78, 309 M 248, 46 P3d 46 (2002), followed in St. v. Bennett, 2022 MT 73, 408 Mont. 209, 507 P.3d 1154. See also Reed v. Lieurance, 863 F.3d 1196 (9th Cir. 2017).

Conviction for Aggravated Assault, Escape, and Obstructing a Peace Officer — No Double Jeopardy: There was no double jeopardy when defendant was convicted of aggravated assault, escape, and obstructing a peace officer, all of which arose out of the same event, as each offense contains an element not common to the other offenses. St. v. Thornton, 218 M 317, 708 P2d 273, 42 St. Rep. 1614 (1985).

Investigation by Peace Officer: Where store delayed approval of check tendered by plaintiff for merchandise while police were called for investigation of suspected forgery but plaintiff meanwhile demanded return of the check, it was his property and he had a right to possession of it, and his subsequent detention after attempting to snatch the check from the hand of a police officer gave rise to a cause of action against the store. Harrer v. Montgomery Ward & Co., 124 M 295, 221 P2d 428 (1950).

45-7-303. Obstructing justice.

Criminal Law Commission Comments

Source: New.

The section is based on the theory that a person who aids another to elude apprehension or trial is obstructing justice and interfering with the processes of government. It is his willingness to interfere and the harm threatened by such interference that constitutes the offense rather than any fiction that equates a "harborer" with the murderer or traitor whom he harbors.

This section makes it an offense to aid misdemeanants as well as felons. This result follows from the purpose to deter an obstruction of justice. Also the aider may not know what crime the offender has committed.

Knowledge or reason to believe that the putative offender is guilty of or charged with a crime is simply evidence of the purpose to aid the putative offender to elude justice. A purpose to aid the offender to avoid arrest is not proved merely by showing that defendant gave succor to one who was in fact a fugitive. When a fugitive seeks help from friends and relatives there may be other motivations in addition to the objective of impelling law enforcement. Such other motivations are not taken into consideration by way of exception of certain classes of near kin, but could possibly be a ground for mitigating sentence after conviction. This section specifies the prohibited forms of aid in addition to the traditional offense of harboring or concealing the fugitive. Subdivision (2)(b) contains an exception to take care of cases like fellow-motorists warning speeder to slow down, or a lawyer advising a client to discontinue illegal activities.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: Prior law provided that a person who concealed his knowledge of a felony or who harbored or protected one charged or convicted of a felony was an "accessory". R.C.M. 1947, § 94-205. At common law such a person was an "accessory after the fact". These terms encompassed all of the specific activities in subsections (2)(a) through (2)(e). These subsections are broader than previous law in two respects. Prior law applied to helping felons, whereas this section applies also to obstruction of justice in connection with misdemeanors. Second, R.C.M. 1947, § 94-205 required that the aider have "full knowledge" of the crime, whereas under this section he may not know what crime has been committed.

Subsection (2)(f) applies to a person who aids another to commit the offense of escape, MCA, 45-7-306. The subsection covers the old crime of Rescue, not only violent jailbreaks and aiding the rescue or escape of a person "from an officer having him in lawful custody", but it applies also to the person who aids a person in departing from any lawful custody. See the definition of "official detention", MCA, 45-2-101. "Aids" in this subsection is more inclusive than "rescues" under prior law. The maximum penalty for the offense is reduced from felony to misdemeanor.

Case Notes

Parole Restriction on Obstructing Justice Sentence Upheld: After the defendant pleaded guilty to obstructing justice and criminal endangerment charges, she appealed the District Court's restriction on parole eligibility for her sentence for obstructing justice, arguing that the restriction was illegal because it led to a disparate sentence compared to a codefendant's sentence, the District Court failed to orally pronounce the reasons for the restriction specifically as to the obstructing justice conviction, and the court exceeded its authority when it restricted parole based on conduct punished by the criminal endangerment sentence. The Supreme Court affirmed the parole restriction, noting that a sentence that is within the sentencing parameters but is merely disparate is not illegal and is best directed toward the Sentence Review Division. Although the District Court did not specifically reference which conduct was attributable to which count, it articulated its reasons for the sentence and legally sentenced the defendant within statutory parameters. In addition, because the parole restriction was not illegal and the defendant only generally objected to the imposition of any restriction, any objections specific to the conduct punished by the restriction were not preserved on appeal. St. v. Old Bull, 2017 MT 247, 389 Mont. 56, 403 P.3d 670.

Jury Instructions Not Deficient — Common Understanding of Terms "Knowing" and "Knew" — Plain Error Review Denied: The District Court did not improperly instruct the jury by failing to separately define "knowing" or "knew" as the terms pertain to the elements of obstruction of justice. The record revealed that the defense addressed the elements of obstructing justice in its opening statement, and both sides addressed the elements during their closing arguments. The jury was properly instructed on all of the elements of the offense, including the requirement that the defendant knew that a person was an offender. Even without an instruction defining the term "knowing", the state was not relieved of its burden to prove the knowing element, and the jury was well aware of the burden. The Supreme Court noted that a jury need not be instructed on words or phrases of common understanding or meaning. The Supreme Court also declined to undertake consideration of the merits of the instruction issue pursuant to the plain error doctrine because failure to review would not result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial proceedings, or compromise the integrity of the judicial process. St. v. Nuessle, 2016 MT 335, 386 Mont. 18, 385 P.3d 952.

Direct Interference With Arrest Attempt Not Required to Constitute Obstruction of Justice: This section does not require direct interference with an arrest attempt before obstruction of justice can occur. As long as the offender is liable to be arrested and the aid received constitutes money, transportation, weapon, disguise, or other means of avoiding discovery or apprehension, obstruction of justice can occur, notwithstanding the lack of any attempt by law enforcement officials to exercise an arrest warrant. In the present case, although there was conflicting testimony whether defendant was ignorant of the existence of a warrant at the time that he assisted a wanted person in escaping to another jurisdiction, a plethora of circumstantial evidence, coupled with defendant's actions, was sufficient for a rational trier of fact to find that defendant knew of the arrest warrant and acted with the purpose of promoting or facilitating obstruction of justice. St. v. Stucker, 1999 MT 14, 293 M 123, 973 P2d 835, 56 St. Rep. 65 (1999).

Harboring Misdemeanant: Section 94-205, R.C.M. 1947 (a forerunner of this section), defining as accessories after the fact persons harboring criminals, applied only to felonies, and where the charge filed against the principal was only a misdemeanor, defendant who harbored him was properly discharged on demurrer even though under the facts the principal might have been charged with a felony. St. v. Williams, 106 M 516, 79 P2d 314 (1938).

Corroboration of Accessory: Witness who became an accessory after the fact under 94-205, R.C.M. 1947 (a forerunner of this section), by receiving part of the stolen property and by failure to report the theft did not thereby become an accomplice so as to require corroboration of his testimony. St. v. Slothower, 56 M 230, 182 P 270 (1919).

45-7-304. Failure to aid peace officer.

Criminal Law Commission Comments

Source: New.

The section is limited to "peace officer" (see definition of peace officer in R.C.M. 1947, section 95-210 [now MCA, 45-2-101(48)]). Rather than require every eighteen-year-old male to assist, a more flexible standard of reasonableness is substituted.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: Subsection (1)(a) refers to MCA, 46-6-402, which states that in securing an arrest the peace officer may command cooperation from male persons over the age of eighteen. A further limitation on the power to so command is imposed by subsection (1). Unlike prior law, it requires that the request be reasonable. The power to so command is limited to "peace officers", defined at MCA, 45-2-101(48).

In subsection (2) the penalty has been increased to provide a possibility of imprisonment.

Case Notes

Compensation of Posse Comitatus: Section 94-35-177, R.C.M. 1947 (the forerunner of this section), requiring adult males to join a posse comitatus when required by the Sheriff, did not require or authorize the county to reimburse members of the posse for their services or for expenses incurred. Sears v. Gallatin County, 20 M 462, 52 P 204 (1898).

45-7-305. Compounding of felony.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 242.5.

The significant difference between this section and prior law is that there is no grading of the offense.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Annotator's Note: Subsection (1) retains most of the coverage of prior law concerning Compounding a Felony. The significant difference between this section and previous law is that there is now no offense of compounding a "misdemeanor", (defined at MCA, 45-2-101). The old law graded the offense according to whether the crime was punishable by death or life imprisonment, was punishable by less than death or life imprisonment, or was a misdemeanor. The section has not gone as far as the Model Penal Code which expressly authorizes the compromise of a misdemeanor for which the injured person has a civil action.

The omission of misdemeanors does not leave unregulated the event of a person taking a reward to forbear or stifle a criminal prosecution for a misdemeanor. This is covered by Bribery in Official and Political Matters, MCA, 45-7-101 and Gifts to Public Servants by Persons Subject to Their Jurisdiction, § 45-7-104. To an extent subsection (1)(a) overlaps in coverage with these sections.

Subsection (2) authorizes a maximum penalty which is the same as that provided for the lowest grade of the offense under old law.

45-7-306. Escape.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 242.6.

The section classifies escapes according to the risk they create. Punishment is more severe for the offense when committed by the use of or threat of force, physical violence, weapon or simulated weapon. The grading of the offense by relying on the prisoner's use of force is actually a return to common law, since early common law clearly distinguished between escapes with and without use of force. The grading scheme implicit in the old code by which punishment is provided in reference to the type of confinement, is not entirely abandoned by section 94-7-306 [now MCA, 45-7-306]. For example, use of force in escaping from a noninstitutional detention calls for a lesser punishment than escape from a prison, county or city jail. Further, an escape without use of force from a noninstitutional detention as provided in subdivision (3)(c) removes the offense from the felony category altogether.

Another grading method for escapes is based on the seriousness of the crime causing the detention. The section includes the grading indirectly in that the seriousness of the crime causing the detention is indicated by the institution in which the detention is made. For example, persons held in the state prison will usually be felons while those in city or county jails will be misdemeanants.

Compiler's Comments

1997 Amendment: Chapter 26 in definition of official detention, in (a) after "means", substituted "placement of a person in the legal custody of a municipality, a county, or the state as a result of" for "imprisonment which resulted from", in (a)(i), after first "offense", substituted "or of having been charged with" for "confinement for an offense, confinement of a person charged with" and after second "offense" deleted "detention", and in (a)(ii), at beginning, inserted "the actual or constructive restraint or custody of a person" and at end inserted "transport, or court order"; in (3)(a), after "escapes", deleted "from or while in transit to or from a state prison, county jail, city jail, community corrections facility or program, or supervised release program"; in (3)(b), at end after "felony", deleted "and escapes from or while in transit to or from a state prison, county jail, city jail, halfway house, life skills center, community corrections facility or program, or supervised release program"; deleted former (3)(b)(ii) that read: "(ii) escapes from or while in transit to or from another official detention by the use or threat of force, physical violence, weapon, or simulated weapon"; in (3)(c), near middle, substituted "the person escapes" for "he commits escape, including escape while in transit to or from official detention"; and made minor changes in style. Amendment effective February 21, 1997.

Applicability: Section 3, Ch. 26, L. 1997, provided: "[This act] applies to escapes occurring after [the effective date of this act]." Effective February 21, 1997.

1991 Amendments: Chapter 114 in (3)(a), (3)(b)(i), (3)(b)(ii), and (3)(c) inserted reference to escape while in transit; and at beginning of (3)(b)(i) inserted "has been charged with or convicted of a felony and".

Chapter 554 in (1), in first sentence after "deportation", inserted "placement in a community corrections facility or program"; and in (3)(a) and (3)(b)(i) inserted "community corrections facility or program". Amendment effective July 1, 1991.

1989 Amendment: In (1), near middle after "supervised release program", inserted "participation in a county jail work program under 7-32-2225 through 7-32-2227"; and in (2) inserted second sentence providing that person commits offense of escape if he knowingly or purposely fails to appear for work program under 7-32-2225 through 7-32-2227.

1981 Amendments — Composite: Chapter 72 inserted "halfway house, life skills center, or furlough placement" in (3)(b)(i).

Chapter 583 added "supervision while under a supervised release program" to the list of methods of constraint that mean "official detention" in (1); and added "supervised release program" to (3)(a) and (3)(b)(i).

In preparing the composite of the Ch. 72 and Ch. 583 amendments to this section, the Code Commissioner chose the term "supervised release program" over "furlough placement" in (3)(b)(i) in order to conform to the intent of Ch. 583, which redefined the prisoner furlough program as the supervised release program.

Annotator's Note: This section on Escape covers any unauthorized departure from legal custody. The definition of subsection (1) is not limited to confinements upon a charge or conviction of a crime, but also includes imprisonment or detention for some purpose in connection with a civil case such as a sanity hearing. The portion of the definition concerning the use of force during an unlawful arrest is consistent with the rule that the illegality of an arrest is no defense to a prosecution on the charge of Resisting Arrest. MCA, 45-7-301. One may not use force either to resist an unlawful arrest or to escape from one.

Subsection (2) describes the offense of escape. Notably, the offense may be committed even where the physical departure from official detention has been authorized. A person who fails to return to official detention when required commits the offense.

Case Notes

Escape Criminalized Regardless of Location if Person in Legal Custody — Conviction Upheld for Failure to Report After Revocation of Suspended Sentence — Criminal Contempt Not Included as Offense of Escape — Declining to Provide Jury Instruction of Lesser-Included Offense Not Error. St. v. Ohl, 2022 MT 241, 411 Mont. 52, 521 P.3d 759.

Furlough Considered "Official Detention": The defendant was placed at a prerelease facility and was released on furlough with a scheduled return date. The defendant failed to return and was charged with escape pursuant to 45-7-306. The defendant moved to dismiss the escape charge on the basis that he was not in "official detention" while on furlough or, alternatively, that furlough should be considered parole and, therefore, exempt from the definition of "official detention". The Supreme Court affirmed the District Court's denial of the motion to dismiss, concluding that under the language of 45-7-306, which the legislature amended in 1997, the defendant remained in "official detention" while on furlough. In addition, citing St. v. Romannose, 281 Mont. 84, 931 P.2d 1304 (1996), the Supreme Court rejected the defendant's argument that furlough should be considered parole, as distinctions exist between the two. St. v. Roundstone, 2011 MT 227, 362 Mont. 74, 261 P.3d 1009.

Evidence of Escape Sufficient to Support Conviction for Aggravated Burglary: When attempting to flee from pursuing officers, Martin ducked into the back door of a bakery and then ran out the front door in a further attempt to get away. Martin was convicted of attempted burglary for entering the occupied structure armed with a weapon for the purpose of committing the offense of escape. On appeal, Martin argued that the evidence was insufficient to prove escape, so the evidence was also insufficient to prove aggravated burglary. The Supreme Court found sufficient evidence to support the escape charge, so the aggravated burglary charge was also affirmed. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Sufficient Evidence to Support Finding That Fleeing Suspect in Detention for Purpose of Proving Escape: Martin was convicted of escape after shooting a police officer who was in pursuit following Martin's attempt to cash a forged check. Martin contended that the evidence was insufficient to support the conviction because he was never placed in official detention and thus could not have formed the requisite mental state for escape. The Supreme Court noted that, pursuant to St. v. Thornton, 218 M 317, 708 P2d 273 (1985), actual restraint does not require physical restraint. It was inconceivable that Martin did not recognize the officer's command to halt or stop as an assertion of the officer's authority to effect Martin's arrest or that Martin believed that he was free to walk away. Therefore, the evidence was sufficient to support the jury's finding that Martin was placed in official detention and to support Martin's conviction for escape. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Rebuttable Presumption That Prison Escapee Abandoned Personal Property: Hawkins escaped from the state prison. Immediately following the escape, officials packed up Hawkins' personal property, sealed it in boxes with security tape and Hawkins' name on each box, and placed it in the prison storage room. After 2 days, Hawkins was apprehended and returned to prison. He was found guilty of escape, but his property was not ordered destroyed. Over the next 30 days, Hawkins requested the return of his personal property several times. Eventually, Hawkins was escorted to the storage room and allowed to remove his legal papers but was informed that, by policy, when a prisoner escapes, all personal property is considered abandoned, so the remainder of his property was destroyed or sold. Hawkins filed an action for the value of the property, alleging that prison officials destroyed his property without affording him due process, which constituted cruel and unusual punishment and violated a gratuitous bailment that Hawkins had formed. The District Court, concluding that Hawkins had abandoned his property by his escape and that the abandonment constituted a complete defense to any action brought by Hawkins that depended on his ownership of the property, dismissed the action based on failure to state a claim for which relief could be granted. On appeal, the Supreme Court cited Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939), for the proposition that in determining whether one has abandoned property or rights, intention is the first and paramount object of inquiry. If there is no expressed intent to abandon, then intent must be inferred from the acts of the property owner. The presumption or inference of intent to abandon one's property based solely on the acts of the owner is a rebuttable presumption. Here, upon returning to prison and requesting the return of his property, Hawkins effectively rebutted the presumption that he intended to abandon it, and when he reclaimed his property by requesting its return, he regained his status as owner of his personal property against all others. The District Court committed reversible error when it found that Hawkins abandoned the property by escape and dismissed the action based on failure to state a claim for which relief could be granted. Hawkins v. Mahoney, 1999 MT 296, 297 M 98, 990 P2d 776, 56 St. Rep. 1185 (1999), distinguishing Herron v. Whiteside, 782 SW 2d 414 (1989). See also 1 C.J.S. Abandonment § 12 (1985).

Live-Out Status Still Official Detention: Romannose argued that since he was on "live-out" status at a community corrections facility, he was not subject to official detention and therefore could not be charged with felony escape. The Supreme Court held that although he was on live-out status, he was still subject to the rules of the facility, including checking in once a day, and therefore was subject to official detention and that his walking away was felony escape. The Supreme Court also held that the defendant could not argue that he had not acted "knowingly or purposely" in walking away because he had signed a prerelease referral form in which he acknowledged that any unauthorized absence on his part would constitute felony escape. St. v. Romannose, 281 M 84, 931 P2d 1304, 54 St. Rep. 72 (1997), affirming St. v. Chandler, 277 M 476, 922 P2d 1164, 53 St. Rep. 774 (1996), holding that a community corrections facility constitutes official detention.

Escape From Prerelease Center — Felony Escape: Chandler argued that he could not be charged with felony escape for leaving a prerelease center because he was not subject to official detention while at the center. The Supreme Court ruled that a prerelease center is a community corrections facility or program as listed in the felony escape statute and therefore escape from the center violated the plain language of the law and was punishable as a felony. St. v. Chandler, 277 M 476, 922 P2d 1164, 53 St. Rep. 774 (1996), distinguishing St. v. Nelson, 275 M 86, 910 P2d 247 (1996), and St. v. Roberts, 275 M 365, 912 P2d 812 (1996). See also St. v. Roundstone, 2011 MT 227, 362 Mont. 74, 261 P.3d 1009.

Supervised Release Program Not Inclusive of Furloughs — Escape Not Chargeable to Furloughed Convict: Roberts was released from the state prison into the parole-related furlough program rather than the supervised release program and did not meet the requirements of the administrative rules governing the supervised release program. A part of Roberts' parole included a 10-day furlough to allow him to find housing and employment. When he failed to meet his parole officer on a specified date, he was charged with felony escape. Roberts moved to dismiss the charge. An escape charge can be maintained only against a person subject to official detention, which is defined in part as supervision under a supervised release program. The term "supervised release program" clearly and unambiguously refers to the program codified in Title 46, ch. 23, part 4 (now repealed), and not to the furlough associated with parole proceedings under 46-23-215. Because Roberts was not being supervised under a supervised release program, the District Court erred in concluding that Roberts could be prosecuted for escape and in denying his motion to dismiss the escape charge. The Supreme Court reversed and remanded with instructions to enter an order of dismissal. St. v. Roberts, 275 M 365, 912 P2d 812, 53 St. Rep. 181 (1996). See also St. v. Roundstone, 2011 MT 227, 362 Mont. 74, 261 P.3d 1009.

Inmates' Escape From Daily Work Assignment Outside Prison — Felony Escape Charge Unwarranted: Three prison inmates escaped from a work detail at the Deer Lodge golf course and were sentenced for felony escape. The Supreme Court remanded for sentencing for misdemeanor escape because the inmates were not at one of the institutions listed in the escape statute or in transit to or from one of those institutions and the escape did not involve the use or threat of force, physical violence, or weapons. St. v. Nelson, 275 M 86, 910 P2d 247, 53 St. Rep. 50 (1996), distinguished in St. v. Romannose, 281 M 84, 931 P2d 1304, 54 St. Rep. 72 (1997).

Flight From Courthouse Not Felony Escape: The defendant escaped from the courthouse before he could be transported back to the county jail. The state argued that the lower court erred in not finding that the defendant was guilty of felony escape from the county jail. The Supreme Court affirmed the decision, holding that the statute is specific in listing the places from which escape is a felony and that the statute did not address escape by a prisoner during transport from a court appearance. (See 1991 and 1997 amendments.) St. v. Savaria, 245 M 224, 800 P2d 696, 47 St. Rep. 2028 (1990).

Conviction for Aggravated Assault, Escape, and Obstructing a Peace Officer — No Double Jeopardy: There was no double jeopardy when defendant was convicted of aggravated assault, escape, and obstructing a peace officer, all of which arose out of the same event, as each offense contains an element not common to the other offenses. St. v. Thornton, 218 M 317, 708 P2d 273, 42 St. Rep. 1614 (1985).

Escape From Arresting Officer — Physical Restraint Not Prerequisite of Arrest: A valid arrest is an underlying element of "official detention" as that term is used in 45-7-306 and is therefore also an underlying element of the offense of escape. A valid arrest occurred when a Department of Highways (now Department of Transportation) enforcement officer stopped a truck to weigh it and a passenger began to unload it, threatened the officer when he was told to stop unloading, and was twice told he was under arrest. Actual physical restraint of the passenger is not a prerequisite to a valid arrest. The standard for an arrest when there is no physical restraint is whether a reasonable person, innocent of any crime, would have felt free to walk away under the circumstances. The passenger was properly charged with and convicted of the offense of escape. St. v. Thornton, 218 M 317, 708 P2d 273, 42 St. Rep. 1614 (1985), followed, as to the lack of need for physical restraint, in St. v. Widenhofer, 286 M 341 950 P2d 1383, 54 St. Rep. 1438 (1997).

Escape From Youth Camp — Felony Escape: Kyle left the Swan River Youth Forest Camp (now Swan River Forest Camp) without authorization and was later found guilty of felony escape under 45-7-306. Kyle argues that departure from the camp should be controlled by St. v. Whiteshield, 185 M 208, 605 P2d 189 (1980). Whiteshield held that a departure from a work furlough is not an escape from the state prison. The Supreme Court held that the camp is a prison and that the rationale of Whiteshield does not apply to escapes from the camp. (Dissent by Justice Sheehy.) St. v. Kyle, 192 M 374, 628 P2d 260, 37 St. Rep. 1324 (1980).

Escape From Prison Furlough Program — Misdemeanor: A prisoner furlough program does not fit within the definition of "prison". Where defendants walked away from such programs, no risk of violence was involved and they could be convicted only of misdemeanor escape. St. v. Whiteshield & Sorensen, 185 M 208, 605 P2d 189, 37 St. Rep. 89 (1980).

Entrapment Elements: Defendants charged with escape failed to prove the elements of an entrapment defense: (1) that criminal intent or design to commit the crime originated in the mind of the law enforcement officer; (2) that no criminal intent or design originated in the minds of the accused; and (3) that the law enforcement officer lured or induced the defendants into committing a crime they had no intention of committing. St. v. Gallaher, 177 M 50, 580 P2d 930 (1978).

Double Jeopardy: The offenses of criminal mischief and escape have no common elements, are separate and distinct criminal offenses, and are designed for the protection of completely different interests. There was no error and no violation of defendant's constitutional right against double jeopardy in permitting defendant to be charged with and convicted of both criminal mischief and attempted escape, even though both charges were based on a single physical act, digging a hole in a county jail wall. St. v. Davis, 176 M 196, 577 P2d 375 (1978).

Affirmative Defense — Standard: Under Montana law the defense of justification is an affirmative defense which must be proved by the defendant by a preponderance of the evidence, hence instructions stating a more lenient burden are not subject to objection by defendant that they constitute a directed verdict of guilt. St. v. Stuit, 176 M 84, 576 P2d 264 (1978).

Defense of Compulsion: In order to establish the defense of justification or necessity to the offense of escape the defendant must establish that: (1) he was faced with the threat of death or serious bodily injury; (2) there was insufficient time to complain to prison authorities; (3) there was insufficient time to resort to the courts; and (4) the prisoner immediately reported to the police when he obtained a position of safety. St. v. Stuit, 176 M 84, 576 P2d 264 (1978), followed in St. v. Strandberg, 223 M 132, 724 P2d 710, 43 St. Rep. 1591 (1986).

Restricting Voir Dire — Right to Impartial Jury: The court did not err in sustaining the State's objections to defense counsel's voir dire questioning of prospective jurors on their attitude toward defense of justification in the prosecution of felony charge of escape from prison. St. v. Stuit, 176 M 84, 576 P2d 264 (1978).

Lawful Detention: Neither 94-4207, R.C.M. 1947, relating to assisting a prisoner to escape, nor 94-4208, R.C.M. 1947 (forerunners of this section), relating to giving a prisoner anything useful in making an escape, required proof that the imprisonment was lawful. St. v. Zuidema, 157 M 367, 485 P2d 952 (1971).

Consecutive Sentences: Section 94-4203, R.C.M. 1947 (a forerunner of this section), providing that sentence for escape should be consecutive to term for which then in confinement, did not result in automatic discharge of the first sentence when a prisoner was paroled on the escape sentence. Petition of Duran, 152 M 111, 448 P2d 137 (1968); State ex rel. Herman v. Powell, 139 M 583, 367 P2d 553 (1961).

Conspiracy to Rescue: In a prosecution for second-degree assault on a police officer, evidence of a conspiracy to rescue a prisoner being taken to jail by the officer was admissible to establish liability of members of the conspiracy not proved to have committed the assault personally. St. v. Dennison, 94 M 159, 21 P2d 63 (1933).

45-7-307. Transferring illegal articles — unauthorized communication.

Criminal Law Commission Comments

Source: R.C.M. 1947, §§ 94-35-241, 94-35-264 and 94-4208.

The section does not require proof of an intent to assist an inmate to escape, but requires only that the actor intended to convey the item involved. It is sufficient that he know the nature of the item as an illegal article, i.e., something that he is prohibited from conveying to the inmate by statute, regulation or institutional rule. The offense is graded on the basis of the nature of the article or thing introduced, i.e., if the thing be a deadly weapon, the offense is a felony; and the section applies to all official detention rather than just the state prison.

Compiler's Comments

2021 Amendment: Chapter 339 in (1)(b)(iii) near middle substituted "53-30-101" for "53-30-101(3)(c)". Amendment effective October 1, 2021.

2001 Amendment: Chapter 144 in (1)(a) near middle and near end substituted "illegal article or weapon" for "illegal article or thing"; in (1)(b) after "transferring illegal articles" inserted "or a weapon"; in (1)(b)(iii) at beginning inserted reference to imprisonment in state prison if article other than weapon or drug is transferred to or from person incarcerated in state prison, as defined, and at end after "not to exceed 10 days, or both" substituted language concerning transfer of article to or from person incarcerated in a place other than prison for "if he conveys any other illegal article or thing to a person subject to official detention"; in (1)(c) after "the article" deleted "or thing"; and made minor changes in style. Amendment effective July 1, 2001.

1987 Amendment: Inserted (1)(b)(ii) providing for a maximum 10-year sentence for person convicted of transferring dangerous drug to person in official detention; and in (1)(c) changed reference to (1)(b)(ii) to (1)(b)(iii).

Annotator's Note: This section on illegal transaction with prisoners retains the coverage of prior law. Additionally, subsection (1) applies to the transfer of any illegal article, whereas previous law applied to an enumerated list of articles (R.C.M. 1947, § 94-35-264) and to articles useful in making an escape (R.C.M. 1947, § 94-4208). The prohibition of communication in subsection (2) is the same as that of prior law, R.C.M. 1947, § 94-35-241. Both subsections are broader than prior law in that they apply to all "official detention", defined at MCA, 45-2-101, rather than just to the state prison. The maximum penalty for transfer of any illegal article other than a "weapon", defined at MCA, 45-2-101, is reduced to ten days or $100 from ten years or $10,000.

The 1977 amendment added the word "illegal" before the word "article" throughout this section so as to make it clear that the provision prohibits only the transfer of illegal articles rather than all articles. The 1977 amendment also changed former subsection (1)(b)(ii), slightly rewording the first sentence and transferring the last sentence to a new subsection, (1)(c), and rewording it slightly so as to make it clear that the defense of lack of notice is unavailable when the article transferred is a weapon.

Case Notes

Suicide Note Inadmissible as Exception to Hearsay Rule: Defendant was convicted of conspiring to deliver a pistol to her husband who was an inmate in the state prison. The delivery failed, and the inmate committed suicide after writing a note that implied his wife had done something wrong. The note admittedly was not written in furtherance of the conspiracy and contained no direct statement implicating defendant in the scheme. Speculation of defendant's complicity did not rise to a sufficient guarantee of trustworthiness nor did the note establish a fact in issue. Hence, the suicide note did not qualify as a recognized exception to the hearsay rule and was inadmissible. It was not a new and unanticipated situation requiring growth and development of the hearsay law because suicide notes predate the rules of evidence by many years. St. v. Brown, 231 M 334, 752 P2d 204, 45 St. Rep. 660 (1988).

Lawful Detention: Section 94-4208, R.C.M. 1947 (now part of 45-7-307), relating to giving a prisoner anything useful in making an escape, did not require proof that the imprisonment was lawful. St. v. Zuidema, 157 M 367, 485 P2d 952 (1971).

45-7-308. Bail-jumping.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 242.8.

Statutes designating the offense of "bail-jumping" are of comparatively recent origin. The first such statute was passed in New York in 1928, and it was over a generation later that the federal provision was enacted in 1954. Montana had no statute making it a separate punishable crime for failure to comply within a condition of a bail bond or recognizance, although such a provision had been anticipated. In the proposed Montana Code of Criminal Procedure of 1966, under section 95-1106, the following comment can be found: "In addition it is recommended that Montana make it a separate punishable crime not to appear, regardless of the method by which the accused was released. It is believed this will be a greater deterrent than any anticipated financial loss." The section is graded on the basis of the seriousness of the crime charged so bail-jumping in connection with a felony is a potential felony and all other cases of bail-jumping are misdemeanors.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: Bail-jumping was not a crime under the old code under which the penalty for jumping bail was forfeiture of the money or property which was posted as bail. Many recent studies have shown that the great majority of offenders may safely be released on bail, and federal appellate courts are tending toward requiring release on bail that is very moderate in amount. The Montana Code of Criminal Procedure (Title 46, chapter 9) has attempted to encourage this trend by making bail easier to secure and lower in amount, and, where possible, to allow release on the prisoner's own recognizance with no bail at all. However, when bail is nominal or nonexistent, forfeiture is no real penalty and provides no incentive to the offender to appear for trial. This statute is intended to provide a penalty for anyone who (1) jumps bail and is accused of a felony, or (2) has been released without bail on a misdemeanor charge. The section is intended to work together with chapter 9, Title 46 to encourage release on little or no bail, but it enables the courts to deal with those who violate their trust.

Because the definition of "official detention", MCA, 45-2-101, expressly excludes "restraint incidental to release on bail", bail-jumping is not covered by the section on escape. The creation of a second offense allows a different treatment of forfeiture of bonds on misdemeanor charges. This is accomplished by subsection (3). Unless otherwise required by the court, it is lawful to forfeit bond on a misdemeanor, but it is not lawful to remove oneself from "official detention" resulting from a misdemeanor charge or conviction. "Misdemeanor" is defined at MCA, 45-2-101.

Subsection (2) establishes that the fact that bail-jumping may be punished as an independent offense does not prevent it from being punished as a contempt of court.

Case Notes

Defendant Charged With Bail Jumping — Minute Entries by Deputy Clerk Admitted Into Evidence Without Subjecting Clerk to Cross-Examination — Minute Entry Regularly Conducted and Regularly Recorded — Substantial Rights Not Prejudiced. St. v. Staudenmayer, 2023 MT 3, 411 Mont. 167, 523 P.3d 29.

Bond Forfeiture Not Generally Synonymous With Conviction — No Double Jeopardy for Assault Proceedings: Toth forfeited bond for disorderly conduct that occurred on the same day that he was charged with assault with a weapon. Toth claimed that if the bond forfeiture arose from the same events that led to the assault charge, double jeopardy would bar further conviction for assault. The Supreme Court disagreed. Absent specific legislation to that effect, bond forfeiture is not generally synonymous with a conviction for double jeopardy purposes. Bond forfeiture is essentially a civil action and is not admissible as evidence in any other civil action, but bond forfeiture is included within the definition of conviction for particular statutorily delineated purposes only, not including assault. Thus, even if Toth's felony assault charge bond forfeiture arose out of the same transaction as the disorderly conduct, jeopardy did not attach by the bond forfeiture, so Toth's claim failed. St. v. Toth, 2008 MT 404, 347 M 184, 197 P3d 1013 (2008). See also Scott v. S. Carolina, 513 SE 2d 100 (S.C. 1999).

No Evidence That Defendant Set at Liberty by Court Order — Conviction for Bail-Jumping Reversed: While out on bail, Nolan failed to appear at a criminal trial for resisting arrest and criminal endangerment, and a charge of bail-jumping was added. Nolan was arrested and the trial was held 2 days later. At the conclusion of the trial, Nolan was remanded to the custody of the Sheriff. Nolan was mistakenly released from jail prior to sentencing when jail personnel saw that an earlier bond had been posted, but did not see that a second bond had been imposed when Nolan failed to appear for trial. Nolan subsequently failed to appear for sentencing, and a second charge of bail-jumping was added. Nolan was convicted on both counts of bail-jumping and appealed the second conviction. The Supreme Court reversed. Having been mistakenly released, Nolan was never set at liberty by court order, so the first element of the offense was not met. The District Court was directed to dismiss the second bail-jumping charge. St. v. Nolan, 2003 MT 55, 314 M 371, 66 P3d 269 (2003).

Sufficient Evidence to Prove Bail-Jumping — Single Witness Testimony Adequate: Kaske maintained that the state failed to provide sufficient evidence to prove every element of bail-jumping because there was no evidence that Kaske was set at liberty by a court order following a drug conviction, or that the trial court had placed any conditions of release specifying that Kaske appear at a specific time and place. During trial on the bail-jumping charge, the state called the District Court Clerk who kept the minutes at the hearing in question. The clerk testified that Kaske was in fact told by the trial court to appear at a specific time and date for sentencing. Testimony of this single witness was sufficient to prove that Kaske had been directed to appear, and the fact that Kaske failed to appear despite the court order was adequate to prove the bail-jumping charge. St. v. Kaske, 2002 MT 106, 309 M 445, 47 P3d 824 (2002).

Ineffective Assistance of Counsel — Minute Entry of Defense Counsel's Comments Held Not Prejudicial on Charge of Bail-Jumping — Instruction on Notice to Attorney Not Prejudicial: Wereman was convicted of bail-jumping after a trial in which he testified that he failed to appear because he thought that the charge would be dismissed. The Supreme Court held that a comment by defense counsel, that counsel did not know where Wereman was, made earlier when Wereman failed to appear on a charge of aggravated assault, did not represent a conflict of interest between counsel and Wereman and did not constitute ineffective assistance of counsel. The Supreme Court stated that because Wereman himself stated that he failed to appear because he thought that the charges would be dismissed, not because he lacked notice, the comments by defense counsel contained in a minute entry did not impact on counsel's ability to represent Wereman and were not prejudicial. Citing St. v. Blackbird, 187 M 270, 609 P2d 708 (1980), the Supreme Court also held that the District Court's instruction imputing notice to Wereman from his defense counsel should not have been given but that in this case, the giving of the instruction was harmless error. St. v. Wereman, 273 M 245, 902 P2d 1009, 52 St. Rep. 958 (1995).

Failure to Appear at Court-Scheduled Hearing on Change of Plea — Bail-Jumping Conviction Affirmed: Snaric was scheduled to appear October 30, 1991, for a change of plea hearing. At the hearing, the Deputy County Attorney and Snaric's counsel were present, but Snaric was not. The court granted defense counsel's request for a continuance, and the hearing was reset for November 13, 1991. Snaric again failed to appear, and a bench warrant and petition for forfeiture of bond were granted. Snaric contended that he could not be convicted of bail-jumping because no new notice to appear was issued by the court for the November 13 hearing, but rather the date to appear was set by the County Attorney. However, it was the District Court, not the County Attorney, that set the date for hearing by granting the continuance, and Snaric's failure to appear was in defiance of the court's order. The elements of bail-jumping were met, and the conviction was affirmed. St. v. Snaric, 262 M 62, 862 P2d 1175, 50 St. Rep. 1443 (1993).

Notice or Knowledge of Attorney of Criminal Trial Date Not Conclusive as to Notice or Knowledge of Client in Criminal Prosecution: In the defendant's trial on a charge of bail-jumping, the jury was instructed that notice to an attorney of a trial date is notice to the client employing him and knowledge of an attorney is knowledge of his client. The Supreme Court found that this instruction had the effect of relieving the State of its burden to prove the mental state of the defendant. The case was remanded to the District Court. St. v. Blackbird, 187 M 270, 609 P2d 708, 37 St. Rep. 739 (1980), distinguished in St. v. Wereman, 273 M 245, 902 P2d 1009, 52 St. Rep. 958 (1995).

Single Trial Not Approved: By affirming the bail-jumping conviction, the Supreme Court in no way approved consolidating in a single trial separate charges against a defendant for violating a specific criminal law and for bail-jumping due to his failure to appear for a court proceeding related to the crime. St. v. Haag, 176 M 395, 578 P2d 740, 35 St. Rep. 604 (1978).

45-7-309. Criminal contempt.

Criminal Law Commission Comments

Source: N.Y. Pen. L. 1967, § 215.50; R.C.M. 1947, § 94-3540.

See "The Increasing Use of the Power of Contempt," John L. Hilts, 32 Mont. L. Rev. 183 (1971).

Compiler's Comments

2015 Amendment: Chapter 55 in (1)(g) substituted "24/7 sobriety and drug monitoring program" for "sobriety program". Amendment effective October 1, 2015.

2011 Amendment: Chapter 318 inserted (1)(g) related to failure to comply with 24/7 sobriety program; and made minor changes in style. Amendment effective October 1, 2011.

Saving Clause: Section 11, Ch. 318, L. 2011, was a saving clause.

Severability: Section 12, Ch. 318, L. 2011, was a severability clause.

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Annotator's Note: This section is substantially the same as prior law. The mental state requirements, "knowingly" and "purposely" are new. Subsection (1)(f) is also new.

Case Notes

Escape Criminalized Regardless of Location if Person in Legal Custody — Conviction Upheld for Failure to Report After Revocation of Suspended Sentence — Criminal Contempt Not Included as Offense of Escape — Declining to Provide Jury Instruction of Lesser-Included Offense Not Error. St. v. Ohl, 2022 MT 241, 411 Mont. 52, 521 P.3d 759.

24/7 Sobriety and Drug Monitoring Program Fees Not Violation of Due Process — Individualized Assessment Required Prior to Participation in Program: After the defendant was charged with DUI, a second offense, he was ordered by the Justice's Court to participate in the 24/7 Sobriety and Drug Monitoring Program as a condition of his release on bond. While enrolled in the program, the defendant missed three tests and was charged with three counts of contempt for the missed tests. The District Court dismissed the contempt charges, concluding that the program fees constituted pretrial punishment in violation of the defendant's right to due process. On appeal, the Supreme Court concluded that fees required under the program do not have a punitive effect on pretrial criminal defendants and that the imposition of the program can be an appropriate condition of release. However, enrollment in the program is discretionary and prior to imposing the testing requirement, a court must conduct an individualized assessment of the defendant, including considering prior alcohol-related arrests, whether the defendant's history and circumstances suggest an increased risk to the community, and whether the defendant is financially able to pay the fees associated with testing. Because the Justice's Court did not conduct an individualized assessment of the defendant before imposing the testing requirement, it was proper to dismiss the defendant's contempt charges. St. v. Spady, 2015 MT 218, 380 Mont. 179, 354 P.3d 590.

Bond Forfeiture Not Generally Synonymous With Conviction — No Double Jeopardy for Assault Proceedings: Toth forfeited bond for disorderly conduct that occurred on the same day that he was charged with assault with a weapon. Toth claimed that if the bond forfeiture arose from the same events that led to the assault charge, double jeopardy would bar further conviction for assault. The Supreme Court disagreed. Absent specific legislation to that effect, bond forfeiture is not generally synonymous with a conviction for double jeopardy purposes. Bond forfeiture is essentially a civil action and is not admissible as evidence in any other civil action, but bond forfeiture is included within the definition of conviction for particular statutorily delineated purposes only, not including assault. Thus, even if Toth's felony assault charge bond forfeiture arose out of the same transaction as the disorderly conduct, jeopardy did not attach by the bond forfeiture, so Toth's claim failed. St. v. Toth, 2008 MT 404, 347 M 184, 197 P3d 1013 (2008). See also Scott v. S. Carolina, 513 SE 2d 100 (S.C. 1999).

No Prosecution for Breach of Suspended Sentence Only: As a condition of Letasky's suspended sentence for partner or family member assault, he was directed to have no contact with the victim. When contact allegedly occurred, Letasky was charged with criminal contempt. Letasky moved to dismiss the charge, but the motion was denied. On appeal, the Supreme Court reversed. A condition of a suspended sentence, unlike a court order, is not an independent mandate of the court, but instead represents a requirement that Montana law allows the court to place upon an order suspending an offender's sentence. An offender may be prosecuted for a crime if the facts that establish the offender's noncompliance with a condition of the suspended sentence also establish the elements of a crime, but an offender may not be prosecuted based only on breach of the condition itself. St. v. Letasky, 2007 MT 51, 336 M 178, 152 P3d 1288 (2007), distinguished in St. v. Fadness, 2012 MT 12, 363 Mont. 322, 268 P.3d 17.

Distinguishing Between Civil and Criminal Contempt: Contempts are neither wholly civil nor wholly criminal, but classification of a contempt as one or the other is crucial, particularly when the person is sentenced to confinement, because the classification determines the procedures that the court must follow. There is nothing inherent in a contemptuous act or refusal to act that classifies it as civil or criminal. Rather, it is the character and purpose of the punishment that the court chooses to impose that serves to distinguish between civil and criminal contempt. If the sanction is intended to force compliance with the court's order, the contempt is properly classified as civil. If the purpose is to punish the contemnor for a specific act and to vindicate the authority of the court, the contempt is criminal. Huffine v. District Court, 285 M 104, 945 P2d 927, 54 St. Rep. 1065 (1997).

Necessity of Criminal Charge and Due Process in Contempt Proceeding Resulting in Criminal Penalty: The District Court stated that the purpose of its sentence for contempt for practicing law without a license was to compel performance and that the court was thus acting under 3-1-520, which allows incarceration until performance occurs. However, in reality, the sentence, 30 days in jail, to be suspended upon paying a $500 fine within 10 days, was punishment for past acts. Therefore, the contempt proceeding was properly characterized as criminal rather than civil because a contempt is classified as criminal if the purpose of the sanction imposed is punishment and civil if the purpose of the sanction imposed is to compel compliance with a court order. A criminal contempt proceeding must be under the procedures in Title 46 to ensure that criminal penalties are not imposed without affording the proper protections. The lower court erred by imposing a criminal sentence when no criminal charges were brought under this section, creating the crime of criminal contempt, and defendant was not afforded the due process that is guaranteed by the state and federal constitutions. Huffine v. District Court, 285 M 104, 945 P2d 927, 54 St. Rep. 1065 (1997).

Misdemeanor Criminal Contempt — Jurisdiction Properly Exercised — Denial of Application for Writ of Certiorari Proper: The District Court properly denied defendant's application for a Writ of Certiorari to review his Justice's Court criminal contempt conviction. The Justice's Court clearly had jurisdiction under 3-10-303 of a misdemeanor criminal contempt action. Thus, one of the three indispensable requisites to the granting of a Writ, that an inferior board has exceeded its jurisdiction, is absent. St. v. McAllister, 218 M 196, 708 P2d 239, 42 St. Rep. 1515 (1985).

Criminal Contempt and Contempt of Court Distinguished — District Court Without Jurisdiction to Try Criminal Contempt: Criminal contempt, a misdemeanor crime defined in 45-7-309, is an offense against society prosecuted by the state, whereas contempt of court is a judicial power arising out of Art. VII, sec. 1, Mont. Const., and Title 3 that allows a court to enforce its own judgments and maintain decorum in its proceedings. Thus, while only the District Court could have found the defendant in contempt of court for failure to pay a fine from a criminal proceeding of that court, it lacked jurisdiction to try a misdemeanor criminal contempt action for failure to pay the fine because criminal contempt, like most other misdemeanors, must be brought in Justice's Court. St. v. Abrams, 209 M 508, 680 P2d 585, 41 St. Rep. 871 (1984).

Criminal and Civil Contempt Distinguished: A criminal contempt is conduct that is directed against the dignity and authority of the court; a civil contempt consists of failure to obey the order of the court to do something for the benefit of the opposing party in a civil action. Pelletier v. Glacier County, 107 M 221, 82 P2d 595 (1938).

In General: The power to punish for contempt is inherent in the courts of record of this state, is a necessary incident to the exercise of judicial functions, exists independently of statutes, and cannot be taken away or abridged by the Legislature. State ex rel. Metcalf v. District Court, 52 M 46, 155 P 278 (1916). Accord, Territory v. Murray, 7 M 251, 15 P 145 (1887); State ex rel. Boston & Mont. Consol. Copper and Silver Min. Co. v. Judges, 30 M 193, 76 P 10 (1904); In re Mettler, 50 M 299, 146 P 747 (1915). Thus, although the publications of a contemptuous report of a court proceeding are punishable as a misdemeanor under this section, this does not deprive the court of the power to punish such acts as a contempt. State ex rel. Haskell v. Faulds, 17 M 140, 42 P 285 (1895). Otherwise contemptuous language concerning a dissenting opinion does not constitute contempt of court, since it is the view of an individual justice and not the opinion of the court, but the remedy for such language is an action for libel. In re Nelson, 103 M 43, 60 P2d 365 (1936).

Pending Cases: A case on which the Supreme Court had handed down a decision but which was still pending on rehearing was still pending for the purposes of contempt, and a false and grossly inaccurate report thereof was punishable as contempt. In re Nelson, 103 M 43, 60 P2d 365 (1936).

Constitutionality: The Montana court has held that, although a citizen has a right to publish decisions of the Supreme Court, comment upon them freely, and discuss their correctness, there is no constitutional right of freedom of speech to do so by false and defamatory publications which dispose the public to disregard the judgments or orders of the court. In re Nelson, 103 M 43, 60 P2d 365 (1936). However, such false publication is punishable as a contempt of court only when published while the cause is still pending. *Id.* See also Bridges v. California, 314 US 252 (1941). Thus, the publication of an article in a newspaper, charging a judge with wrongdoing in a cause disposed of by him 6 months previously, did not constitute contempt of court under this section. State ex rel. Metcalf v. District Court, 52 M 46, 155 P 278 (1916).

Criticism of Courts: Comment on and criticism of a court's decision, once the matter is no longer pending before the court, was not prohibited by subsection (7) of 94-3540 (now part of this section) and is protected by the free speech and free press section of the Constitution. State ex rel. Metcalf v. District Court, 52 M 46, 155 P 278 (1916).

Attorney's Behavior: Counsel for a witness being examined in court had the right to be heard in his client's behalf, but he did not have the right to abuse his privilege to insult the court or judge or to interrupt the orderly procedure which should characterize every judicial investigation. Arbitrary rulings or oppressive conduct on the part of the court would not warrant retaliation by an attorney or resort to undignified or insolent behavior. The law affords him ample redress. In re Mettler, 50 M 299, 146 P 747 (1915).

Change of Judge: Proceedings for contempt under 94-3540 (now part of this section) were criminal in nature, even when the basis for the charge was disobedience of an injunction issued in a civil case, and the statute providing for change of judge in civil cases did not apply. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. Judges, 30 M 193, 76 P 10 (1904).

Civil Remedy: On prosecution for criminal contempt under 94-3540 (now part of this section) for disobedience of a decree, the court had no power to order payment of costs to plaintiffs in the previous action; rather, the court exhausted its power when it imposed a fine of $500, and any reimbursement of costs must come out of the fine. State ex rel. Flynn v. District Court, 24 M 33, 60 P 493 (1900).

False Publication:

Published statement that Supreme Court, in case still before it, was dealing out injustice and was a party to a "dirty deal" was a false and grossly inaccurate report within the meaning of subsection (7) of 94-3540 (now part of this section) and was punishable under the contempt powers of the court. State ex rel. Haskell v. Faulds, 17 M 140, 42 P 285 (1895).

Territorial Supreme Court had inherent power to protect its processes by punishing for contempt a party who, by publishing unfounded reports of undue influence by his adversaries, attempted to influence the court to hold for him to avoid further charges of corruption. Territory v. Murray, 7 M 251, 15 P 145 (1887).

Part 4
Official Misconduct

45-7-401. Official misconduct.

Criminal Law Commission Comments

Source: Ill. C.C. 1961, Chapter 38, § 33-3.

The intent of this section is to provide criminal sanctions when a public servant intentionally acts in a manner he knows to be contrary to regulation or statute. The existence of the section does not dispute the fundamental premise that inadequate performance in public office should be regulated by civil service.

The section provides punishment for failure to comply with specific mandatory duties set forth outside of the Criminal Code. It also provides punishment for failure to comply with mandatory duties which are set forth in provisions of the Criminal Code.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This section codifies a variety of provisions of similar import found under prior law. It applies to "public servants", defined at MCA, 45-2-101.

The section provides criminal sanctions for failure of a public servant to perform specific mandatory duties set forth outside the criminal code. It also provides sanctions for failure to comply with mandatory duties set forth within the provisions of the criminal code.

To an extent, subsection (1)(d) overlaps with Bribery in Official and Political Matters, MCA, § 45-7-101 and Gifts to Public Servants by Persons Subject to Their Jurisdiction, § 45-7-104. However, this section goes far beyond the offenses of bribery and accepting gifts to encompass any act by a public servant contrary to either statute or regulation. It encompasses acts done in excess of authority (subsection (1)(c)) and failures to perform a mandatory duty (subsection (1)(a)). Notably, the failure to perform in subsection (1)(a) is punishable even though the omission is "negligently" done. "Negligently" is defined at MCA, 45-2-101. Affirmative actions are not punishable unless done "knowingly" or "with a purpose" contrary to law. "Knowingly" is defined at MCA, 45-2-101; "purposely" at MCA, 45-2-101.

The 1975 amendment added subsection (1)(e) making it a violation of this provision to hold a public meeting in violation of § 2-3-203, requiring certain meetings to be open to the public.

The existence of the section does not dispute the fundamental premise that inadequate performance in public office should be regulated by civil service. However, the section does provide an additional means of discouraging misfeasance or malfeasance of public officers.

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IN GENERAL

Official Misconduct Not Continuing Course of Conduct — Statute of Limitations: The Legislature has not explicitly extended the statute of limitations for the offense of official misconduct, nor is the nature of the offense of official misconduct such that it must be treated as a continuing offense. Therefore, charges of official misconduct are subject to the general 1-year statute of limitations for misdemeanor offenses. St. v. Hamilton, 252 M 496, 830 P2d 1264, 49 St. Rep. 33 (1992).

Meaning of "Official Misconduct" Under Montana Recall Act: A public official has not committed "official misconduct" within the meaning of the Montana Recall Act unless the official has committed one or more of the acts set forth in this section. Foster v. Kovich, 207 M 139, 673 P2d 1239, 40 St. Rep. 1949 (1983).

Official Misconduct — Probable Cause: An affidavit alleged that two County Commissioners consciously excluded the third Commissioner from their discussion and approval of a reorganization plan for staff personnel. Such allegations were sufficient to initially establish probable cause that the crime of official misconduct had been committed under subsection (1)(e). St. v. Conrad, 197 M 406, 643 P2d 239, 39 St. Rep. 680 (1982).

Open Meeting Law — Criminal Penalty Void for Vagueness: In 1975 this statute was expanded to include a violation of the open meeting law (2-3-203). In 1977 a broad definition of "meeting" was enacted (2-3-202). Because there was no express legislative intent to amend the criminal statute to encompass the expanded definition of "meeting" and because people of common intelligence could differ over this matter, it is not clear what constitutes prohibited conduct. Subsection (1)(e) of this section is void for vagueness. St. v. Conrad, 197 M 406, 643 P2d 239, 39 St. Rep. 680 (1982).

Subsequent Changes in Open Meeting Law: In 1975 this statute was expanded to include a violation of the open meeting law (2-3-203). In 1977 a broad definition of "meeting" was enacted (2-3-202). In 1979 1-2-108 was amended, creating the presumption that a reference to a section encompasses subsequent changes. However, because 1-2-109 states that no law is retroactive unless expressly declared to be, 1-2-108 did not act to incorporate the 1977 definition of "meeting" into the 1975 criminal statute (retroactivity provided by 1983 amendment to 1-2-108). St. v. Conrad, 197 M 406, 643 P2d 239, 39 St. Rep. 680 (1982).

Act in Excess of Authority: An individual County Commissioner may be criminally liable under this section for entering into a contract for the purchase of road equipment in excess of $10,000 cost without publishing notice calling for bids, as required by 16-1803, R.C.M. 1947 (now 7-5-2301). St. v. Cole, 174 M 380, 571 P2d 87 (1977). Any contract made by an individual board member without board approval is "an act in excess of his lawful authority", and a crime under this section. St. v. Cole, 174 M 380, 571 P2d 87 (1977).

Offense Sufficiently Charged: An indictment which charged that a police officer solicited a fee to have a charge of petty theft and possession of fictitious license plates dismissed when charge came up for hearing and which charged that he knew he was not authorized to solicit the fee was sufficient to charge the offense of "official misconduct". People v. Smith, 57 Ill. App.2d 74, 206 N.E.2d 463, certiorari denied 383 US 910 (1965).

Offense Insufficiently Charged: An indictment which did not set forth some act constituting malfeasance of office was not sufficient in view of the fact that the statute does not specifically set out what conduct constitutes malfeasance in office. Use of word "corruptly" in indictment purporting to charge malfeasance in office was merely conclusion of law on part of pleader and added nothing to accusation. People v. Crosson, 30 Ill. App.2d 57, 173 N.E.2d 552 (1961).

JURISDICTION

Prosecution of Sheriff: In prosecution of Sheriff under 94-5516 (now part of 45-7-401) for nonfeasance in not arresting and instituting proceedings against one who offered a bribe, where the evidence showed that the Sheriff actively solicited and received bribes but the accusation had not been brought by the grand jury as required by 94-5502 (now part of 45-7-401), which required accusation by grand jury and trial by jury, rather than under former section, the court lost jurisdiction and should have dismissed the charge. State on Accusation of McNaught v. Beazley, 77 M 430, 250 P 1114 (1926).

PROCEDURE

Intent of Restitution Not Negation of Conduct Amounting to Embezzlement: Under former law fact that public officer made reimbursement to activity fund did not negate offense of embezzlement which proscribes punishable conduct without reference to an intent to make restitution. St. v. Lewis, 169 M 290, 546 P2d 518, 33 St. Rep. 266 (1976).

Time for Trial: Accused officer was entitled to dismissal of accusation under 94-5516 (now part of 45-7-401) when it had not been brought to trial within the 40 days allowed by that section, even where accused had demanded jury trial under the 1917 amendment. State ex rel. Galbreath v. District Court, 108 M 425, 91 P2d 424 (1939).

Pleadings:

Accusation against County Commissioner for collecting illegal fees that quoted a number of items of per diem, mileage, and expenses without specifying which portions of which items were excessive or unlawful did not sufficiently apprise defendant of the charge against him. State ex rel. King v. Smith, 98 M 171, 38 P2d 274 (1934).

Accusation listing fees received by a County Commissioner which were unlawful on their face was sufficient. State ex rel. Payne v. District Court, 53 M 350, 165 P 294 (1917), distinguished in State ex rel. Arnot v. District Court, 155 M 344, 472 P2d 302 (1970).

Appeal From District Court: An order sustaining demurrer to two counts of an accusation under section 94-5516, R.C.M. 1947 (now part of 45-7-401), was not appealable without a judgment entered thereon, and where trial judge sustained demurrer, then disqualified himself and called in another judge, the successor judge should have entered judgment on the two counts in order to make a final determination which would be appealable. State ex rel. King v. District Court, 95 M 400, 26 P2d 966 (1933).

Evidence of Value Received: Under clause in 94-5516 (now part of 45-7-401) permitting officer charged with collecting illegal fees to show the value received by the public body from his services, it was error to exclude evidence of the amounts county would have had to pay by contract to have done the road work for which the officer, a County Commissioner, was accused of having received unauthorized fees. St. v. Russell, 84 M 61, 274 P 148 (1929).

Survival of Action: Action did not abate on death of officer pending appeal from judgment ousting him from office under 94-5516 (now part of 45-7-401), since the question of his entitlement to the per diem and fees in question, as well as other emoluments accrued since the judgment of ouster, still remained. St. v. Russell, 84 M 61, 274 P 148 (1929).

Trial by Judge:

Since 94-5516 (now part of 45-7-401) provided for no penalty other than removal from office, there was no right to trial by jury except as provided in that section, even though the proceeding was criminal in nature, and a prosecution for neglect of mandatory duty was properly triable by the judge alone. State ex rel. Bullock v. District Court, 62 M 600, 205 P 955 (1922).

Section 94-5516 (now part of 45-7-401), providing for removal from office in certain instances, was quasi-criminal in nature, so that the officer was entitled to have his case adjudicated by the trial judge, and Supreme Court would not issue mandamus requiring his removal on the trial judge's findings. State ex rel. Rowe v. District Court, 44 M 318, 119 P 1103 (1911).

Disqualification of Judge: Proceeding under 94-5516 (now part of 45-7-401) for removal of an officer from office was criminal rather than civil in nature, so section 93-901 (superseded by Supreme Court Rule, 34 St. Rep. 26), relating to disqualification of the judge by affidavit, did not apply. State ex rel. Houston v. District Court, 61 M 558, 202 P 756 (1921).

Prosecution by Attorney General: When the Attorney General petitions for the removal of a county officer, he is acting in behalf of the public, and even though the prosecution is unsuccessful, the county rather than the Attorney General personally is liable for witness fees. Griggs v. Glass, 58 M 476, 193 P 564 (1920).

County Attorney Accused: When an accusation is filed against a County Attorney, the District Court may appoint another attorney, including a County Attorney from a nonadjoining county, to prosecute the accusation, but the prosecuting attorney is not entitled to compensation from the county for his services. State ex rel. McGrade v. District Court, 52 M 371, 157 P 1157 (1916).

FAILURE TO PERFORM MANDATORY DUTY

Advertising for Bids:

An individual commissioner may be criminally liable for official misconduct for entering into a contract for purchase of equipment in excess of $10,000 without publishing notice calling for bids. St. v. Cole, 174 M 380, 571 P2d 87, 34 St. Rep. 1169 (1977).

There was sufficient substantial evidence to sustain guilty verdicts and judgment against three County Commissioners for official misconduct committed by failing to perform a mandatory duty of advertising a county road contract of over $10,000 for bid and by knowingly performing the forbidden act of dividing a single road contract into parts to circumvent bidding requirements. St. v. DeGeorge, 173 M 35, 566 P2d 59 (1977).

Willfulness: Section 94-5516 (now part of 45-7-401), required that neglect of duty be willful before it would constitute ground for removal from office, and an accusation that failed to allege willfulness should be dismissed. State ex rel. Arnot v. District Court, 155 M 344, 472 P2d 302 (1970).

Police Captains: Police captain could be removed from office for failure for 3 years to file bond required. State ex rel. O'Brien v. Mayor of Butte, 54 M 533, 172 P 134 (1918).

Sheriff: Sheriff could be convicted and removed from office under 94-5516 (now part of 45-7-401) for failure to take any steps to dispel a riot and for failure to attempt to serve bench warrants issued by District Court. St. v. Driscoll, 49 M 558, 144 P 153 (1914).

PERFORMANCE OF FORBIDDEN ACT

Conflicting Evidence Regarding Falsification of Prison Payroll Records — Denial of Directed Verdict Proper: Struble was charged with falsifying payroll records at the state prison where he was employed. After the state presented its case, Struble moved for a directed verdict on grounds that: (1) no evidence was presented to show that he was not entitled to the payroll and benefits that he received; (2) there was no direct evidence linking him to the offense; (3) no witnesses testified that he was not working or engaged in employment at the times reported on his time cards; and (4) the logbooks on which the state relied were inaccurate, untrustworthy, and unreliable. The District Court denied the motion, and the Supreme Court affirmed. A directed verdict is proper only if reasonable persons could not conclude from the evidence taken in a light most favorable to the prosecution that guilt has been proved beyond a reasonable doubt. Here, the jury had considerable evidence that was susceptible to differing interpretations, and it was within the province of the jury to decide which interpretation would prevail, so the standard for granting a directed verdict was not satisfied. St. v. Struble, 2004 MT 107, 321 M 89, 90 P3d 971 (2004).

Motion to Introduce Letter Unrelated to Payment for Work Hours Properly Denied: Struble was charged with falsifying work records at the state prison where he was employed. Struble made a motion in limine to introduce a letter from the County Attorney to the Department of Corrections outlining the County Attorney's concern that there was insufficient evidence to prosecute six other employees on similar charges. The motion was denied, and Struble appealed, but the Supreme Court affirmed. The letter did not directly concern Struble, was unrelated to the charges against him, was irrelevant to the state's case against Struble, and thus was properly not admitted into evidence. St. v. Struble, 2004 MT 107, 321 M 89, 90 P3d 971 (2004).

Advertising for Bids: There was sufficient substantial evidence to sustain guilty verdicts and judgment against three County Commissioners for official misconduct committed by failing to perform a mandatory duty of advertising a county road contract of over $10,000 for bid and by knowingly performing the forbidden act of dividing a single road contract into parts to circumvent bidding requirements. St. v. DeGeorge, 173 M 35, 566 P2d 59 (1977).

Misfeasance and Malfeasance:

Accusation that Sheriff actively participated in offenses involving bribery charged malfeasance in office, and where not properly brought under 94-5502 (now part of 45-7-401), which required accusation by grand jury and trial by jury, rather than under former section, was subject to dismissal even though joined with other counts properly brought under 94-5516 (now part of 45-7-401). State ex rel. Beazley v. District Court, 75 M 116, 241 P 1075 (1925).

Accusations charging school board members with selecting a school site and erecting a building without submitting the matter to the electors, with employing an uncertified teacher, and with issuing warrants not authorized by the County Superintendent charged affirmative acts rather than nonfeasance and could be brought only under 94-5516 (now part of 45-7-401). State ex rel. Hessler v. District Court, 64 M 296, 209 P 1052 (1922).

Dealing in Warrants: Police captain could be removed from office for purchase and redemption of a city warrant in violation of section 59-504, R.C.M. 1947 (now 2-2-204), and it was no defense that the purchase was made on behalf of a fellow officer. State ex rel. O'Brien v. Mayor of Butte, 54 M 533, 172 P 134 (1918).

UNLAWFUL FEES

Good Faith:

Evidence that County Surveyor acted with knowledge of members of County Airport Board and on advice of state examining officer in filing claim under another name for services for which he could not have been paid in his own name tended to establish the good faith defense. St. v. Hale, 126 M 326, 249 P2d 495 (1952).

The good faith defense to officers accused of receiving illegal fees established the public policy of the state, and the Governor should have heard evidence on such defense before removing officers removable by him only for cause. State ex rel. Holt v. District Court, 103 M 438, 63 P2d 1026 (1936).

County Commissioner charged with receiving illegal fees for supervising road work was virtually deprived of good faith defense allowed by 94-5516 (now part of 45-7-401) by admission of evidence of Attorney General's opinions holding such fees unlawful and of conversations with the County Attorney, together with instructions that the Attorney General and County Attorney were the Commissioner's legal advisers and that ignorance of the law was no excuse. St. v. Russell, 84 M 61, 274 P 148 (1929).

Section 94-5516 (now part of 45-7-401) did not require a showing that the exaction of unauthorized fees was knowingly made, and it was no defense that the officer charged the fees in good faith and in reliance on the Attorney General's advice. State ex rel. Rowe v. District Court, 44 M 318, 119 P 1103 (1911).

Services Rendered in Office: Section 94-5516 (now part of 45-7-401), insofar as it related to unlawful fees, was restricted to fees "for services rendered. . . in his office", so that accusation that County Commissioner received fees for attending a convention did not come within the section where it was shown that another Commissioner was authorized to attend and thus that defendant's attendance was not "in his office". State ex rel. King v. Smith, 98 M 171, 38 P2d 274 (1934).

Per Diem and Reimbursable Expenses: The term "fees" used in 94-5516 (now part of 45-7-401) was broad enough to include both the per diem and reimbursable expenses of a County Commissioner. St. v. Story, 53 M 573, 165 P 748 (1917); State ex rel. Payne v. District Court, 53 M 350, 165 P 294 (1917).

PENALTY

Forfeiture of Office: Forfeiture of office is automatic upon conviction under 94-7-401, R.C.M. 1947 (now 45-7-401), and is not stayed by the filing of an appeal from the conviction. St. v. DeGeorge, 173 M 35, 566 P2d 59 (1977).

Attorney General's Opinions

Purpose: This section is a remedial provision to be used concerning allegations of official misconduct and does not establish substantive duties or obligations of public servants. 40 A.G. Op. 32 (1984).

Official Misconduct Conviction — Right to Run for Subsequent Term: This section's provision that a public servant (in the instant case, Justice of the Peace) convicted of official misconduct "shall permanently forfeit his office" mandates forfeiture of the rest of his term of office and forbids reinstatement, reappointment, or reelection to that term but does not bar him from running for another term of that office after state supervision for the offense has ended. To conclude that this section prevents him from running for a subsequent term after the end of state supervision would violate Art. II, sec. 28, Mont. Const., providing for full restoration of rights upon termination of state supervision for an offense against the state. 39 A.G. Op. 61 (1982).

Cost of Defending Official Misconduct: A county is not obligated to pay the costs of defending a nonindigent county officer charged with official misconduct. 37 A.G. Op. 57 (1977).

Removal of Public Official Upon Conviction Occurring in Prior Term: A public servant convicted under 45-7-401 of official misconduct which occurred during a prior term of office forfeits his current term of office. 37 A.G. Op. 32 (1977).

Replacement by Acting Officer: The Board of County Commissioners may appoint an acting County Attorney to replace, for the period of the suspension, a County Attorney who has been suspended under this section. 36 A.G. Op. 85 (1976).

Acting County Attorney — Appointment: County Commissioners may employ and appoint an acting County Attorney to fill the office of a County Attorney suspended under this section. 35 A.G. Op. 85 (1976).

Officers Interested in Contracts: A violation of 2-2-201 could result in prosecution of a public officer under this section. 35 A.G. Op. 92 (1974).

Part 5
Employer Misconduct

45-7-501. Employer misconduct.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 6
Confidential Criminal Justice Information

45-7-601. Misuse of confidential criminal justice information.

Compiler's Comments

Effective Date: This section is effective October 1, 2015.

CHAPTER 8
OFFENSES AGAINST PUBLIC ORDER

Chapter Compiler's Comments

Annotator's Note — Source: The compiler's comments entitled "Annotator's Note" are taken from the Montana Criminal Code of 1973 Annotated (1980 rev. ed.) produced by the Montana Criminal Law Information Research Center (MONTCLIRC) and printed under cosponsorship of the State Bar of Montana. Minor revisions have been made to conform to the style and format of the annotations.

Part 1
Conduct Disruptive of Public Order

45-8-101. Disorderly conduct.

Criminal Law Commission Comments

Source: New.

There appeared to have been no distinct crime known as disorderly conduct at common law. Some of the acts now included by statute in this category fell under the general heading of breaches of the peace such as fighting or causing a disturbance which would tend to provoke fighting among those present.

In many jurisdictions statutes have developed which go beyond merely preventing breaches of the peace. Included generally are acts which offend others or annoy them or create resentment without necessarily leading to a breach of peace. The crime of disorderly conduct appears to be directed at curtailing that kind of behavior which disrupts and disturbs the peace and quiet of the community by various kinds of annoyances. These acts standing alone may not be criminal under other categories such as theft, or assault and battery, or libel, etc. The difficulty is in defining the conduct which falls within these objectives, for a given act under some circumstances is not objectionable, while under others it is. Thus sounding a horn at a carnival is not objectionable. But sounding it at midnight in a residential section might be. The intent of the provision is to use somewhat broad, general terms to establish a foundation for the offense and leave the application to the facts of a particular case. Two important qualifications are specified in making the application, however. First, the offender must knowingly make a disturbance of the enumerated kind, and second, the behavior must disturb "others." It is not sufficient that a single person or a very few persons have grounds for complaint.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 767, L. 2023. Amendment effective October 1, 2023.

2019 Amendment: Chapter 372 inserted (1)(b) regarding prohibited conduct recognized by a peace officer to create an articulable public safety risk; inserted (4) regarding penalty for a person convicted of a violation of (1)(b); and made minor changes in style. Amendment effective October 1, 2019.

Applicability: Section 3, Ch. 372, L. 2019, provided: "[This act] applies to crimes committed on or after [the effective date of this act]." Effective October 1, 2019.

2017 Amendment: Chapter 321 in (2)(a) near beginning substituted "subsections (2)(b) and (3)" for "subsection (3)" and at end deleted "or be imprisoned in the county jail for a term not to exceed 10 days, or both"; inserted (2)(b) concerning certain persons convicted of a second or subsequent violation; in (3) substituted "subsections (1)(g) through (1)(i)" for "subsection (1)(i)"; and made minor changes in style. Amendment effective July 1, 2017.

Applicability: Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

2013 Amendment: Chapter 250 deleted former (1)(d) that read: "(d) discharging firearms, except at a shooting range during established hours of operation"; and made minor changes in style. Amendment effective October 1, 2013.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: In (1)(d) inserted exception for a shooting range. Amendment effective April 15, 1991.

Applicability: Section 10, Ch. 415, L. 1991, provided: "[This act] applies to shooting ranges in operation on or after [the effective date of this act] [effective April 15, 1991]."

Severability: Section 11, Ch. 415, L. 1991, was a severability clause.

1989 Amendment: In (1)(h), after "fire", deleted "impending explosion"; inserted (1)(j) expanding disorderly conduct to include transmitting false report of impending explosion that endangers human life; at beginning of (2) inserted exception clause; and inserted (3) providing criminal and civil penalties for transmitting false report of impending explosion.

Annotator's Note: This section gathers in one statute former Montana laws relative to the public peace and provides a more concise statement of those laws. This section is an attempt to cover the entire range of minor breaches of the public peace.

Case Notes

Racial Epithet Spoken in Vehicle — Fighting Words: The driver of a car slowed her vehicle next to a 13-year old boy. The driver raised her middle finger, speaking an expletive toward the teenager. The passenger in the vehicle added, "spic bastard", and the women then drove away. The passenger argued that "spic bastard" did not constitute fighting words, since the listener could not have undertaken an immediate violent response because the speaker was inside the vehicle. The Supreme Court found that the very utterance of a racial slur tends to incite a breach of the peace and that the speech could have incited an immediate violent response. Billings v. Nelson, 2014 MT 98, 374 Mont. 444, 322 P.3d 1039.

Disorderly Conduct Not Lesser Included Offense of Partner or Family Member Assault: The defendant was convicted of partner or family member assault and argued the jury should have been instructed on disorderly conduct as a lesser included offense. However, disorderly conduct includes the element of disturbing the peace and therefore cannot be proven by proof of the same or less than all the elements of partner or family member assault. St. v. Fehringer, 2013 MT 10, 368 Mont. 226, 293 P.3d 853.

Civil, Private, and Attractive Nuisance and Trespass Claims Against Shooting Range — Opportunity to Further Develop Certain Claims Allowed on Remand: After an individual defendant transferred property to defendant ranch company and helped the ranch develop a shooting range on the property, plaintiff neighbors brought multiple claims alleging that operation of the shooting range in close proximity to a subdivision and elementary school constituted a public nuisance, private nuisance, attractive nuisance, trespass, and a violation of various constitutional provisions. The District Court dismissed all claims and plaintiffs appealed. Citing Barnes v. Thompson Falls, 1999 MT 77, 294 Mont. 76, 979 P.2d 1275, the Supreme Court noted that the Legislature explicitly exempted shooting ranges from civil nuisance liability, so plaintiffs' public nuisance claims were properly dismissed. Regarding the private nuisance claims, the District Court should have focused on injury to specific plaintiffs rather than dismissing the claims as related to all plaintiffs. The trespass claims concerned noise from the shooting range invading plaintiffs' property and thus took the form of intangible trespass. The District Court prematurely dismissed the trespass claims by failing to recognize that an intangible invasion supported by actual damages may support a trespass action, and plaintiffs should have been allowed to develop evidence and facts demonstrating actual damages. Plaintiffs should also have been allowed to develop facts of an actual threat of irreparable injury in support of the attractive nuisance claims. Lastly, plaintiffs failed to show how common law or statutory remedies would not adequately address any potential damages or to demonstrate how the constitutional provisions in question directly addressed the conduct of private parties, so the constitutional claims were properly dismissed. The case was remanded to allow plaintiffs the opportunity to develop their trespass and public, private, and attractive nuisance claims. Tally Bissell Neighbors, Inc. v. Eyrie Shotgun Ranch, LLC, 2010 MT 63, 355 Mont. 387, 228 P.3d 1134.

Number of Persons Disturbed Not Dispositive of Whether Peace Disturbed: Ashmore contended that she could not have disturbed the peace because only two officers witnessed her conduct. However, this section requires, at a minimum, that a defendant engage in behavior that disturbs a number of people. The Supreme Court declined to adopt a strict numerical requirement to the number of persons affected in order for the peace to be disturbed. Rather, the question is whether the defendant engaged in disorderly conduct as defined by the statute. In this case, after Ashmore was stopped for a traffic violation she quarreled with the officers, resisted the officers' instructions, threw items at the officers, made loud noises by honking her horn when unnecessary, and directed threatening, profane, or abusive language at the officers. The evidence of disorderly conduct was sufficient to convict Ashmore of disturbing the peace, and denial of her motion to dismiss was affirmed. St. v. Ashmore, 2008 MT 14, 341 M 131, 176 P3d 1022 (2008). See also Billings v. Nelson, 2014 MT 98, 374 Mont. 444, 322 P.3d 1039.

Investigation of Disorderly Conduct — No Expectation of Privacy in Backyard — Fruits of Warrantless Search Properly Admitted: Officers investigated a disorderly conduct complaint at Dunn's residence and found Dunn and six others partying in Dunn's backyard with loud music blaring. Dispatch indicated an outstanding warrant for Dunn, he was searched, officers found drugs and paraphernalia on Dunn's person, and Dunn was arrested. Dunn moved to suppress the evidence on grounds that the search was an unlawful invasion of privacy. The District Court denied the motion, and on appeal, the Supreme Court affirmed. Pursuant to Whitefish v. Large, 2003 MT 322, 318 M 310, 80 P3d 427 (2003), two factors are considered when determining whether a search was unlawful: (1) whether the person had an actual expectation of privacy that society is willing to recognize as objectively reasonable; and (2) the nature of the state's intrusion. Given the unique circumstances of this case, Dunn did not have a reasonable expectation of privacy. The ongoing disorderly conduct invited officers to investigate the complaint. Blasting loud music at 4 a.m. was not conduct that society would be willing to recognize as objectively reasonable. The unobtrusive investigation by officers accessing the backyard by an open and unobstructed path that would be used by any casual visitor was reasonable. Dunn's motion to suppress was properly denied. St. v. Dunn, 2007 MT 296, 340 M 31, 172 P3d 110 (2007).

Unprovoked Obscenity Directed at Police Officer Not Considered Free Speech — Disorderly Conduct Conviction Affirmed: Robinson was charged with disorderly conduct after directing an unprovoked obscenity, referring to a fornicating porcine, at a police officer who was seated in a patrol car at an intersection. Robinson contended that the remark did not rise to the level of fighting words and was thus protected by freedom of speech. The Supreme Court disagreed. Under the fighting words interpretation of this section, the remark, outside the confines of a sty, qualified as sufficiently and inherently inflammatory, irrespective of the intended audience. St. v. Robinson, 2003 MT 364, 319 M 82, 82 P3d 27 (2003), following Chaplinsky v. N.H., 315 US 568 (1942), and Whitefish v. O'Shaughnessy, 216 M 433, 704 P2d 1021 (1985).

Insufficient Particularized Suspicion of Crime to Justify Investigative Stop — To Pee or Not to Pee: On the night of November 16, 1999, officers came up behind a vehicle parallel parked legally beside a frontage road. As they passed the vehicle, they noticed a man standing by the passenger door on the side farthest from the road, apparently urinating. The man had taken steps so as not to expose himself to passers-by. The officers proceeded on, but decided to return and warn the man about the impropriety of his conduct. Upon reaching the vehicle, there was no longer anyone standing by it, but Kleinsasser was in the driver's seat making a call on a cell phone, another person was in the passenger seat, and another was lying down on the back seat. All three denied standing by the vehicle and denied knowing who had been doing so. The officers also smelled alcohol emanating from the vehicle, and asked Kleinsasser to perform field sobriety tests, which he failed. Kleinsasser was arrested for DUI, but refused to take a breath test, so his driver's license was seized and suspended. The District Court denied Kleinsasser's petition challenging the license suspension, and Kleinsasser appealed. The only relevant issue for the District Court to consider was whether the officer had reasonable grounds to believe that Kleinsasser was driving under the influence. The reasonable grounds requirement in 61-8-403 (now repealed and content reorganized in Title 61, chapter 8, part 10) is equivalent to the requirement for particularized suspicion to make an investigative stop in 46-5-401, which requires the state to show objective data from which an experienced officer could make certain inferences, and a resulting suspicion that the occupant of a certain vehicle is or has been engaged in wrongdoing or was a witness to criminal activity. When the totality of the circumstances does not support a particularized suspicion, an investigative stop is not justified. The state argued that the observed activity constituted disorderly conduct. The Supreme Court disagreed. Kleinsasser's act did not create a hazardous condition, and the court found it hard to imagine any act that serves a more legitimate purpose than answering nature's call. Further, the behavior was not considered physically offensive in this case because it occurred at night, in a rural location where there were no overhead lights or other traffic at the time. There was no evidence that the act disturbed anyone other than the officers, and neither officer was so disturbed that he considered giving the individual a citation; therefore, an allegation of disorderly conduct was unfounded. Absent a particularized suspicion to justify an investigative stop, the subsequent seizure of Kleinsasser's driver's license was invalid. The Supreme Court reversed the District Court's error in denying Kleinsasser's petition for reinstatement of his license. Kleinsasser v. St., 2002 MT 36, 308 M 325, 42 P3d 801 (2002).

Honking Car Horn to Protest Location of RV Park Not Speech Protected by First Amendment: Compas testified that she honked her car horn each time that she passed a certain RV park as a protest against the location of what she felt was an eyesore. Compas argued that her horn-honking activities were "expressive conduct" long recognized as protected speech under the first amendment of the United States Constitution. The Supreme Court ruled that Compas was not exercising her right to protest any allegedly unlawful act of her government but instead her actions were intended to and did disturb the owners and guests of the RV park and that the constitution does not protect activity intended to annoy or harass another. St. v. Compas, 1998 MT 140, 290 M 11, 964 P2d 703, 55 St. Rep. 560 (1998).

Honking Car Horn to Protest RV Park Held Disturbance of the Peace: Compas testified that she honked her car horn each time that she passed a certain RV park as a protest against what she felt was an eyesore. The Supreme Court held that a rational trier of fact could have found that she knowingly disturbed the peace by making loud or unusual noises. St. v. Compas, 1998 MT 140, 290 M 11, 964 P2d 703, 55 St. Rep. 560 (1998).

Knowingly Remaining on Premises: The defendants argued that they did not intend to break the law and therefore did not possess a criminal intent. The Supreme Court held that their defense bordered on the frivolous and that the defendants' concepts of criminal mental states had been replaced by the requirement of showing that the defendants had knowingly remained on the premises. Helena v. Lewis, 260 M 421, 860 P2d 698, 50 St. Rep. 1103 (1993).

Circumstantial Evidence of Disorderly Conduct: Defendant was "almost fanatic" about his property line and posted four profane signs on the line, warning his neighbor about trespassing. The neighbor called a deputy to investigate the signs. As they were returning to the deputy's car, they heard screaming and gunshots coming from defendant's property, which the neighbor felt were directed at her and the deputy. Defendant claimed he was shooting at a target and yelling at his horse. Under the circumstances, a jury could have found that the screaming and shooting were directed at the neighbor and the deputy because defendant considered them to be trespassers. A conviction for disorderly conduct based on these circumstances was affirmed. St. v. Felando, 248 M 144, 810 P2d 289, 48 St. Rep. 359 (1991).

Disturbing Peace in Noisy Environment: Defendant maintained that because the environment surrounding the incident was noisy from vehicles and bar activities, there was no "peace" to be disturbed and he therefore could not be convicted of disturbing the peace. Although the conduct did not disturb a quiet residential neighborhood, it nevertheless upset the status quo by causing a crowd to form and causing people to stop other business and observe the confrontation. The conviction was affirmed. Columbia Falls v. Bennett, 247 M 298, 806 P2d 25, 48 St. Rep. 205 (1991).

No Requirement for "Fighting Words" to Establish Disorderly Conduct: Defendant contended he was improperly convicted of disorderly conduct because his words were neither threatening nor obscene and therefore could not be labeled "fighting words". However, under this section, there is no requirement that the words be "fighting words". Defendant's knowing use of profane and abusive language, within the common understanding of those terms, to both an officer and a wrecker driver was sufficient to constitute disorderly conduct. Columbia Falls v. Bennett, 247 M 298, 806 P2d 25, 48 St. Rep. 205 (1991), distinguishing Whitefish v. O'Shaughnessy, 216 M 433, 704 P2d 1021 (1985).

Apprehension of Injury — No Observation of Weapon by Victim: Defendant and welfare eligibility technician had confrontations over defendant's welfare claims on several occasions. After one such meeting, defendant left the office and was seen getting a rifle from his truck and yelling and shaking the gun in the direction of the welfare office. The secretary who observed this act immediately related the presence of the weapon to the technician, who unequivocally testified to his apprehension of serious bodily injury. It was not necessary for the technician to personally observe the gun in order to experience reasonable apprehension of injury. Defendant's conviction of felony assault (now assault with a weapon) of the technician and of disorderly conduct against the secretary was affirmed. St. v. Misner, 234 M 215, 763 P2d 23, 45 St. Rep. 1853 (1988).

Resisting Removal From Public Meeting — Disturbance of Eight People Constituting Disorderly Conduct: Defendant argued that his forcible removal from a town council meeting constituted a physical censorship. However, the decision of a presiding officer to have a citizen physically removed from a public meeting for disrupting the meeting cannot lawfully be challenged by forcible resistance. Defendant's actions in physically resisting removal did not fit within the concept of constitutionally protected speech. Further, the disturbance of eight people was sufficient to justify prosecution for disorderly conduct. St. v. Lowery, 233 M 96, 759 P2d 158, 45 St. Rep. 1322 (1988).

Disturbing Lawful Assembly — Elements — Free Speech Considerations: The offense of disorderly conduct, in this case pertaining to a public meeting as provided by subsection (1)(g) of this section, has two elements—that the defendant knowingly disturbed the peace and that he did it through disrupting a lawful assembly or public meeting. In analyzing this offense, the Supreme Court held that, in relation to similar offenses in other states, this section is a hybrid and that disturbing the peace is synonymous with breaching the peace. In the second element, the section must be given a narrow interpretation because it makes disorderly conduct a criminal offense affecting the right of free speech. In this instance, where the defendant's conduct at a meeting with county officials was "discourteous, bordering on the irrational, and [he] was hollering and screaming at the commissioners" and he "mumbled a bad word" and slammed a door so the glass rattled, the Supreme Court held that such actions did not present the clear and present danger of the substantive evils that the state may constitutionally seek to prevent. Thus, the conduct was not sufficient to constitute the offense. St. v. Ytterdahl, 222 M 258, 721 P2d 757, 43 St. Rep. 1245 (1986), distinguished in St. v. Lowery, 233 M 96, 759 P2d 158, 45 St. Rep. 1322 (1988), and St. v. Compas, 1998 MT 140, 290 M 11, 964 P2d 703, 55 St. Rep. 560 (1998).

Behavior Supports Charge of Disorderly Conduct: During the incident that led to his conviction of disorderly conduct, defendant chased two people from his property, then continued to verbally assault and threaten them, using loud and profane language. The commotion initiated by defendant also drew the attention of several nearby people. These facts were sufficient to establish the elements of disorderly conduct as enumerated in 45-8-101. Billings v. Batten, 218 M 64, 705 P2d 1120, 42 St. Rep. 1398 (1985).

"Fighting Words" Unprotected by Right of Free Speech: Upon his appeal from conviction of disorderly conduct, defendant's speech and conduct were held to constitute "fighting words" and therefore were unprotected by his constitutional right of free speech. Billings v. Batten, 218 M 64, 705 P2d 1120, 42 St. Rep. 1398 (1985).

Statute Not Unconstitutional for Vagueness or Overbreadth: Upon defendant's appeal from his conviction of disorderly conduct, the Supreme Court construed 45-8-101 in light of the principles set down in Whitefish v. O'Shaughnessy, 216 M 433, 704 P2d 1021, 42 St. Rep. 928 (1985), concerning statutes or ordinances which seek to preserve the peace through regulation of loud, profane, and threatening speech. The court construed the section as only applying to words that have a direct tendency to violence and that are knowingly uttered. So interpreted, the statute is not unconstitutional on its face for vagueness or overbreadth. Billings v. Batten, 218 M 64, 705 P2d 1120, 42 St. Rep. 1398 (1985).

Narrow Construction of Disturbing the Peace Ordinance — No Vagueness or Overbreadth: Appellant was convicted of breach of the peace under Whitefish Municipal Ordinance, 9.64.010, which read: "No person within the municipality, or within three miles of the municipal limits, shall willfully and maliciously disturb the peace and quiet of any street, neighborhood, family, or person by loud, tumultuous noise, or by tumultuous or offensive conduct, or by using offensive, loud radio or television sets, or by threatening, quarreling, scolding, hallooing, hollering, challenging to fight, or fighting, or by cursing, swearing, uttering obscene, profane, vulgar, or indecent language in the presence of any person or persons, or by committing any obscene, vulgar, indecent, or lewd act in any public place, or in view of any person or persons". Appellant had been talking louder than normal on a city street at about 2 a.m., and when a police officer told appellant to "hold it down", appellant said "Well, [m.f.], I will holler and yell when and wherever I want if I want to". The Supreme Court construed the ordinance narrowly as applying only to words spoken willfully and maliciously, and that constitute "fighting words" with a direct tendency to violence, and stated that as so construed the ordinance is not unconstitutional for vagueness or overbreadth. Whitefish v. O'Shaughnessy, 216 M 433, 704 P2d 1021, 42 St. Rep. 928 (1985).

Obscene "Fighting Words" Spoken to Police Officer — Disturbing the Peace Conviction Upheld: While on a city street at about 2 a.m. after closing his restaurant and bar, appellant and his friends were engaged in a louder-than-normal conversation. A police officer approached and told appellant to "hold it down". Appellant said, "Well, [m.f.], I will holler and yell when and wherever I want if I want to". The language constituted "fighting words", and by definition a threat of violence or violent response occurred. Appellant was properly convicted of disturbing the peace. Whitefish v. O'Shaughnessy, 216 M 433, 704 P2d 1021, 42 St. Rep. 928 (1985).

Conviction of Lesser Included Offense as Bar to Subsequent Prosecution: A subsequent prosecution is barred by a prior conviction if the subsequent prosecution: (1) is based upon the same acts as was the prior conviction; (2) is for the offense of which the offense in the prior conviction is a lesser included offense; and (3) is in the court which is part of the same sovereign as the court involved in the prior conviction. Because the offense of disturbing the peace essentially requires no proof beyond that required for conviction of first-degree assault, it is a lesser included offense of the greater offense of assault. Yother v. St., 182 M 351, 597 P2d 79 (1979).

Disturbing the Peace: Evidence that defendant was slapping his pistol against his leg in an agitated manner, that he unholstered the weapon and pointed it at another and threatened to shoot him, and that he spat at that person's departing automobile was sufficient to support conviction of disturbing the peace. St. v. Turley, 164 M 231, 521 P2d 690 (1974).

Law Review Articles

State v. Robinson: Free Speech, or Itchin' for a Fight?, Korver, 65 Mont. L. Rev. 385 (2004).

45-8-102. Failure of disorderly persons to disperse.

Criminal Law Commission Comments

Source: M.P.C. 1962, § 250.1(2).

State statutes commonly penalize refusal to disperse when ordered to do so by those in authority and present at the scene of an unlawful assembly. The elements of the offense are that at least two persons be involved and that the group members must purposely refuse or fail to disperse when they are ordered to do so by an official of the law or one given authority by law.

Compiler's Comments

2017 Amendment: Chapter 321 in (1) near beginning substituted "one or more persons" for "two or more persons"; in (2) near end substituted "1 day" for "10 days"; and made minor changes in style. Amendment effective July 1, 2017.

Applicability: Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

Annotator's Note: This section on Failure to Disperse is basically a restatement of the former Montana law on the subject. However, it requires "disorderly conduct" while previous law prohibited remaining at the place of a "riot, rout, or unlawful assembly" after being warned to leave. Also, the new section enumerates the persons having power to order dispersement. The new law, therefore, is broader as to the circumstances under which an order to disperse may be given, and narrower as to the persons who may give such an order so as to bring the assembled persons within the statute.

45-8-103. Riot.

Criminal Law Commission Comments

Source: New.

The common-law misdemeanor, "unlawful assembly," was a gathering of three or more persons with the common purpose of committing an unlawful act. When an act was done toward carrying out this purpose, the offense was "rout." The actual beginning of the perpetration of the unlawful act became "riot." All states penalize some form of unlawful assembly or riot. The section follows the common law with the exception of the number of people involved and the inclusion of the language "purposely and knowingly," which is the standard mens rea requirement in the code.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1983 Amendment: In (2), inserted proviso for (3); inserted (3) establishing 1- to 5-year prison term for person who commits the offense of riot by engaging in act of violence while in any state adult correctional facility or city or county jail.

Annotator's Note: At common law there were three substantive offenses involving group disorders: unlawful assembly, rout, and riot. "Unlawful assembly" was the gathering of three or more persons with a common plan which, if carried out, would result in riot. "Rout" was the movement of these people toward the commission of acts which would constitute riot when committed. Former law incorporated this common-law scheme, but the former sections on rout and unlawful assembly have been repealed, and riot has been changed.

This section on Riot covers all group acts of violence and threats of violence. To be in violation of this section the assemblage must have proceeded to or beyond the point of threatening damage to property or injury to persons. The acts of the group must constitute at least a "clear and present danger" of causing such result. Under former Montana law, Riot covered only threats "accompanied by immediate power of execution", R.C.M. 1947, § 94-35-181. The new definition does away with the almost impossible task of defining or determining what is "immediate power of execution". It also does away with the problem of determining what is an "attempt" at riot or an "advance toward the commission of an act which would be riot". The latter constituted the old offense of Rout, R.C.M. 1947, § 94-35-183. These problems culminate in what under old law would be a conceivable situation, of a group of persons advancing toward a threat to use violence, thereby committing the offense of Rout.

There are other important differences between this section and prior law and the common law. The required number of persons is five rather than two, as under R.C.M. 1947, § 94-35-181, or three as under common law; the concept of malice has been replaced with the mental states "knowingly" and "purposely", defined in 45-2-101; and the penalty for the offense has been lowered from felony punishment to a misdemeanor.

This chapter, like all of the new code, attempts to define crimes in terms of objective and observable acts. The new code, like the old one, presents a hierarchy of offenses, but the progression proceeds on a different basis. The individual members of an assemblage may be guilty of disorderly conduct if they are loud, quarrelsome, or abusive, or if they make streets, sidewalks, or building entrances impassable, 45-8-101. This is the manner in which the new code deals with most conduct which is thought of as "riotous", and there are only a few individuals who can be dealt with individually. If the assembly is so large that individual identification is impossible or very difficult, the members can be ordered to disperse and be arrested for that offense, 45-8-102, if they do not. If the assemblage goes beyond disorderly conduct and threatens or commits violence, then the offense of riot is committed. This is a more serious offense, as is reflected in the penalties. Further, the leaders or inciters can be charged under 45-8-104, Incitement to Riot.

Case Notes

Defendant's Defiance of Officers — Tends to Show Willingness to Participate in Riot: During a prison riot, Langford refused to follow the orders of officers retaking a cell block until a warning shot was fired. During his trial for burglary and deliberate homicide related to the prison riot, Langford argued that the shooting incident was inadmissible because it was not relevant. The Supreme Court held that the incident was relevant because Langford's defiance of the officers' orders tended to show his willingness to disturb the peace and participate in the riot. St. v. Langford, 267 M 95, 882 P2d 490, 51 St. Rep. 962 (1994).

Murder During Burglary With Intent to Riot — Felony-Murder Rule Applicable: An inmate who knowingly entered a cell block at the state prison with the intent to participate in a riot committed the offense of burglary with intent to riot. Within the course of the riot, five protective custody inmates were murdered. Therefore, a causal connection existed between the commission of the underlying burglary offense and the murders, and it was proper for the trial court to deny dismissal of felony-murder charges against the inmate. St. v. Cox, 266 M 110, 879 P2d 662, 51 St. Rep. 680 (1994).

45-8-104. Incitement to riot.

Criminal Law Commission Comments

Source: New.

This section introduces a new concept to the Montana Criminal Code. The intent of the section is to specifically define an offense which might otherwise be covered in another part of the code.

It is conceivable that an act constituting incitement to riot would be covered under the inchoate offense of solicitation. However, with the increase in the general social upheaval in many jurisdictions, a single statute specifically prohibiting incitement to riot might provide more effective law enforcement. Preventing a riot before substantial injury to property and persons has occurred is the only practical method of dealing with such social unrest, for after the substantive offenses are committed, and a riot is in progress, normal law enforcement procedures are generally unworkable and the tactics used by enforcement officials to restore order often extend beyond that which may be considered a reasonable use of force under the circumstances.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1983 Amendment: In (2), inserted proviso for (3); inserted (3) establishing a 1- to 5-year prison term for person who commits the offense of incitement to riot while in any state adult correctional facility.

Annotator's Note: Inciting to riot is the employment of words, signs, or actions and movements with the purpose of provoking a riot. The concept is new to Montana criminal law. The rationale behind the section is that preventing a riot before substantial injury to property or persons has occurred is the best method of dealing with such social unrest. While the substantive offense of riot is in progress, normal law enforcement procedures are generally unworkable, and law enforcement officials may overreact, increasing the level of violence. The section contemplates precluding riots by discouraging their immediate and proximate cause. It thereby provides the possibility of more effective law enforcement.

This section defines an offense which would likely be covered under the inchoate offense of solicitation, 45-4-101. The purpose of a single statute specifically prohibiting incitement to riot is to focus upon a method of preventing an offense which has been committed increasingly within the context of general social upheaval in many jurisdictions.

45-8-105. Criminal incitement.

Criminal Law Commission Comments

Source: Substantially the same as Minnesota Statutes Annotated, § 609.405.

The intent of the provision is to provide a more concise statute to deal with those social elements which advocate violence, subversion and destruction by (1) eliminating the cumbersome and convoluted language found in the old sedition statute (R.C.M. 1947, section 94-4401) and (2) modernizing the statute for application to present social needs.

There can be little doubt that the former sedition statute is obsolete. The statute was derived from the Espionage Act of 1917, as amended. (40 Stat. 553) The amended language provided a more detailed delineation of acts causing the offense and broadened immensely the scope of activity that could be included therein. The amendment was passed exclusively as a wartime measure. In upholding the constitutionality of the section, Justice Holmes said in Schenck v. United States, 249 US 47, 52, 63 L Ed 470, 39 S Ct 247 (1919) "When a nation is at war, many things that might be said in time of peace are such a hinderance to its effect that those utterances will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right". The Congress of the United States, in keeping with the intent of the section as a wartime measure, repealed it in 1921 (41 Stat. 1395, 1360) and replaced it with the original act. This, in turn, was repealed in 1948 (62 Stat. 862). The former Montana statute was directly derived from the 1918 amendment to the Espionage Act of 1917. In spite of the federal government's use of the language as a wartime provision, the statute remained intact in Montana for nearly half a century. There is an additional reason for repealing the former sedition statute. In Commonwealth of Pennsylvania v. Nelson, 350 US 497, 100 L Ed 640, 76 S Ct 477 (1955) Chief Justice Warren, writing for the majority stated, "The Congress determined in 1940 that it was necessary for it to re-enter the field of antisubversive legislation which it had abandoned in 1921. In that year it enacted the Smith Act which proscribed advocacy of the overthrow of any government—federal, state or local—by force and violence and organization of and knowing membership in a group which so advocates." Referring further to the Internal Security Act of 1950 (50 U.S.C. 781 et seq.), Warren went on to say, "We examine these Acts only to determine the congressional plan. Looking to all of them in the aggregate, the conclusion is inescapable that Congress has intended to occupy the field of Sedition. Taken as a whole, they evince a congressional plan which makes it reasonable to determine that no room has been left for the states to supplement it. Therefore, a state sedition statute is superseded regardless of whether it purports to supplement the federal law." The opinion also stated that "enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program."

Compiler's Comments

1999 Amendment: Chapter 350 substituted definition of criminal incitement for definition of criminal syndicalism that read: ""Criminal syndicalism" means the advocacy of crime, malicious damage or injury to property, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political ends"; in (2) substituted "incitement" for "syndicalism"; substituted (2)(a) and (2)(b) concerning advocacy for former (2)(a), (2)(b), and (2)(c) that read: "(a) orally or by means of writing, advocates or promotes the doctrine of criminal syndicalism;

(b) organizes or becomes a member of any assembly, group, or organization which he knows is advocating or promoting the doctrine of criminal syndicalism; or

(c) for or on behalf of another whose purpose is to advocate or promote the doctrine of criminal syndicalism, distributes, sells, publishes, or publicly displays any writing advocating or advertising such doctrine"; inserted (3) containing definition of imminent; in (4) substituted "incitement" for "syndicalism"; deleted former (4) that read: "(4) Whoever, being the owner or in possession or control of any premises, knowingly permits any assemblage of persons to use such premises for the purpose of advocating or promoting the doctrine of criminal syndicalism shall be fined not to exceed $500 or imprisoned in the county jail for a term not to exceed 6 months, or both"; and made minor changes in style. Amendment effective April 19, 1999.

Applicability: Section 3, Ch. 350, L. 1999, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective April 19, 1999.

Annotator's Note: This section on Criminal Syndicalism encompasses 26 former statutes on the subject in the old Criminal Code. The statute was intended to provide a concise approach to dealing with activities which have a tendency to promote violence and disrupt traditional governmental and political processes. To sustain a conviction under this section, the state must show that the defendant committed one of the three acts listed in subsection (2) and that he did so purposely or knowingly. Subsection (4) provides misdemeanor punishment for the owner of premises who allows criminal syndicalism to occur on his property. The wording for this section is substantially the same as the Minnesota source.

The 1977 amendment made only minor changes in wording, changing "who purposely thereby" in subsection (2)(c) to "whose purpose is" and "premise" in subsection (4) to "premises".

45-8-106. Bringing armed individuals into state.

Criminal Law Commission Comments

Source: Derived from Revised Codes of Montana 1947, §§ 94-3524 and 94-3920.

This is intended to deal with those individuals who would bring criminal and politically adverse elements into Montana to carry on criminal or socially disruptive activities, or to take over duties of law enforcement authorities.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section on Bringing Armed Men Into the State substantively varies from both R.C.M. 1947, § 94-3524 and 94-3920 in that it covers all situations where the purpose of such importation is criminal or socially disruptive. The previous sections covered only importation for the purpose of discharging duties of peace officers in preserving the peace or suppressing violence. Also, this new section omits the exception in R.C.M. 1947, § 94-3524 for situations where the Governor or Legislature solicits and permits such importation.

Severability: Section 12, Ch. 583, L. 1981, was a severability section.

45-8-107. Purpose.

Compiler's Comments

Severability: Section 4, Ch. 492, L. 1991, was a severability clause.

45-8-108. Definitions.

Compiler's Comments

2005 Amendment: Chapter 36 in definition of law enforcement agency near beginning substituted "sheriff's office" for "sheriff's department". Amendment effective October 1, 2005.

Severability: Section 4, Ch. 492, L. 1991, was a severability clause.

45-8-109. Civil disorder — prohibited activities — penalties — exceptions.

Compiler's Comments

1995 Amendment: Chapter 546 in (3)(d) substituted "department of corrections" for "department of corrections and human services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Name Change: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Severability: Section 4, Ch. 492, L. 1991, was a severability clause.

45-8-110. Obstructing health care facility access.

Compiler's Comments

Preamble: The preamble attached to Ch. 331, L. 2005, provided: "WHEREAS, the Montana Legislature recognizes that access to health care facilities to obtain medical counseling and treatment is imperative for the citizens of this state; and

WHEREAS, the exercise of a person's right to protest or counsel against a medical procedure must be balanced against the right of other persons to obtain medical counseling and treatment in an unobstructed manner; and

WHEREAS, preventing the knowing obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern; and

WHEREAS, the Montana Legislature declares that it is appropriate and necessary to enact legislation prohibiting a person from knowingly obstructing another person's entry into or exit from a health care facility."

Effective Date: This section is effective October 1, 2005.

45-8-111. Public nuisance.

Criminal Law Commission Comments

Source: Cal. Pen. Code 1970, §§ 370 through 372. [Compiler's note: Subsection (4), inserted by 1981 amendment, relating to farming, is based on section 72-108 of the Georgia Code Annotated.]

The phrase "any considerable number of persons" as used in the provision will undoubtedly be subject to court interpretation. The phrase has not been interpreted by any Montana case to date. The New York Court of Appeals held that "The expression 'any considerable number of persons' is used solely for the purpose of differentiating a public nuisance, which is subject to indictment, from a private nuisance. But a considerable number of persons does not necessarily mean a very great or any particular number of persons." People v. Kings County Iron Foundry, 209 NY 530, 102 NE 598, 599 (1913).

The offense of "nuisance," in some ways, resembles disorderly conduct in its requirement that the proscribed conduct annoy, alarm or inconvenience the public or "a considerable number of persons"; however disorderly conduct relates to existing acts or acts of brief duration while nuisance usually involves the creation or maintenance of a continuing condition. In practical application, most criminal nuisance cases fall into two categories: (1) the maintenance of manufacturing plants, entertainment resorts and the like, which by virtue of excessive noise, noxious gases, etc., annoy or offend groups or areas of the community; and (2) the conduct of resorts where people gather for illegal or immoral purposes. Subdivision (1)(a) deals with the first category. One difficulty of this offense is the fine balancing of the relative rights of plant operators or business people on the one hand and the residents of the vicinity on the other. The problem is accentuated by the fact that "public nuisance," as defined and construed, requires little if any criminal intent, being virtually a crime of absolute liability.

[Subsection (4) is based upon Georgia Code Annotated sec. 72-108.]

Compiler's Comments

2017 Amendment: Chapter 321 in (6) after "$500" deleted "or be imprisoned in the county jail for a term not to exceed 6 months, or both"; and made minor changes in style. Amendment effective July 1, 2017.

Applicability: Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: Inserted (5) exempting noise at a shooting range. Amendment effective April 15, 1991.

Applicability: Section 10, Ch. 415, L. 1991, provided: "[This act] applies to shooting ranges in operation on or after [the effective date of this act] [effective April 15, 1991]."

Severability: Section 11, Ch. 415, L. 1991, was a severability clause.

1981 Amendment: Inserted (4) excluding from the definition of public nuisance an agricultural or farming operation or facility that has been in operation longer than the complaining resident, or that has become a public nuisance as a result of changed residential or commercial conditions in the locality.

Annotator's Note: This section and 45-8-112 were originally enacted as one statute. Section 94-8-107(5), R.C.M. 1947, became 45-8-112 under the recodification of the Montana Code Annotated of 1978. The abatement of nuisances and punishment for creating such conditions have presented continuing difficulty for law enforcement authorities. Certain activities, such as operating gambling establishments and houses of prostitution, have long been treated as criminal nuisances against which public officials could bring legal actions. The criminal status of other activities and conditions has been less clear, although civil actions have been allowed. R.C.M. 1947, § 94-35-120, which did provide misdemeanor penalties for maintaining a nuisance was unsatisfactorily vague in defining what type of nuisance could be so punished. This new provision on public nuisance, which is quite similar to the California provision upon which it is based, should alleviate many of the prior difficulties. The definition of "public nuisance", as provided in subsection (1) is sufficiently broad to encompass all activities specifically outlawed under prior statutes as well as conditions, such as noisy installations, polluting septic tanks, etc., which while offensive may be less certain in offensiveness than the activities traditionally banned. The remaining subsections provide that both civil and criminal penalties may be utilized and that anyone, public officer or private individual may bring the action. This provision permits the county attorney to bring an action in the name of the state where the general public interest is involved without depriving the individual of a remedy if the county attorney feels the situation is too limited or personal to require state intervention. It should be noted that this section does not repeal any of the portions of R.C.M. 1947, Title 57 [now Title 27, chapter 30], which specifically provide civil remedies for nuisances.

The 1977 amendment made minor stylistic changes.

Case Notes

Civil, Private, and Attractive Nuisance and Trespass Claims Against Shooting Range — Opportunity to Further Develop Certain Claims Allowed on Remand: After an individual defendant transferred property to defendant ranch company and helped the ranch develop a shooting range on the property, plaintiff neighbors brought multiple claims alleging that operation of the shooting range in close proximity to a subdivision and elementary school constituted a public nuisance, private nuisance, attractive nuisance, trespass, and a violation of various constitutional provisions. The District Court dismissed all claims and plaintiffs appealed. Citing Barnes v. Thompson Falls, 1999 MT 77, 294 Mont. 76, 979 P.2d 1275, the Supreme Court noted that the Legislature explicitly exempted shooting ranges from civil nuisance liability, so plaintiffs' public nuisance claims were properly dismissed. Regarding the private nuisance claims, the District Court should have focused on injury to specific plaintiffs rather than dismissing the claims as related to all plaintiffs. The trespass claims concerned noise from the shooting range invading plaintiffs' property and thus took the form of intangible trespass. The District Court prematurely dismissed the trespass claims by failing to recognize that an intangible invasion supported by actual damages may support a trespass action, and plaintiffs should have been allowed to develop evidence and facts demonstrating actual damages. Plaintiffs should also have been allowed to develop facts of an actual threat of irreparable injury in support of the attractive nuisance claims. Lastly, plaintiffs failed to show how common law or statutory remedies would not adequately address any potential damages or to demonstrate how the constitutional provisions in question directly addressed the conduct of private parties, so the constitutional claims were properly dismissed. The case was remanded to allow plaintiffs the opportunity to develop their trespass and public, private, and attractive nuisance claims. Tally Bissell Neighbors, Inc. v. Eyrie Shotgun Ranch, LLC, 2010 MT 63, 355 Mont. 387, 228 P.3d 1134.

City Court Jurisdiction Over Public Nuisance Charges: Section 46-2-203 provides a City Court with jurisdiction over criminal misdemeanor charges as authorized by 3-11-102. A violation of this section, maintaining a public nuisance, is clearly a misdemeanor; therefore, a City Court has jurisdiction over a criminal prosecution for public nuisance. Billings v. Panasuk, 253 M 403, 833 P2d 1050, 49 St. Rep. 499 (1992).

Remedy for Criminal Prosecution of Public Nuisance: Panasuk, convicted in City Court of misdemeanor criminal public nuisance charges under this section, contended that because 3-10-301, 25-31-102, and former Rule 4(B), M.R.Civ.P. (now superseded), preclude a nonrecord court from hearing actions involving the title to or possession of real property, jurisdiction for prosecution of the public nuisance charge must lie with the District Court. He cited 45-8-112 as authority that any action to abate a nuisance must be brought in the name of the state and that because abatement is a form of injunctive relief, the District Court has exclusive jurisdiction. He also argued that 27-30-202 provides the exclusive civil and criminal remedies for public nuisance. His claims were dismissed for the following reasons: (1) charges filed under this section were criminal rather than related to a civil action involving title to or possession of real property, which is regulated by the sections cited by Panasuk; (2) the remedy created by 27-30-202 has been supplemented by subsequent legislative action regarding a City Court's jurisdiction over misdemeanors and by the enactment of 46-17-101, which requires that all prosecutions brought in City Court be commenced by a sworn complaint; and (3) because Panasuk's interpretation would result in a direct contradiction between 27-30-202 and statutes subsequently enacted, the argument that 27-30-202 provides the exclusive remedies for public nuisance is erroneous. Billings v. Panasuk, 253 M 403, 833 P2d 1050, 49 St. Rep. 499 (1992).

Livestock Wandering on Open Range — Public Nuisance Doctrine Inapplicable: As a matter of law, the public nuisance abatement statutes should not be used to require a livestock owner to prevent stock from running free on county roads in an open range area. State ex rel. Martin v. Finley, 227 M 242, 738 P2d 497, 44 St. Rep. 1050 (1987), followed in Williams v. Selstad, 235 M 137, 766 P2d 247, 45 St. Rep. 2254 (1988), and in Yager v. Deane, 258 M 453, 853 P2d 1214, 50 St. Rep. 610 (1993).

45-8-112. Action to abate public nuisance.

Criminal Law Commission Comments

Source: Cal. Pen. Code 1970, §§ 370 through 372.

The phrase "any considerable number of persons" as used in the provision will undoubtedly be subject to court interpretation. The phrase has not been interpreted by any Montana case to date. The New York Court of Appeals held that "The expression 'any considerable number of persons' is used solely for the purpose of differentiating a public nuisance, which is subject to indictment, from a private nuisance. But a considerable number of persons does not necessarily mean a very great or any particular number of persons." People v. Kings County Iron Foundry, 209 NY 530, 102 NE 598, 599 (1913).

The offense of "nuisance," in some ways, resembles disorderly conduct in its requirement that the proscribed conduct annoy, alarm or inconvenience the public or "a considerable number of persons"; however disorderly conduct relates to existing acts or acts of brief duration while nuisance usually involves the creation or maintenance of a continuing condition. In practical application, most criminal nuisance cases fall into two categories: (1) the maintenance of manufacturing plants, entertainment resorts and the like, which by virtue of excessive noise, noxious gases, etc., annoy or offend groups or areas of the community; and (2) the conduct of resorts where people gather for illegal or immoral purposes. Subdivision (1) (a) deals with the first category. One difficulty of this offense is the fine balancing of the relative rights of plant operators or business people on the one hand and the residents of the vicinity on the other. The problem is accentuated by the fact that "public nuisance," as defined and construed, requires little if any criminal intent, being virtually a crime of absolute liability.

[Subsection (4) is based upon Georgia Code Annotated sec. 72-108.]

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This section was originally enacted as R.C.M. 1947, § 94-8-107(5), but was made a section unto itself in the recodification process. The Annotator's Note and Criminal Law Commission Comments for 45-8-111 are, therefore, relevant to this section as well. The 1977 amendment substituted "public nuisance" for "premises upon which a public nuisance is being maintained" and made other minor changes in style and phraseology.

Case Notes

Cause of Action for Erection of Spite Fence Solely Intended to Injure Neighbor — Availability of Injunctive Relief or Nuisance Claim — Bordeaux Overruled: Kottas built a 200-foot long, 7 feet 3 inches to 7 feet 9 inches high wooden fence that obstructed Haugen's view. Haugen sought injunctive relief for removal of the fence, alleging that it was a spite fence. The District Court concluded that it was indeed a spite fence, but declined to issue an injunction or recognize any remedy under Montana law, citing Bordeaux v. Greene, 22 M 254, 56 P 218 (1899), in holding that a person with a legal right can enforce the enjoyment of that right without inquiry into motive. The Supreme Court noted the many changes in property law since 1899 and overruled Bordeaux, adopting instead the rationale in Sundowner, Inc. v. King, 509 P2d 785 (Idaho 1973). Sundowner rejected the older rule that erection of a spite fence is not an actionable wrong and held that a property owner cannot erect a structure for the sole purpose of injuring a neighbor, such as a spite fence, which is of no beneficial use to the owner but is erected and maintained for the purpose of annoying a neighbor. A spite fence gives rise to an action for both injunctive relief and damages and may also be addressed through a nuisance claim. The Supreme Court reversed for a determination of the proper remedy. Haugen v. Kottas, 2001 MT 274, 307 M 301, 37 P3d 672 (2001).

Classification of Nuisances — Per Se or Per Accidens — Absolute or Qualified: A nuisance action may be based upon conduct of a defendant that is either intentional, negligent, reckless, or ultrahazardous. Thus, negligence is merely one type of conduct upon which liability for nuisance may be based. In general, a nuisance may be classified as either a nuisance per se or at law or as a nuisance per accidens or in fact. A nuisance per se is an inherently injurious act, occupation, or structure that is a nuisance at all times and under any circumstances, without regard to location or surroundings. A nuisance per accidens is one that becomes a nuisance by virtue of circumstances and surroundings. In turn, nuisances may be classified as either absolute or qualified. An absolute nuisance, similar to a nuisance per se, is a nuisance the substance of which is not negligence and that obviously exposes a person to probable injury. A qualified nuisance is a nuisance dependent on negligence that consists of anything done lawfully but so negligently or carelessly done or permitted as to create a potential and unreasonable risk of harm, which in due course results in injury to another. When determining how a plaintiff can bring a nuisance action against a defendant who is engaged in a statutorily authorized endeavor, when 27-30-101(2) indicates that authorized activities may not be considered a nuisance, the Supreme Court held that the plaintiff must show, pursuant to a particularized assessment of the authorizing statute, that: (1) the defendant completely exceeded its statutory authority, resulting in a nuisance; or (2) the defendant was negligent in carrying out its statutory authority, resulting in a qualified nuisance. In the present case, the city of Thompson Falls was statutorily authorized to construct the city's storm and sewer drain system, which Barnes alleged to be a nuisance. Given a verdict of no negligence, the city was not negligent in its operation or maintenance of the storm drain behind Barnes's duplex and thus would not have been liable for a qualified nuisance because of the incidental flooding of Barnes's property. Therefore, the District Court did not abuse its discretion in refusing Barnes's proposed instructions on nuisance because the instructions constituted a misstatement of the law. Barnes v. Thompson Falls, 1999 MT 77, 294 M 76, 979 P2d 1275, 56 St. Rep. 321 (1999), citing 58 Am. Jur. 2d Nuisances § 9 and 66 C.J.S. Nuisances §§ 3, 5. The Barnes criteria for consideration of unequivocal legislative intent and whether a defendant's activity falls outside statutory authority were applied to shooting ranges in Tally Bissell Neighbors, Inc. v. Eyrie Shotgun Ranch, LLC, 2010 MT 63, 355 Mont. 387, 228 P.3d 1134.

Remedy for Criminal Prosecution of Public Nuisance: Panasuk, convicted in City Court of misdemeanor criminal public nuisance charges under 45-8-111, contended that because 3-10-301, 25-31-102, and former Rule 4(B), M.R.Civ.P. (now superseded), preclude a nonrecord court from hearing actions involving the title to or possession of real property, jurisdiction for prosecution of the public nuisance charge must lie with the District Court. He cited this section as authority that any action to abate a nuisance must be brought in the name of the state and that because abatement is a form of injunctive relief, the District Court has exclusive jurisdiction. He also argued that 27-30-202 provides the exclusive civil and criminal remedies for public nuisance. His claims were dismissed for the following reasons: (1) charges filed under 45-8-111 were criminal rather than related to a civil action involving title to or possession of real property, which is regulated by the sections cited by Panasuk; (2) the remedy created by 27-30-202 has been supplemented by subsequent legislative action regarding a City Court's jurisdiction over misdemeanors and by the enactment of 46-17-101, which requires that all prosecutions brought in City Court be commenced by a sworn complaint; and (3) because Panasuk's interpretation would result in a direct contradiction between 27-30-202 and statutes subsequently enacted, the argument that 27-30-202 provides the exclusive remedies for public nuisance is erroneous. Billings v. Panasuk, 253 M 403, 833 P2d 1050, 49 St. Rep. 499 (1992).

Nuisance Action — Contributory Negligence as Defense: The Supreme Court cited 58 Am. Jur. 2d Nuisances 221 in holding that contributory negligence can be a defense in a nuisance action. Wilhelm v. Great Falls, 225 M 251, 732 P2d 1315, 44 St. Rep. 211 (1987), clarified, with regard to the distinction between an absolute nuisance and a qualified nuisance, in Barnes v. Thompson Falls, 1999 MT 77, 294 M 76, 979 P2d 1275, 56 St. Rep. 321 (1999).

Order of Abatement:

An order closing the premises and ordering confiscation of personal property was a final judgment and could not be entered while a motion to strike portions of the complaint was still pending. State ex rel. Harrison v. Baker, 135 M 180, 340 P2d 142 (1959).

Trial court should have included in the order abating a nuisance and confiscating equipment a description of the fixtures and equipment confiscated, but where there was evidence as to the equipment used in illegal activities, it was immaterial that the complaint did not describe it. State ex rel. Bottomly v. Johnson, 116 M 483, 154 P2d 262 (1944).

Order abating nuisance was not required, as a prerequisite or concurrent with closing of the premises, to order confiscation of the fixtures. State ex rel. Lamey v. Young, 72 M 408, 234 P 248 (1925).

Good Faith: Defendants could not plead good faith compliance with unconstitutional statute purporting to authorize certain types of lotteries when they had not paid the tax or license fees required by those statutes. Good faith was relevant only in applying for release of the premises for lawful use. State ex rel. Harrison v. Deniff, 126 M 109, 245 P2d 140 (1952).

Complaint: Complaint initiating an action in equity under section 94-1003, R.C.M. 1947 (since repealed), was sufficient if verified as required by that section, and it was not necessary that it comply with the requirements of 27-19-303 that the allegations be made positively, rather than on belief, as required for temporary injunction in other types of cases. State ex rel. Bergland v. Bradley, 124 M 434, 225 P2d 1024 (1951).

Closing of Premises:

Where facts established that gambling operations had been conducted on premises in violation of perpetual injunction ordered by Supreme Court 13 years before but Sheriff's return reported that he found no gambling equipment there, order would be entered closing premises for a year and restraining defendants from removing any gambling equipment. State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P2d 1029 (1950).

Closing of an entire building was justified on evidence that previous attempts to abate unlawful activities had failed and that the operation of all parts of the building were connected with the unlawful activities. State ex rel. Lamey v. Young, 72 M 408, 234 P 248 (1925).

Destruction of Property: Order directing Sheriff to sell equipment confiscated was erroneous where equipment was gambling equipment of the type described in 23-15-103, since under 23-5-122 (now repealed) such equipment is to be destroyed. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P2d 988 (1950).

Temporary Injunction: Under section 94-1004, R.C.M. 1947 (since repealed), the District Court was required, on a prima facie showing of unlawful gambling on the premises, to issue a temporary injunction which should be effective at least until the hearing on the order to show cause, and an order quashing the temporary injunction before that time was appealable. State ex rel. Olsen v. 30 Club, 124 M 91, 219 P2d 307 (1950).

Parties Plaintiff: The fact that the nominal complainant in an abatement action under section 94-1003, R.C.M. 1947 (since repealed), was an attorney and had been paid by an undisclosed person to file the action and testify as a witness was not ground for questioning his motives or the credibility of his testimony. State ex rel. Leahy v. O'Rourke, 115 M 502, 146 P2d 168 (1944).

Burden of Proof:

Where the evidence overwhelmingly established gambling activities on the premises, Supreme Court reversed judgment dismissing action to abate nuisance and directed entry of judgment of abatement, including a perpetual injunction against use of premises for gambling. State ex rel. Nagle v. Naughton, 103 M 306, 63 P2d 123 (1936).

An action in equity to abate a nuisance initiated under section 94-1003, R.C.M. 1947 (since repealed), was a civil action, and the burden resting on the State was proof by a preponderance of the evidence only. State ex rel. Lamey v. Young, 72 M 408, 234 P 248 (1925).

Parties Defendant: Owner of building could not complain that a particular lessee of part had not been made a party to abatement action initiated under section 94-1003, R.C.M. 1947 (since repealed). State ex rel. Lamey v. Young, 72 M 408, 234 P 248 (1925).

Permitting Nuisance: Finding that the owner of a place knew of and permitted unlawful conduct therein was justified by evidence of its general reputation for gambling and unlawful sale of liquor. State ex rel. Lamey v. Young, 72 M 408, 234 P 248 (1925).

Unlawful Conduct: Gambling, prostitution, and unlawful sale of liquor were proper grounds for an abatement action. State ex rel. Lamey v. Young, 72 M 408, 234 P 248 (1925).

45-8-113. Creating hazard.

Criminal Law Commission Comments

Source: Substantially the same as proposed Michigan Criminal Code 1967, § 7505.

The section is designed primarily to protect children, unsuspecting or handicapped adults and injured hunting victims. In addition it deals with several unrelated and somewhat unique problems in imposing criminal liability on aircraft meddlers, railroad derailers and possessors of steam engines or steam boilers. The mens rea requirement for each offense is "knowingly" and the penalty is a misdemeanor only.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This section encompasses offenses which were covered by eight prior Montana statutes. Subsection (1)(b) is a recodification and expansion of R.C.M. 1947, § 94-35-125. Subsection (1)(c) is a recodification of R.C.M. 1947, § 94-35-272. Subsection (1)(d) is a consolidation of R.C.M. 1947, §§ 94-35-211 and 94-35-214. Subsection (1)(d) covers conditions which may also be regulated by the boiler regulations in [Title 50, ch. 74]. Subsection (1)(e) is essentially a recodification of R.C.M. 1947, § 94-35-269. It should be noted that a negligent act under (1)(e) might also be prosecuted under § 45-5-201 (1)(b), negligently causing bodily injury to another, where bodily injury results from the negligent manner of hunting. Subsection (1)(a) is much broader than the prior law on attractive nuisances. R.C.M. 1947, § 94-35-265 applied to only ice boxes and refrigerators which are dangerous to children, whereas this subsection applies to all dangerous containers. Subsection (1)(f) is also much broader than prior law, which made it an offense to drive cattle onto railroad tracks, R.C.M. 1947, § 94-3569.

The purpose of the section is to prevent the creation or maintenance of conditions which are dangerous to people. Subsection (1)(a) is designed primarily to protect children. Subsection (1)(b) deals with conditions which are dangerous to unsuspecting or handicapped adults and children. The section deals with several unrelated problems in imposing criminal liability on aircraft tamperers, railroad derailers, and possessors of steam engines and steam boilers. Subsection (1)(e) imposes criminal liability upon hunters who fail to aid a person whom they have injured. The mens rea requirement for each offense is "knowingly", defined at 45-2-101.

The section covers situations which may also entail civil tort liability. The penalty for each offense is a misdemeanor. The 1977 amendment made minor changes in phraseology, punctuation, and style.

Case Notes

Trench: Section 94-35-125, R.C.M. 1947 (since repealed), did not apply to a temporary trench opened for the laying of sewer pipe, even though more than 10 feet deep. McLaughlin v. Bardsen, 50 M 177, 145 P 954 (1915).

Civil Liability: Failure to put a cover over or a fence around an open shaft as required by 94-35-125, R.C.M. 1947 (since repealed), was negligence per se and made the landowner liable for injuries sustained in a fall even by a trespasser. Conway v. Monidah Trust, 47 M 269, 132 P 26 (1913).

45-8-114. Failure to yield party line.

Criminal Law Commission Comments

Source: Substantially the same as Revised Codes of Montana 1947, §§ 94-35-221.1, 94-35-221.2, 94-35-221.3 and 94-35-221.4.

This section is a recodification of old laws dealing with party lines.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This section is a recodification of old laws dealing with emergency telephone calls. The only change from prior law is the omission of "spiritual aid" as a basis for making an emergency call which is privileged.

45-8-115. Illegal posting of state and federal land.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

45-8-116. Funeral picketing — penalties.

Compiler's Comments

Preamble: The preamble attached to Ch. 10, L. 2007, provided: "WHEREAS, the Legislature reveres the rights of free speech, association, and privacy guaranteed or protected by both the state and federal constitutions; and

WHEREAS, the memorialization of a loved one is often a time of significant grief involving particularly somber and sacred rites and rituals, whether religious in nature or not; and

WHEREAS, people attending funerals, particularly loved ones and family members of the deceased, are involved in a circumstance of disquiet and grieving that civil society has traditionally recognized and accorded deepest respect and privacy; and

WHEREAS, the Legislature finds that it is likely that the circumstances of a funeral, including the gathering of many people at one place for solemn services during a time of mourning and emotional vulnerability, mean that picketing at a funeral subjects mourners to messages that the mourners are powerless to avoid and to which they are essentially captive, whether they agree with the messages or not; and

WHEREAS, it has been discovered that regardless of the picketers' message, picketing at a funeral to promote a position garners the picketers significant attention to their message that they might not otherwise enjoy, not in the least by the fact that society finds such exploitation of another's grief shocking to the conscience; and

WHEREAS, the Legislature finds that funeral picketing may constitute a deliberate verbal or visual assault on funeral mourners who are powerless to avoid the assault; and

WHEREAS, the Legislature finds that the taking of unjust advantage of funeral mourners is a flagrant and egregious exploitation of grief that constitutes an assault that justifies proscription; and

WHEREAS, the Legislature recognizes the right of speakers to convey a message; and

WHEREAS, the Legislature recognizes the right of people to grieve and memorialize the death of a loved one; and

WHEREAS, the Legislature recognizes the need to carefully balance the rights of speakers against the privacy rights of those who may be unwilling and captive recipients of the speakers' message; and

WHEREAS, the Legislature finds that there is a significant government interest in preserving and protecting the sanctity and dignity of funeral services and in protecting funeral mourners from unwanted and unwarranted intrusion by strangers by narrowly tailoring the prohibition on funeral picketing for a relatively brief time period and only to a certain distance from funeral sites, thereby leaving open ample alternative channels of communication.

THEREFORE, the Legislature finds it necessary and right to enact this Right to Grieve in Privacy Act."

Severability: Section 3, Ch. 10, L. 2007, was a severability clause.

Effective Date: Section 4, Ch. 10, L. 2007, provided that this section is effective on passage and approval. Approved March 16, 2007.

Applicability: Section 5, Ch. 10, L. 2007, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective March 16, 2007.

45-8-117. Definitions.

Compiler's Comments

Effective Date: Section 7, Ch. 719, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 22, 2023.

Severability: Section 6, Ch. 719, L. 2023, was a severability clause.

45-8-118. Restrictions on sexually oriented businesses — penalty.

Compiler's Comments

Effective Date: Section 7, Ch. 719, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 22, 2023.

Severability: Section 6, Ch. 719, L. 2023, was a severability clause.

Part 2

Offensive, Indecent, and Inhumane Conduct

Part Compiler's Comments

Section Not Codified: Section 94-8-216, R.C.M. 1947, definition of unincorporated town, was not codified in MCA. This section has not been repealed and is still valid law. Citation may be made to sec. 7, Ch. 74, L. 1917.

45-8-201. Obscenity.

Criminal Law Commission Comments

Source: Substantially the same as Illinois Criminal Code 1961, Chapter 38, § 11-20.

This section closely follows section 11-20 of the Illinois Criminal Code, which is essentially the same as the American Law Institute Model Penal Code Draft. Slight changes in wording were undertaken in recognition that today's society often condones literature, movies and other art which may incidentally provide erotic stimulation. The significant difference between this section and the prior provisions is that a violation cannot occur unless the obscene art is specifically directed to a person under the age of majority with the exception of subdivision (1)(f) which is aimed at "pandering", using its common definition.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 449, L. 2023. Amendment effective October 1, 2023.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: At end of (5) substituted "45-8-206" for "45-8-202"; and made minor changes in style.

1978 Amendment by Initiative: Initiative No. 79, proposed by initiative petition and approved at the general election held November 7, 1978, amended this section to allow cities, towns, or counties to adopt obscenity ordinances or resolutions more restrictive than state law. Amendment effective January 1, 1979.

Annotator's Note: The 1975 amendment rewrote subsection (2), changed the punishment subsection (4) so as to provide for a minimum fine of five hundred dollars ($500)—the former maximum fine—and added subsection (5) which invalidated municipal ordinances more restrictive than this section and § 45-8-202 (Public Display of Offensive Sexual Material) (45-8-202 now repealed). The 1979 amendment changed the standard to be applied from a statewide standard to a community-based standard by substituting "community" for "Montana" in subsection (2)(d)(i) and "the community" for "this state" in subsection (3)(c). Additionally, subsection (5) was completely changed to allow communities to adopt ordinances more restrictive as to obscenity than the state statutes.

As originally enacted subsection (2) was patterned after the Illinois provision and the proposal of the Model Penal Code 1962, section 251.4, both of which were designed to comport with the definition of obscenity set forth in Memoirs v. Massachusetts, 383 US 413 (1965) which established the following three-part test: a thing is obscene if: (1) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (2) the material is patently offensive because it affronts community standards relating to the description or representation of sexual materials; and (3) the material is utterly without redeeming social value.

However, in Miller v. California, 413 US 15 (1973) the Supreme Court discarded the Memoirs test and adopted a new test. Subsection (2) was rewritten to comply with the constitutional standards enunciated in Miller.

Subsections (1)(a) through (1)(e) are aimed at distribution of obscene materials to minors. Only subsection (1)(f) is designed to apply to the adult community—and then, only for common pandering.

Case Notes

Obscenity or Indecent Exposure: The obscenity statute (45-8-201) is imprecise when applied to an exposure crime. Though the portion of the obscenity statute that requires proof of contemporary community standards refers to "material" and could be stretched to mean that community standards do not apply to exposure crimes, since "material" is not involved, the court reversed the obscenity conviction saying: "charge a flasher as a flasher and not as a striptease artist". St. v. Price, 191 M 1, 622 P2d 160, 37 St. Rep. 1926 (1980).

Standards — Evidentiary Basis: An obscenity conviction was reversed because the State did not establish at trial, as an evidentiary proposition, that based on contemporary community standards, the conduct involved appealed to the prurient interest in sex. This section requires that the conduct involved must appeal to the prurient interest in sex and requires that this standard must be determined by contemporary community standards. Nowhere does this statute permit the trier of fact to make these determinations without an evidentiary basis in the trial record. St. v. Price, 191 M 1, 622 P2d 160, 37 St. Rep. 1926 (1980).

Obscenity "Community Standards" Statewide: Municipal corporation does not have power to enact ordinance relating to obscenity in excess of limits imposed on city ordinances by state Legislature, as constitutionally adequate community standard to establish whether a work is obscene is not local city standards as opposed to statewide standards, but statewide standards as opposed to national standards. Court held that in the face of Art. XI, sec. 6, Mont. Const., a city ordinance in conflict with a prohibitive section of state law cannot stand where the state law is constitutionally valid. U.S. Mfg. & Distrib. Corp. v. Great Falls, 169 M 298, 546 P2d 522, 33 St. Rep. 272 (1976). [Note: Subsection (5) has been amended to allow more restrictive community ordinances relative to obscenity.]

Construction and Application: The following cases have construed the Illinois obscenity statute, upon which the Montana provision has been based, in accordance with U.S. Supreme Court opinions which may no longer be authoritative after the decision in Miller v. California, 413 US 15 (1973). See People v. Butler, 49 Ill.2d 435, 275 N.E.2d 400 (1971); People v. Brocic, 80 Ill. App.2d 65, 224 N.E.2d 572 (1967).

Obscene Materials: The test to be used in determining whether material is obscene has been significantly altered by the U.S. Supreme Court in Miller v. California, 413 US 15 (1973), and may affect the value of the decisions listed below which applied older Supreme Court guidelines to determine the obscenity of various types of material: People v. Brocic, 80 Ill. App.2d 65, 224 N.E.2d 572 (1967); City of Chicago v. Universal Pub. & Distrib. Corp., 34 Ill.2d 250, 214 N.E.2d 251 (1966); People v. Sikora, 32 Ill.2d 260, 204 N.E.2d 768 (1965); People v. Bruce, 31 Ill.2d 459, 202 N.E.2d 497 (1965); City of Chicago v. Geraci, 46 Ill.2d 576, 264 N.E.2d 153 (1970); Movies, Inc. v. Conlisk, 345 F. Supp. 780 (D. Ill. 1972); People v. Ridens, 51 Ill.2d 410, 282 N.E.2d 691 (1972); People v. Price, 8 Ill. App.3d 158, 289 N.E.2d 280 (1972).

Attorney General's Opinions

Regulation of Live Dance Performance in Licensed Liquor Establishment — Abridgment of Free Expression: The validity of a city ordinance regulating live dance performances in establishments licensed to serve liquor must be measured against free expression standards imposed by Art. II, sec. 7, Mont. Const., and the first amendment to the U.S. Constitution. Therefore, a proposed city ordinance prohibiting any live performance involving dance or the removal of clothing in licensed liquor establishments is an unconstitutional abridgment of the constitutional standards because: (1) it fails to distinguish carefully between protected and unprotected conduct; and (2) the requisite governmental interest in regulating such conduct has not been sufficiently established. 41 A.G. Op. 75 (1986).

45-8-203. Certain motion picture theater employees not liable for prosecution.

Criminal Law Commission Comments

Source: New.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: In (2) substituted "45-8-206" for "45-8-202".

Annotator's Note: This section was enacted in 1974 and is designed to exempt from prosecution under the obscenity statutes, 45-8-201 and 45-8-202 (45-8-202 now repealed), employees of a theater. This is a legislative enactment of the belief that such employees are just doing their job and should not be punished for doing so.

45-8-205. Definitions.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 449, L. 2023. Amendment effective October 1, 2023.

45-8-206. Public display or dissemination of obscene material to minors.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 449, L. 2023. Amendment effective October 1, 2023.

2007 Amendment: Chapter 180 in (2)(a) near middle of second sentence inserted "tribal identification card"; and made minor changes in style. Amendment effective October 1, 2007.

Case Notes

Obscenity "Community Standards" Statewide: Municipal corporation does not have power to enact ordinance relating to obscenity in excess of limits imposed on city ordinances by state Legislature, as constitutionally adequate community standard to establish whether a work is obscene is not local city standards as opposed to statewide standards, but statewide standards as opposed to national standards. Court held that in the face of Art. XI, sec. 6, Mont. Const. a city ordinance in conflict with a prohibitive section of state law cannot stand where the state law is constitutionally valid. U.S. Mfg. & Distrib. Corp. v. Great Falls, 169 M 298, 546 P2d 522, 33 St. Rep. 272 (1976).

45-8-207. Notice of violation.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

45-8-209. Harming a police dog — penalty — definition.

Compiler's Comments

1997 Amendment: Chapter 63 inserted (1)(b) expanding definition of harming a police dog to include a dog being used by a person under the direction of an officer; in (3)(a), at end, inserted "or any other agent of a criminal justice agency"; in (3)(b)(i) substituted "44-11-303" for "7-32-201"; in (3)(b)(ii) inserted "or search and rescue"; and made minor changes in style.

1991 Amendment: In definition of law enforcement officer substituted "46-1-202" for "46-1-201".

1989 Amendment: In (1), after "kills", inserted "or otherwise injures"; and made minor changes in phraseology.

Source: Based on sections 4.24.410 and 9A.76.200, Revised Codes of Washington.

45-8-210. Causing animals to fight — owners, trainers, and spectators — penalties — exception — definition.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

45-8-211. Cruelty to animals — exceptions.

Criminal Law Commission Comments

Source: Derived from the proposed Mich. C. 1967, § 5565; also derived from Model Penal Code 1962, § 250.11.

Subdivision (1)(c) covers instances in which a person knowingly and negligently releases or abandons a wild or semi-wild animal in a populated area where it will not be able to fend for itself.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 358 inserted (3)(b) relating to payment of costs necessary to care for the affected animal; and made minor changes in style. Amendment effective April 17, 2003.

Chapter 366 in (1)(a) inserted "torturing"; substituted language in (1)(c)(i) concerning food and water for former (1)(c)(i) that read: "(i) proper food, drink, or shelter"; inserted (1)(c)(ii) concerning protection for the animal from adverse weather conditions; in first sentence in (2)(a) increased fine from $500 to $1,000 and increased the term of imprisonment from 6 months to 1 year and in second sentence after "animals" inserted "or of a first or subsequent offense of aggravated animal cruelty" and substituted "fined an amount not to exceed $2,500 or be sentenced to the department of corrections" for "fined not to exceed $1,000 or be imprisoned in the state prison"; inserted (2)(c) providing that each act is separate offense when more than one animal subject to cruelty; in (3)(a) and (3)(c) substituted "shall" for "may"; at end of (3)(a) inserted "including reasonable costs of care incurred by a public or private animal control agency or humane animal treatment shelter"; inserted (4)(c) excluding rodeo activities conducted under humane standards; inserted (4)(d) excluding lawful fishing, hunting, and trapping activities; inserted (4)(e) excluding lawful wildlife management practices; inserted (4)(f) excluding lawful scientific or agricultural research or teaching involving animals; inserted (4)(g) excluding services performed by licensed veterinarian; inserted (4)(h) excluding lawful control of rodents and predators; inserted (4)(i) excluding accepted training and discipline methods; and made minor changes in style. Amendment effective October 1, 2003.

Saving Clause: Section 2, Ch. 358, L. 2003, was a saving clause.

1993 Amendment: Chapter 556 near end of (2)(a) substituted "state prison" for "county jail" and increased maximum prison term from 1 year to 2 years; inserted (3)(b) allowing the court to limit animal ownership, possession, or custody during the sentence term; and made minor changes in style. Amendment effective April 28, 1993.

1991 Amendment: In (1)(b) inserted "or confining"; inserted (1)(c)(ii) requiring medical care; in (1)(e) substituted "an animal" for "a horse" and at end inserted exception clause; in (2) inserted second sentence regarding penalty for second or subsequent offenses; inserted (4) establishing exceptions; and made minor changes in style.

1985 Amendments: Chapter 148 inserted second and third sentences in (2) providing that owner convicted of cruelty to animals may be required to forfeit animal to county; and inserted (3) providing that the court may require person convicted of cruelty to animals to pay costs of veterinary treatment.

Chapter 410 in (1)(e) at end, deleted "or promoting, sponsoring, conducting, or participating in any fight between any animals".

Annotator's Note: This section consolidates an entire chapter plus two sections of prior law. The section is nearly identical in coverage with the old law. Notably, the mens rea for the offense may be either "knowingly" or "negligently", defined at 45-2-101.

Case Notes

Warrantless Search Administrative in Nature — Motion to Suppress Evidence Obtained in County Inspections of Dog Kennel Properly Denied: The defendant was charged with several counts of animal cruelty related to the operation of a dog kennel. Her license to run the kennel had lapsed and county health officials scheduled and performed three inspections of the kennel, which included rooms in her home. After the county officials notified law enforcement that animals in the kennel were neglected and malnourished, a warrant was issued and her kennel was searched. At her trial, she moved to suppress the findings from the inspections, claiming they were warrantless searches. The District Court denied the motion and she was convicted. On appeal, the Supreme Court affirmed, ruling that the three inspections were administrative in nature and fell within the applicable warrant exception. St. v. Warren, 2019 MT 49, 395 Mont. 15, 439 P.3d 357.

Forfeiture of All Defendant's Animals, Not Only Those Identified as Victims — Forfeiture as Penalty Affirmed: Local law enforcement had received numerous complaints about the defendant's Malamute breeding operation. During a search of the operation, nearly 90% of the defendant's dogs were identified as victims of animal cruelty and the defendant was convicted of over 90 counts of felony animal cruelty. As a part of his sentence, the District Court ordered that all of the defendant's dogs be forfeited. The defendant appealed to the Supreme Court, arguing that only those dogs identified as victims could be forfeited. The Supreme Court ruled that the District Court did not abuse its discretion in ordering the forfeiture of all of the defendant's dogs given the conditions in which all of the dogs had lived and the defendant's ability to care for them in the future. St. v. Chilinski, 2014 MT 206, 376 Mont. 122, 330 P.3d 1169.

Volunteers Used to Conduct Search — No Constitutional Violation — Motion to Suppress Correctly Denied: Local law enforcement had received numerous complaints about the defendant's Malamute breeding operation. Sheriff's officials received a warrant to search the defendant's kennels and home that extended to "any and all agents" required for the search. Because the sheriff's office did not have the resources to conduct the search, it organized a group of volunteers to assist. Following the search, the defendant was charged with over 90 counts of felony animal cruelty. The defendant filed a motion to suppress the evidence retrieved during the search, arguing that the use of volunteers violated his rights under Article II, section 11, of the Montana Constitution. The judge denied the motion to suppress and on appeal, the Supreme Court similarly rejected this argument, noting that 46-5-226 allows civilians to aid in serving a warrant. St. v. Chilinski, 2014 MT 206, 376 Mont. 122, 330 P.3d 1169.

Cruelty to Animals Conviction Proper — Horse Trailer Boarding Not Acceptable — Obvious Malnourishment — Knowledge of Owner: In a bench trial, the defendant was found guilty of three misdemeanor counts of cruelty to animals for housing two stallions and a mare in a small stock trailer. She appealed the conviction and claimed that the state did not offer sufficient evidence to prove that she acted knowingly or negligently because a doctor testified that "in her mind" she was caring for the horses appropriately. The Supreme Court affirmed the conviction, reasoning that the defendant's actions demonstrated awareness that conditions in the trailer were inadequate. Additionally, multiple witnesses testified that the horses were obviously malnourished, unable to stand in the horse trailer, and visibly wounded and bleeding. The evidence was sufficient to allow a rational trier of fact to conclude beyond a reasonable doubt that the defendant knew, consciously disregarded the risk, or should have known there was a risk that she was cruelly confining the horses and failing to provide them with adequate food, water, and medical care. St. v. Beaudet, 2014 MT 152, 375 Mont. 295, 326 P.3d 1101.

Lack of District Court Authority to Direct County on Manner of Disposition of Forfeited Animals: The defendant was found guilty of three misdemeanor counts of cruelty to animals for improper care of horses. On appeal, she claimed that the District Court exceeded its statutory authority under 45-8-211 when it allowed the county to decide whether the horses should be sold or adopted after forfeiture. Additionally, the defendant claimed that adoption would be a taking without just compensation and that the county should sell the horses and credit her with the proceeds. The Supreme Court affirmed, reasoning that the District Court does not have the authority under 45-8-211 to direct the county on the disposition of forfeited animals. Additionally, to the extent that the District Court may have exceeded its authority by ordering the county to apply any proceeds of any sales to the defendant's restitution obligation, any error was in her favor "and it is never wise to look a gift horse in the mouth". St. v. Beaudet, 2014 MT 152, 375 Mont. 295, 326 P.3d 1101.

Sentence for Animal Cruelty Exceeded — Remand: Stone was convicted of one misdemeanor count and four felony counts of cruelty to animals and was sentenced to a prison term of 5 years for each count, to run concurrently. Stone appealed the sentence and the Supreme Court reversed. Under the 2001 version of subsection (2)(a) of this section, the maximum sentence for a second or subsequent offense was a $1,000 fine and up to 2 years in prison (see 2003 revisions, including sentence enhancements). Thus, the District Court erred in sentencing Stone to 5 years on each count, and the case was remanded for resentencing within the statutory parameters. St. v. Stone, 2004 MT 151, 321 M 489, 92 P3d 1178 (2004).

Threat of Cruelty to Animals Sufficient Exigent Circumstance to Justify Warrantless Entry of Probationer's Home — Entry Authorized by Probation Officer: Stone ran an animal zoo at his home. A neighborhood boy who assisted in feeding animals and cleaning cages notified authorities that some animals had died and that numerous others appeared to be without food or water. When officers arrived on Stone's posted property, they confirmed that numerous animals were dead and others had no food or water. Stone was not home, but the boy informed the officers that there were other animals in the house. The officers also learned that Stone was on probation and notified Stone's probation officer, who authorized entry into the house so that the animals inside could be cared for. Stone was convicted of animal cruelty and appealed on grounds that he had an expectation of privacy and that, although probable cause existed, the entry was unlawful because of the absence of exigent circumstances, so the evidence should have been suppressed. In a case of first impression, the Supreme Court concluded that the unrefuted imminent threat to the lives and well-being of the animals and the prevention of needless suffering and death of the animals were adequate exigent circumstances to justify warrantless entry into the house so as not to frustrate legitimate law enforcement efforts in preventing animal cruelty. Having reasonable cause to suspect that Stone was violating probation by committing cruelty to animals inside the house, the warrantless entry was also considered a justifiable probation search, and denial of the motion to suppress was proper. St. v. Stone, 2004 MT 151, 321 M 489, 92 P3d 1178 (2004). See also Tuck v. U.S., 477 A2d 1115 (1984), St. v. Bauer, 379 NW 2d 895 (1985), Pine v. St., 889 SW 2d 625 (1994), and People v. Thornton, 676 NE 2d 1024 (1997).

No Implied Contract Agister's Lien Absent Custody or Control of Cattle: Bellanger obtained loans from the Daniels-Sheridan Federal Credit Union to finance a ranching operation, securing the loans with several promissory notes securing an interest in the cattle on the ranch. Bellanger subsequently defaulted on the loans, and the credit union initiated an action to enforce the promissory notes pursuant to the Uniform Commercial Code. The case broadened to encompass a dispute over proceeds from the sale of the cattle to include Bellanger's father Alfred, who asserted an agister's lien for having kept the cattle on his property. The cattle were subsequently seized and sold for $79,012.27, and the District Court split the proceeds, with $45,467.94 paid to the credit union and a judgment for the remainder owed on the promissory notes and $33,544.33 paid to the owner of the auction company where Bellanger customarily sold cattle, but Alfred and Bellanger were foreclosed of all interest in the proceeds. On appeal, Alfred asserted that his agister's lien should have entitled him to some of the proceeds. Alfred contended that an agister's lien was commenced via an implied contract when the credit union obtained a preliminary injunction against removal or sale of the cattle, which required Alfred to care for the cattle on his property, pursuant to 27-1-222, 70-6-206, and this section. The Supreme Court affirmed the District Court's finding that because Alfred never had custody or control of the cattle, allowing Bellanger to run the cattle on the property rent-free in exchange for looking after Alfred's cattle, the statutory duties upon which Alfred relied in support of an implied contract agister's lien were inapplicable. The court declined to recognize any manner for the creation of an agister's lien except as provided in 71-3-1201. Daniels-Sheridan Fed. Credit Union v. Bellanger, 2001 MT 235, 307 M 22, 36 P3d 397 (2001).

Test for Judicial Immunity From Federal Section 1983 Case — Quasi-Judicial Immunity Extended to Official Acting Under Valid Court Order: State immunity laws do not shield the state or its officials from liability based on 42 U.S.C. 1983. To be immune from a claim based on that section, the immunity must be found in federal law. In Stump v. Sparkman, 435 US 349 (1978), the U.S. Supreme Court established a two-part test for determining when a judge is entitled to immunity from a sec. 1983 action. The first part is whether the judge dealt with the plaintiff in a judicial capacity. If the judge was not dealing in a judicial capacity, there is no immunity. If the judge was dealing in a judicial capacity, the second part of the test is whether the judge acted in the clear absence of all jurisdiction. From the doctrine of judicial immunity has come the doctrine of quasi-judicial immunity. Officials acting pursuant to a facially valid court order have absolute immunity from damages for actions taken to execute that order. In the present case, the Justice of the Peace was clearly acting in a judicial capacity when issuing an order that Reisdorff feed and care for her animals. Reisdorff did not argue that the order was facially invalid, and the District Court did not err in holding that officials carrying out the order were entitled to quasi-judicial immunity. Reisdorff v. Yellowstone County, 1999 MT 280, 296 M 525, 989 P2d 850, 56 St. Rep. 1128 (1999), overruled, to the extent that liability under 42 U.S.C. 1983 was extended to local government units pursuant to the doctrines of judicial and quasi-judicial immunity, in Miller v. Red Lodge, 2003 MT 44, 314 M 278, 65 P3d 562 (2003). See also Patterson v. Von Riesen, 999 F2d 1235 (8th Cir. 1993).

Lack of Evidence of Harassment by Dog — Conviction Upheld Despite Misapplication of Statute: Walter shot a dog on March 7, 1993, and was subsequently convicted of misdemeanor cruelty to animals under this section. Walter defended on the basis that his actions were justified under 81-7-401. The Supreme Court held that Walter, the state, and the District Court applied the version of 81-7-401 effective October 1993, but should have applied the version effective in March that did not authorize the shooting of a dog that harasses livestock. However, the

Supreme Court also found that the Deputy Sheriff witness testified that there was no evidence that the dog was harassing livestock, as the owner of the sheep testified. Citing St. v. Bower, 254 M 1, 833 P2d 1106 (1992), the Supreme Court noted that the credibility of witnesses and weight of evidence are for the trier of fact to determine and, citing Higham v. Red Lodge, 247 M 400, 807 P2d 195 (1991), that the Supreme Court will affirm a correct result regardless of the reasoning used by the lower court. Because there was no evidence of any action by the dog falling within either version of 81-7-401, the Supreme Court affirmed the conviction. St. v. Walter, 266 M 429, 880 P2d 1346, 51 St. Rep. 903 (1994).

45-8-212. Criminal defamation.

Criminal Law Commission Comments

Source: Minnesota Criminal Code 1962, § 609.765.

The law of criminal libel has been based upon two divergent, and often confused, policy considerations. The first is that personal reputations should be protected from injury by punishing the communication of scandalous matter. The second is that breaches of the peace which might be caused by the publication of such matter can be avoided by punishing the publication. This section has the main function of preserving personal reputations by assimilating the nearly one dozen statutes now involved in present provisions, and by clearing up the traditionally confusing language associated with the statutes.

Compiler's Comments

2003 Amendment: Chapter 344 in (2) near beginning after "means" inserted "including by electronic communication, as defined in 45-8-213"; and made minor changes in style. Amendment effective October 1, 2003.

1999 Amendment: Chapter 395 in (4) at end inserted "or nolo contendere". Amendment effective October 1, 1999.

1997 Amendment: Chapter 230 in (3)(a), after "is true", deleted "and is communicated with good motives and for justifiable ends"; and made minor changes in style. Amendment effective April 10, 1997.

Preamble: The preamble attached to Ch. 230, L. 1997, provided: "WHEREAS, the Montana Supreme Court in State v. Helfrich, 53 St. Rep. 741 (1996), held that section 45-8-212, MCA, was unconstitutional for not allowing truth as an absolute defense in criminal defamation proceedings."

Annotator's Note: Defamation was a criminal offense both at common law and under prior statutory law. In the past, the law of criminal defamation was based on two competing and often divergent policy considerations. The first of these was protection of personal reputation by punishing the communication of scandalous matter and the second was the prevention of breaches of the peace caused by communication of such materials. This section has taken as its main function the protection of personal reputation by adding to the common-law requirement of communication the requirement that such communication be to a third party.

The definition of defamatory matter has remained essentially the same as it was under both the common law and prior Montana law in that the communication will be considered defamatory if it exposes a person to "hatred, contempt, ridicule, degradation or disgrace in society, or injury to his or its business or occupation". The new law represents a departure from the old law in that it specifically provides for the application of criminal sanctions to individuals who communicate defamatory matters concerning "a group, class or association" as well as those who defame individuals. This section is more limited than common or prior law in that it does not provide for the punishment of an individual who "blackens the memory of one who is dead".

As noted above, this section has modified the publication requirements of the common law with regard to criminal defamation. Under the common law there was no requirement of communication to a third party and under prior Montana law there was no need to show that there had been an actual communication, only that the defendant had parted with libel under such circumstances that it was "exposed to be read or seen by any person other than himself". This section also expands prior law by expanding coverage to include any communication "orally, in writing, or by any other means" while prior law required a writing, printing, or similar means to achieve publication. It should be noted in this context that while both written and oral defamation are treated alike for purposes of establishing the offense, the quantum of proof required to establish an oral defamation is specifically set out in subsection (4) as at least two witnesses or a plea of guilty.

Criminal defamation differs from the civil law torts of libel and slander in that the truth of the statement is not in and of itself a defense. To avoid punishment as an offense, a defamatory statement must be shown to fall within one of the specifically established exceptions to criminal defamation. These exceptions are set out in subsection (3). Subsection (3)(a) provides that if the material is true and communicated with "good motives and for justifiable ends" it will not be treated as criminal defamation. This defense has no precise counterpart in prior law although it was allowable under § 94-2804, R.C.M. 1947, to introduce the motive of the matter asserted as a factor for the jury's consideration in order to counteract the malice presumed from the fact of publication (§ 94-2803, R.C.M. 1947). Subsection (3)(b) tightens the common law exception for statements which are privileged to except only those statements which are absolutely privileged. This defense was also included in the prior law exception of privileged communications contained in § 94-2809, R.C.M. 1947. The third exception contained in subsection (3) is (3)(c) which preserves the constitutional right of free speech by excepting communications which are fair comment made in good faith with respect to individuals involved in public affairs. Part (d) of subsection (3) reenacts the privilege contained in § 94-2807, R.C.M. 1947, that a fair report of an event in which the public is interested is also privileged. Subsection (3)(e) continues the privilege extended to those having an interest or duty with regard to the subject matter of the communication when the communication is made in furtherance of that interest or duty—such as communications by parents concerning misbehavior of their children.

This section has reduced the penalties for criminal defamation to six months or $500 or both from the prior maximum of imprisonment for up to one year or a fine of five thousand dollars. The wording for the provision is substantially the same as the Minnesota statute from which it was taken.

Case Notes

Criminal Defamation Statute Unconstitutionally Overbroad: In a civil action for defamation, truth is an absolute defense barring any recovery by plaintiff. However, under this section, the criminal defamation statute, truth is not allowed as an absolute defense, impermissibly requiring the defendant to prove that the material, even if true, was communicated in good faith and for justifiable ends. Citing numerous cases, the Supreme Court held that in prohibiting truthful criticism, this section is overbroad and a violation of Art. II, sec. 7, Mont. Const., and the 1st and 14th amendments to the United States Constitution. A showing of good motives and justifiable ends is not required to avoid liability for criminal defamation. Truth alone is sufficient as an absolute defense. (See 1997 amendment.) St. v. Helfrich, 277 M 452, 922 P2d 1159, 53 St. Rep. 741 (1996).

Public Officer: Statements leading to necessary inference that township constable had acted unlawfully in the administration of the affairs of his office were libelous within the meaning of § 94-2801, R.C.M. 1947 (now 45-8-212). St. v. Winterrowd, 77 M 74, 249 P 664 (1926).

45-8-213. Privacy in communications.

Criminal Law Commission Comments

Source: Derived from Revised Codes of Montana 1947, §§ 94-3203, 94-3320, 94-3321, 94-3323, 94-35-220, 94-35-221.5, 94-35-274 and 94-35-275.

This statute is merely a recodification of the old Montana law. A comprehensive electronic surveillance proposal was defeated by the 1971 state legislature.

Compiler's Comments

2019 Amendments — Composite Section: Chapter 56 in (1)(a) in first sentence after "harass" deleted "annoy, or offend", after "communication and" deleted "uses obscene, lewd, or profane language, suggests a lewd or lascivious act, or", at end inserted provisions regarding repeated use of obscene, lewd, or profane language or repeated lewd or lascivious suggestions, and deleted former second sentence that read: "The use of obscene, lewd, or profane language or the making of a threat or lewd or lascivious suggestions is prima facie evidence of an intent to terrify, intimidate, threaten, harass, annoy, or offend"; inserted (5) regarding no liability on an interactive computer service for content provided by another person; in (6) at beginning inserted "As used in this section, the following definitions apply" and inserted definition of interactive computer service; and made minor changes in style. Amendment effective October 1, 2019.

Chapter 243 in (1)(a) after "to terrify, intimidate, threaten, harass" substituted "or injure" for "annoy, or offend" and deleted last sentence that read: "The use of obscene, lewd, or profane language or the making of a threat or lewd or lascivious suggestions is prima facie evidence of an intent to terrify, intimidate, threaten, harass, annoy, or offend"; inserted (1)(d) concerning unauthorized publication or distribution of printed or electronic photographs, pictures, images, or films of an identifiable person that show certain visible body parts or that depict the person engaged in a real or simulated sexual act; in (2)(a) substituted "Subsection (1)(c)" for "This subsection"; inserted (2)(b) concerning exceptions from subsection (1)(d), including voluntary exposure of a person's genitals in public or commercial settings, disclosures made in the public interest, disclosures made in the course of performing duties related to law enforcement, and disclosures concerning historic, artistic, scientific, or educational materials; in (4)(b) and (4)(c) inserted reference to (1)(d); inserted (5) concerning interpretations imposing liability on interactive computer services; in (6) at beginning inserted "As used in this section, the following definitions apply"; inserted definition of interactive computer service; and made minor changes in style. Amendment effective October 1, 2019.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

2007 Amendment: Chapter 214 in (1)(c)(iii) at end after "recording" inserted "and if one person provides the warning, either party may record"; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendment: Chapter 435 in (1)(c)(i) near middle and (2) in second sentence near middle before "employees" inserted "to public"; inserted (1)(c)(iv) excepting from subsection (1)(c) a health care emergency phone communication to a health care facility or to a government agency dealing with health care; and made minor changes in style. Amendment effective October 1, 2005.

2003 Amendment: Chapter 344 in (1)(a) near beginning after "person by" substituted "electronic communication" for "telephone or electronic mail"; in (1)(b) at beginning after "uses" substituted "an electronic communication" for "a telephone or electronic mail", near middle after "repeated" substituted "communications" for "telephone calls or electronic mailings", and at end after "where the" substituted "communications" for "telephone call or calls or electronic mailings"; deleted former (1)(d) through (1)(f) that read: "(d) by means of any machine, instrument, or contrivance or in any other manner:

(i) reads or attempts to read a message or learn the contents of a message while it is being sent over a telegraph line or by electronic mail;

(ii) learns or attempts to learn the contents of a message while it is in a telegraph office or is being received at or sent from a telegraph office; or

(iii) uses, attempts to use, or communicates to others any information obtained as provided in this subsection (1)(d);

(e) discloses the contents of a telegraphic message, electronic mail, or any part of a telegraphic message or electronic mail addressed to another person without the permission of the person, unless directed to do so by the lawful order of a court; or

(f) opens or reads or causes to be read any sealed letter or electronic mail not addressed to the person opening the letter or reading the electronic mail without being authorized to do so by either the writer of the letter, the sender of the electronic mail, or the person to whom the letter or electronic mail is addressed or, without the like authority, publishes any of the contents of the letter or electronic mail knowing the letter or electronic mail to have been unlawfully opened"; deleted former (2) that read: "(2) Subsection (1) does not apply to an employer or a representative of an employer who opens or reads, causes to be opened or read, or further publishes an electronic mail or other message that either originates at or is received by a computer or computer system that is owned, leased, or operated by or for the employer"; in (2) in first sentence after "intercepts" substituted "an electronic" for "a telephonic voice or data"; inserted (4) defining electronic communication; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 77 throughout section inserted references to electronic mail and electronic mailings; inserted (2) excepting an employer or representative of an employer who opens or further publishes electronic mail on a computer that is owned, leased, or operated by the employer; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 354 in (1)(c) at end before "recording" inserted "transcription or"; inserted (2) establishing that, with certain exceptions, purposeful interception of a telephonic voice or data communication constitutes the offense of violating privacy in communications; and made minor changes in style. Amendment effective October 1, 1999.

1991 Amendment: Inserted (2)(b) establishing a penalty for second conviction involving illegal telephone calls; and inserted (2)(c) establishing a penalty for third or subsequent conviction involving illegal telephone calls.

Annotator's Note: This section recodifies prior Montana law. The use of obscene or threatening language is prima facie evidence of an intent to "terrify, intimidate, threaten, harass, annoy, or offend". The 1977 amendment reworded subsection (1)(a). As enacted, this subsection used the term "intent"; as amended the term "intent" was replaced with the term "purpose", and in doing so made the provision consistent with the rest of the Criminal Code of 1973. The 1977 amendment also placed the last sentence of subsection (1)(a) in parentheses; inserted "any conversation" in subsection (1)(c); and made other minor changes in wording and punctuation.

Subsection (1)(c) continues the blanket prohibition of R.C.M. 1947, § 94-35-274 on recording conversations without the consent of all the parties and the exceptions contained in R.C.M. 1947, § 94-35-275 for public officials in the course of their official duties and for public meetings.

Subsections (1)(d) and (1)(e) prohibit the interception of telegraph messages both by tapping the lines and by inspection in the telegraph office. Disclosure of a telegraphic message addressed to another without the other's permission is also prohibited. These provisions parallel prior law provisions R.C.M. 1947, §§ 94-3322, 94-3323, 94-35-220 and 94-3321.

Opening, reading or causing to read a sealed letter addressed to another without that other's authorization is prohibited by subsection (1)(f) which replaces prior law, R.C.M. 1947, § 94-3320. Also made punishable in conformity with prior law are those individuals who, without authority, publish the contents of an unlawfully opened letter.

The penalties for these various offenses have been made uniform as misdemeanors. This represents a reduction in most cases since under prior law penalties could range as high as 5 years in some instances (94-35-221.5, 94-3321, 3322, 3323, 94-35-220).

The 1979 amendment added the phrase, "except as provided in 69-6-104", in subsection (1). Section 69-6-104 was enacted at the same time to permit supervisory law enforcement personnel to control telephone communications to and from a person holding hostages and to limit the liability of telephone company officials.

In St. v. Brackman, 178 M 105, 582 P2d 1216 (1978), the Montana Supreme Court struck down police use of warrantless consensual participant monitoring, i.e., the use of electronic surveillance equipment concealed on a police informant whose conversations with the defendant are simultaneously transmitted to concealed agents. The court held that electronic interception by third parties of conversations between individuals who neither consent to nor know of the interception was a violation of the right to privacy guaranteed by the Montana Constitution. A "compelling state interest" was held to be required under Montana's constitutional right to privacy before participant electronic monitoring could be engaged in. In St. v. Hanley, decided on March 14, 1980, (opinion after rehearing) the court approved of the procedure whereby officers obtained a search warrant prior to engaging in participant electronic monitoring. The court did not make clear what showing was required to obtain such a search warrant, whether of "probable cause" or "compelling state interest". However, it appears that even a compelling state interest showing requirement would not impose a terribly heavy burden on the state. In State ex rel. Zander v. District Court, 180 M 548, 591 P2d 656 (1979), the court held that there was no impermissible infringement of the right of privacy guaranteed under Art. II, sec. 10 of Montana's constitution where an officer, informed by a neighbor of the defendant that he thought a burglary was in progress at defendant's trailer, entered defendant's trailer without a warrant (and inadvertently discovered some marijuana plants), since the state has a "compelling state interest" in protecting the home and property of its citizens from unlawful intrusion. It is, in light of this opinion, conceivable that the court would find the state's interest in enforcing its laws to be a "compelling state interest" which would permit issuance of a search warrant to allow participant electronic monitoring.

Case Notes

Jury Instruction Regarding Text Messages to Minor Offering Money in Exchange for Seeing Minor Nude — District Court Did Not Abuse Discretion by Refusing to Give Jury Instruction for Violation of Privacy in Communication as Lesser-Included Offense of Sexual Abuse of Children — Crime Charged Is Matter of Prosecutorial Discretion. St. v. Brown, 2022 MT 176, 410 Mont. 38, 517 P.3d 177.

Statute Not Unconstitutionally Overbroad — Motion to Dismiss Properly Denied: The defendant was charged with three counts of felony privacy in communications for using profane, threatening, offensive, and harassing language in phone calls to his ex-wife's father and employee. The defendant moved to dismiss one of the counts, arguing that 45-8-213 is unconstitutionally overbroad under the freedom of speech clauses of the Montana Constitution and the United States Constitution. The District Court denied the defendant's motion to dismiss. On appeal, the Supreme Court agreed that 45-8-213 is not overly broad or an improper content-based law and does not violate the Montana Constitution or the United States Constitution. St. v. Lamoureux, 2021 MT 94, 404 Mont. 61, 485 P.3d 192.

Prima Facie Statutory Presumption of Intent Facially Overbroad: Dugan called a victim services office for assistance with obtaining an order of protection. When informed by the officer that she could not assist him, he argued with the officer and called her a "fucking cunt" as he hung up the phone. The District Court found that Dugan's words constituted unprotected "fighting words" that were inherently inflammatory and held little social value. On appeal, the Supreme Court found that Dugan's speech did not fall under any categorical exceptions to free speech protection, including the "fighting words" exception. Since Dugan's words could not be punished under a categorical exception, the Supreme Court found that the privacy in communications statute's presumption of intent impermissibly shifted the evidentiary burden from the state to the defendant. Finding that the statute's prima facie presumption of intent was facially overbroad, the Supreme Court struck the following provision in the statute: "The use of obscene, lewd, or profane language or the making of a threat or lewd or lascivious suggestions is prima facie evidence of an intent to terrify, intimidate, threaten, harass, annoy, or offend." The Supreme Court remanded the case, requiring the state to prove Dugan's intent. St. v. Dugan, 2013 MT 38, 369 Mont. 39, 303 P.3d 755.

Privacy in Communications Statute Not Violative of Due Process: Dugan called a victim services office for assistance with obtaining an order of protection. When informed by the officer that she could not assist him, he argued with the officer and called her a "fucking cunt" as he hung up the phone. Dugan argued that the privacy in communications statute under which he was charged, 45-8-213, was impermissibly vague and violated due process. The District Court found that the statute was neither facially vague nor vague as applied. On appeal, the Supreme Court affirmed this issue, noting that exhaustive definitions of every word in a statute are not necessary if the meaning of the statute is clear and provides sufficient notice of what conduct is proscribed. Here, statutorily undefined terms had commonly understood meanings, a mental state clarified the type of behavior prohibited, and Dugan's utterance clearly qualified as "obscene, lewd, or profane" conduct. St. v. Dugan, 2013 MT 38, 369 Mont. 39, 303 P.3d 755. See also St. v. Lamoureux, 2021 MT 94, 404 Mont. 61, 485 P.3d 192.

Recording Face-to-Face Conversation With Consent of Informant Without Warrant Violates Defendant's Right to Privacy and Constitutes Unreasonable Search: In two separate cases, consolidated by the Supreme Court, the defendants Goetz and Hamper pleaded guilty to felony distribution of dangerous drugs but reserved their right to appeal the denial of their motions to suppress the warrantless monitoring and recording of their face-to-face conversations with an informant wearing a wire who had consented to the procedure. In the case of Goetz the recorded conversation had taken place in Goetz's residence, and in Hamper's case the recorded conversation had taken place in his vehicle. The Supreme Court stated that Art. II, sec. 10 and 11, Mont. Const., when taken together afford citizens a greater right to privacy that, in turn, provides broader protection than the Fourth Amendment of the United States Constitution in situations involving searches and seizures occurring in private settings. The Supreme Court overruled St. v. Brown, 232 M 1, 755 P2d 1364 (1988), to the extent that it relied only on federal law and held that warrantless electronic monitoring of face-to-face conversations with the consent of one party is lawful. The Supreme Court found that the recorded conversations between the defendants and the informant took place in the private residences or vehicles of the defendants and were not conducted where other individuals were present, and therefore the defendants had exhibited actual subjective expectations of privacy in the face-to-face conversations. The Supreme Court also found that the defendants' privacy expectations were expectations that society was willing to accept as reasonable, and the conversations therefore constituted searches within the contemplation of Art. II, sec. 10 and 11, Mont. Const. The Supreme Court further held that the consent of the informant did not fall under the consent exception to unlawful warrantless searches and that the state could not rely on the particularized suspicion standard rather than the probable cause requirement in Art. II, sec. 11, Mont. Const., for the issuance of a warrant because the state's intrusion into the defendants' privacy expectations by electronic monitoring and recording of their conversations was not a minimal intrusion not rising to a level requiring probable cause. The Supreme Court concluded that the electronic monitoring and recording of the defendants' conversations without a warrant or the existence of an established exception to the warrant requirement violated the defendants' rights under Art. II, sec. 10 and 11, Mont. Const. St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008).

Discretion of Prosecutor in Charging Defendant When Facts Support Possibility of More Than One Crime: After threatening to shoot his estranged wife's boyfriend during a telephone call, Smith was charged with assault with a weapon. Smith contended that he should instead have been charged with violation of privacy in communications through intimidation over the telephone and that the assault with a weapon charge should have been dismissed. The Supreme Court disagreed. The two charges were distinctly different, and the facts of the case supported a charge for either crime. Thus, the crime to be charged was a matter of prosecutorial discretion, and the County Attorney did not abuse those broad discretionary powers in charging Smith with assault with a weapon. St. v. Smith, 2004 MT 191, 322 M 206, 95 P3d 137 (2004).

Sufficient Evidence of Indirect Telephone Conversation to Warrant Conviction of Violating Privacy in Communications: Flowers' wife Pamela received a telephone call from her son, who was at Flowers' residence. While speaking to her son, she heard Flowers yelling in the background that he was going to kill Pamela. As a result of Flowers' statements, he was charged with violating privacy in communications. At trial, Flowers moved for a directed verdict on grounds that because he did not have a telephone conversation with Pamela, he could not have used the telephone to threaten her. The motion was denied, and on appeal, the Supreme Court affirmed. Although Flowers did not have a direct telephone conversation with Pamela, he nevertheless communicated a message over the telephone that was threatening in nature, which constituted sufficient evidence for the jury to find Flowers guilty of violating privacy in communications. St. v. Flowers, 2004 MT 37, 320 M 49, 86 P3d 3 (2004).

No Error in Admission of Recorded Telephone Calls Made While Defendant in Prison — No Expectation of Privacy: At DuBray's homicide trial, the state introduced into evidence recordings of telephone calls between DuBray and others while DuBray was incarcerated in state and federal facilities. DuBray argued that the evidence was inadmissible under state and federal wiretap laws. Although monitoring and recording telephone conversations are a search within the meaning of state and federal constitutions, under St. v. Scheetz, 286 M 41, 950 P2d 722 (1997), when no reasonable expectation of privacy exists, there is neither a search nor a seizure. At both the state and federal facilities, DuBray was notified that telephone calls were subject to monitoring and recording, so no reasonable expectation of privacy in the calls existed. Evidence of the calls was properly admitted because DuBray consented to the recording. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003).

Admissibility of Recording of Warrantless Face-to-Face Conversation by Police Use of Body Wire Transmitting Device: Warrantless consensual electronic monitoring of face-to-face conversations by the use of a body wire transmitting device, when performed by law enforcement officers while pursuing their official duties, does not violate the constitutional right to be free of unreasonable search and seizure or the right of privacy. Consent must be clearly obtained from at least one party to the conversation and must be freely made and without compulsion. As in telephone conversations, the consenting party may be an informant or police officer. Evidence obtained from such monitoring is admissible in a subsequent criminal trial. St. v. Brown, 232 M 1, 755 P2d 1364, 45 St. Rep. 818 (1988), overruling St. v. Brackman, 178 M 105, 582 P2d 1216 (1978), and reaffirmed in St. v. Belgarde, 244 M 500, 798 P2d 539, 47 St. Rep. 1762 (1990). Brown was overruled in St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008).

Interpretation of Largely Inaudible Tape Recording by Police — No Prejudice: It was not prejudicial to allow introduction of mostly inaudible tape recordings made with the consent and participation of an informant nor to allow a police officer who was present when the recordings were made to act as an oral transcriber to interpret what was said and what occurred while the tapes were being made. St. v. Morse, 229 M 222, 746 P2d 108, 44 St. Rep. 1919 (1987).

Deputy Sheriff — Public Employee Authorized to Employ Hidden Device: A Deputy Sheriff serving as an undercover officer in a neighboring county is a public employee with an official duty to maintain contact with persons involved in the drug scene and thus is a person authorized by this section to use a hidden electronic device to record conversations so far as it is done in compliance with the guidelines set forth in St. v. Brackman, 178 M 105, 582 P2d 1216 (1978). St. v. Hanley, 186 M 410, 608 P2d 104, 37 St. Rep. 427 (1980).

Electronic Recording — Consent of One Party in Conversation: The recording of a conversation between an undercover officer and defendant during a drug sale using a hidden electronic monitoring device that was authorized by court order as required by St. v. Brackman, 178 M 105, 582 P2d 1216 (1978), is not subject to suppression by virtue of 18 U.S.C. 2511(2)(c) and is permitted by 45-8-213, if one of the party consents to the recording, as the undercover officer did here. The recording being legal it is then subject only to ordinary rules of admissibility. St. v. Hanley, 186 M 410, 608 P2d 104, 37 St. Rep. 427 (1980), followed in St. v. Coleman, 189 M 492, 616 P2d 1090, 37 St. Rep. 1661 (1980), St. v. Canon, 212 M 157, 687 P2d 705, 41 St. Rep. 1659 (1984), and St. v. Brown, 232 M 1, 755 P2d 1364, 45 St. Rep. 818 (1988).

Effect on Constitutional Requirements: Subsection (1)(c), which excuses certain conduct by public officials or employees from criminal liability, neither addresses nor modifies any constitutional requirements relating to search and seizure. St. v. Leighty, 179 M 366, 588 P2d 526, 35 St. Rep. 2017 (1978).

Police Monitoring: Article II, sec. 10 and 11, Mont. Const., protects the individual from any monitoring and recording by the state without a search warrant or prior showing of compelling state interest of conversations between the individual and police informants even though the informants consented to the monitoring and recording. Section 45-8-213 does not give consensual participant monitoring the status of a compelling state interest. St. v. Brackman, 178 M 105, 582 P2d 1216, 35 St. Rep. 1103 (1978), followed in St. v. Coleman, 189 M 492, 616 P2d 1090, 37 St. Rep. 1661 (1980), and St. v. Canon, 212 M 157, 687 P2d 705, 41 St. Rep. 1659 (1984). Brackman overruled in St. v. Brown, 232 M 1, 755 P2d 1364, 45 St. Rep. 818 (1988). Brown was overruled in St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008).

45-8-214. Bribery in contests.

Criminal Law Commission Comments

Source: Substantially the same as Ill. C.C. 1961, Title 38, § 29-1.

The bribery of a participant in a sporting event constitutes an activity sufficiently deceitful to warrant criminal sanctions. The purpose of this section is two-fold. First, by preventing the offer and acceptance of bribes it attempts to protect the moral character of participants and officials from influence and corruption. Second, through the use of criminal sanctions, the economic and psychological ill effects of "fixed" contests are sought to be avoided. The general phrase "failure to use his best efforts in connection with (a contest)" is intended to cover any conduct whereby a participant tries to lose the contest, lower the margin of victory, establish a point spread, etc., or, in the case of an official or other person, conduct whereby he deliberately misjudges, dishonestly referees or supervises, or otherwise unfairly attempts to influence the outcome of the contest. The section has no counterpart in the old Montana Criminal Code.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Annotator's Note: This section is included on the theory that bribery of participants in sporting events is an activity sufficiently deceitful to justify the imposition of criminal sanctions. The general principles of this offense are the same as those involved in other bribery offenses which relate to public servants. The section prohibits both offering, conferring or agreeing to confer, and soliciting, accepting or agreeing to accept, thus providing for the punishment of both the payor or potential payor and the payee or potential payee.

The phrase "failure to use his best efforts" in subsection (1)(a) is intended to cover any conduct which could affect either the outcome or the margin of victory. Subpart (1)(b) which prohibits the violation of a known duty as a participant or official is directed toward both the player who fails to perform and toward the official who deliberately misjudges, dishonestly referees or supervises, or otherwise unfairly attempts to influence the outcome of the contest. It should be noted that this section applies only to those directly involved in a sporting event and those individuals who deal with them directly. It would not, for example, cover an unrelated individual who is paid to slip into the barn and drug a race horse. It would reach the conduct if a trainer were paid to do so.

45-8-215. Desecration of flags.

Criminal Law Commission Comments

Source: Minnesota Criminal Code 1963, § 609.40.

This section is not intended to prevent giving away flags to customers of a business enterprise as a patriotic gesture or placing the names of donors on flags by the Red Cross. United States Code, Title 36, Sections 170 and 171 and subsequent sections prescribe the formalities of using and displaying the flag on various occasions.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section is a more concise statement of the former Montana law on Desecration of Flags. For a conviction under this section the state must prove that one of the four overt acts described in subsection (2) was committed by the defendant, that the act was done purposely or knowingly, and that the item desecrated fit the definition of flag as provided by subsection (1). The statute varies from the prior Montana law as follows:

(1) It pertains to the Montana flag as well as the flag of the United States.

(2) It does not except flag treatment under military regulations from its purview.

(3) It explicitly permits in subsection (4) the depiction of flags for ornamental purposes under certain conditions.

The wording for this section is identical to the Minnesota source.

45-8-216. Unlawful automated telephone solicitation — exceptions — penalties.

Case Notes

Regulation for Political Campaigns Unconstitutional: A robocall service challenged the restriction on political robocalls as a content-based restriction on speech in violation of the first amendment to the U.S. Constitution. The federal District Court granted summary judgment to the state, and the robocall service appealed. The Ninth Circuit Court ruled that the robocall service had standing to sue because it was injured by the statute, and ruled that the statute is a content-based restriction on speech that is not narrowly tailored to advancing a compelling state interest in that the restrictions present both underinclusive and overinclusive restriction on political speech. The court reversed the grant of summary judgment and remanded for further proceedings. Victory Processing, LLC v. Fox, 937 F.3d 1218 (9th Cir. 2019).

45-8-217. Aggravated animal cruelty.

Compiler's Comments

Effective Date: This section is effective October 1, 2003.

45-8-218. Deviate sexual conduct.

Criminal Law Commission Comments

Source: New.

The section includes both homosexuality and bestiality. There has been a reduction in the penalty because it was felt that the severe penalty was more a product of revulsion than the social harm in fact committed. The Model Penal Code recommends that bestiality be made a misdemeanor. The Illinois Code contains no provision on the subject. Subsection (3) increases the penalty if the human-victim participant in the bestiality or homosexuality acts without consent. To appreciate the meaning and scope of "without consent" see sections 94-2-101(68) and 94-5-506(3) [now MCA, 45-5-501 and 45-5-511(3)].

Compiler's Comments

2013 Amendment: Chapter 225 deleted former (3) that read: "(3) The fact that a person seeks testing or receives treatment for the HIV-related virus or another sexually transmitted disease may not be used as a basis for a prosecution under this section and is not admissible in evidence in a prosecution under this section." Amendment effective October 1, 2013.

1991 Amendments: Chapter 175 deleted former (3) providing that a person convicted of deviate sexual conduct be imprisoned in the state prison for a term not exceeding 20 years or be fined an amount not exceeding $50,000, or both.

Chapter 687 inserted (3) precluding the fact that a person seeks or receives treatment for HIV-related virus or other sexually transmitted disease from use as the basis of and admissibility in a prosecution. Amendment effective April 27, 1991.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section prohibits both bestiality and homosexuality. (See the definition of "deviate sexual relations", § 45-2-101.)

The common-law crime of sodomy, embodied in R.C.M. 1947, § 94-4118, is replaced by this section and is far different from it. At common law sodomy required some penetration. By definition "deviate sexual relations" may consist of a "sexual contact", defined at MCA, 45-2-101. "Sexual contact" requires only a touching and not a penetration. Thus, this section prohibits a broader range of deviate sexual acts between persons of the same sex and between persons and animals than did the old law.

Case Notes

No Right to Appeal Judgment Absent Adverse Determination of Specific Pretrial Motion: Defendant filed a pretrial motion to dismiss a felony deviate sexual conduct offense on equal protection grounds, but prior to a ruling on the motion, defendant entered a plea agreement, pleaded guilty, and reserved the right to appeal the constitutional issue. The District Court accepted the plea, but did not accept the terms of the plea agreement, and following conviction, defendant appealed the equal protection issue. Although a defendant who knowingly and voluntarily pleads guilty generally waives the right to appeal any nonjurisdictional defects and defenses that occurred prior to the plea, under 46-12-204(3), a defendant may enter a guilty plea and reserve the right to appeal an adverse determination of any specified pretrial motion. However, the District Court did not rule against the pretrial motion to dismiss, so defendant's reservation of the right to appeal did not meet the statutory condition. Defendant's conditional guilty plea was invalid because the state was not authorized to consent to it and the District Court was not authorized to approve it, so the Supreme Court vacated the guilty plea and sentence and reversed for further proceedings. St. v. Rytky, 2006 MT 134, 332 M 364, 137 P3d 530 (2006).

Standing to Bring Declaratory Judgment Action — Possibility of Prosecution Under Criminal Statute Held Sufficient: Gryczan and others, who were homosexuals, brought a declaratory judgment action against the state, seeking a determination of whether this section, proscribing deviate sexual conduct, was unconstitutional as applied, as a violation of their right to privacy. The plaintiffs alleged that they had in the past and intend in the future to engage in acts that violate the statute. The state contested the plaintiffs' right to bring the action, arguing that the statute had never been enforced. Relying upon Lee v. St., 195 M 1, 635 P2d 1282 (1981), and Helena Parents v. Lewis & Clark County, 277 M 367, 922 P2d 1140 (1996), the Supreme Court reviewed the criteria for standing generally and standing to challenge a criminal statute in particular and noted that it had never required a person to suffer arrest in order to challenge a criminal statute. Moreover, the Supreme Court noted that although it had never been enforced, the Legislature had amended the statute as late as 1991 and had even later rejected attempts to repeal the statute. The Supreme Court reviewed opinions decided by the U.S. Supreme Court and other federal courts and held that because the Legislature did not regard the statute as moribund and because the Attorney General had not foresworn the enforcement of the statute, plaintiffs had a legitimate and realistic fear of criminal prosecution along with other psychological harms. Noting that the plaintiffs are precisely the individuals against whom the statute is intended to operate, the Supreme Court held that the District Court did not err in holding that the plaintiffs had standing to challenge the statute. Gryczan v. St., 283 M 433, 942 P2d 112, 54 St. Rep. 699 (1997). (See 2013 amendments to 45-2-101 and 45-8-218.)

Statute Unconstitutional as Applied — Invasion of Right to Privacy: Gryczan and others, all of whom were homosexuals, brought a declaratory judgment action to determine whether this section, as applied, violated their right of privacy. After reviewing the case of Bowers v. Hardwick, 478 US 186 (1986), in which the U.S. Supreme Court held that the federal constitution does not confer a fundamental right on homosexuals to engage in sodomy, the Supreme Court noted that it had long held that the Montana Constitution affords citizens broader protection of a right to privacy than does the U.S. Constitution and that since privacy is explicit in the Montana Constitution, privacy is a fundamental right and any statute limiting the right must pass the strict scrutiny test. The Supreme Court then applied the test enunciated in Katz v. U.S., 389 US 347 (1967), and adopted by the Montana Supreme Court in Hastetter v. Behan, 196 M 280, 639 P2d 510 (1982), and found that all adults have an expectation of privacy in noncommercial, consensual sexual conduct and that, while society may disapprove of homosexual conduct, society still recognizes that expectation of privacy, even concerning homosexual acts. The Supreme Court then determined that the interests advanced by the state in support of the constitutionality of the statute, the protection of public health by preventing the spread of the HIV-related virus, and the protection of public morals were not supported by the facts and were therefore not compelling state interests justifying an invasion of privacy. For these reasons, the Supreme Court determined the statute to be unconstitutional as applied to noncommercial, same-sex consensual sex between adults. Gryczan v. St., 283 M 433, 942 P2d 112, 54 St. Rep. 699 (1997), followed in Armstrong v. St., 1999 MT 261, 296 M 361, 989 P2d 364, 56 St. Rep. 1045 (1999). (See 2013 amendments to 45-2-101 and 45-8-218.)

Alleged Error Part of Defense Strategy — Trial Not Constitutionally Defective — Plain Error and Cumulative Error Doctrines Held Inapplicable: Hanson was charged with sexual assault of and deviate sexual conduct with his former girlfriend's son, Aaron. Hanson alleged that the testimony of his victim and certain witnesses was unreliable, that certain testimony was incorrectly presented on rebuttal, that the state introduced evidence of other acts in violation of both Rule 404(b), M.R.Ev. (Title 26, ch. 10), and his constitutional right to due process, that the state's cross-examination of him went too far, that he was improperly impeached by certain state evidence, and that the prosecutor incorrectly commented on the veracity of a witness. For these reasons, Hanson argued that he was deprived of a fair trial in violation of the constitutional guaranty of a fair trial and that the doctrines of plain error and cumulative error applied so as to require a new trial even though he had not objected to the evidence before the District

Court. The Supreme Court reviewed the trial record and pointed out that either Hanson failed to object to testimony by Aaron, Aaron's therapist, and a Deputy Sheriff or he actually solicited their testimony himself in an effort to show their lack of credibility. The Supreme Court held, citing St. v. Campbell, 241 M 323, 787 P2d 329 (1990), and St. v. Finley, 276 M 126, 915 P2d 208 (1996), that the alleged errors did not rise to the level of a manifest miscarriage of justice, did not leave unsettled the question of the fundamental fairness of the trial, and did not compromise the integrity of the judicial system. Therefore, the court refused to invoke the plain or cumulative error doctrine to review issues raised for the first time on appeal. St. v. Hanson, 283 M 316, 940 P2d 1166, 54 St. Rep. 678 (1997).

Endangering Welfare of Child Not Lesser Included Offense of Deviate Sexual Conduct: As evidenced by the plain language of this section, the offense of deviate sexual conduct requires proof that the persons were of the same sex, while endangering the welfare of a child, 45-5-622, plainly requires proof of the ages of the offender and the victim. Each crime requires proof of additional facts that the other does not. Therefore, applying the test in Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932), the crime of endangering the welfare of a child is not a lesser included offense of deviate sexual conduct. St. v. Steffes, 269 M 214, 887 P2d 1196, 51 St. Rep. 1463 (1994).

Sufficiency of Information Charging Deviate Sexual Conduct Without Defining Specific Terms — Definitions as Legal Term of Art: Defendant contended that the information charging him with deviate sexual conduct was insufficient because the information did not specify that the sexual contact was for the purpose of gratifying the sexual desire of either party, thereby failing to inform him of all of the essential elements of the crime. Defendant cited Russell v. U.S., 369 US 749, 8 L Ed 2d 240, 82 S Ct 1038 (1962), for the holding that the words of a statute may not be sufficient in a charging document if the words themselves do not fully, directly, and expressly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense intended to be punished. The Supreme Court instead relied on Hamling v. U.S., 418 US 87, 41 L Ed 2d 590, 94 S Ct 2887 (1974), in distinguishing between cases in which the offense charged depends upon a specific identification of fact and instances when the definition of the offense is not one of fact, but one of law. In the instant case, the information did not have to allege that the sexual contact was for the purpose of gratifying the sexual desire of either party because both "sexual contact" and "deviate sexual conduct" are legal terms of art defined elsewhere in the criminal code. Thus, the amended information citing the name of the offense, the statute alleged to have been violated, and the time and place of each offense was sufficient to apprise defendant of the charges against him. St. v. Steffes, 269 M 214, 887 P2d 1196, 51 St. Rep. 1463 (1994).

Limited Agreement Not to Prosecute for Deviate Sexual Conduct — Not Grant of Statutory Immunity — Independently Derived Evidence Applicable: The Jefferson County Attorney contractually agreed not to prosecute Myrhow for criminal acts related to an investigation of deviate sexual conduct by Marks, of which Myrhow had knowledge. However, until other incidents came to light as part of a separate investigation, Myrhow at no time related that he was involved in other unrelated incidents of deviate sexual conduct, including an incident committed prior to the contractual agreement. Myrhow contended that the immunity granted for his information regarding Marks's conduct also extended to his own conduct. The District Court properly found that Myrhow had been granted de facto immunity from prosecution for acts directly related to the Mark's investigation, but that immunity was a limited, contractual, transactional immunity arising solely from the agreement not to prosecute, rather than from 46-15-331. The statutory immunity provided by 46-15-331 did not apply because that immunity is granted only when a witness is compelled to testify by court order, a circumstance inapplicable to this case. Because the evidence used to convict Myrhow was derived independently of the Marks investigation and independently of any immunized evidence Myrhow provided through his agreement with the County Attorney, the District Court correctly convicted Myrhow for deviate sexual conduct committed prior to the immunity agreement. St. v. Myrhow, 262 M 229, 865 P2d 231, 50 St. Rep. 1528 (1993).

Admissibility of Expert Testimony in Assessing Credibility of Child Sexual Assault Victim: Expert testimony was admissible for the purpose of helping the jury assess the credibility of a child sexual assault victim since the jury had the discretion to accept or reject the testimony and the testimony merely enlightened the jurors on the subject without impinging on the jury's right to decide the victim's credibility. St. v. Geyman, 224 M 194, 729 P2d 475, 43 St. Rep. 2125 (1986), followed in St. v. French, 233 M 364, 760 P2d 86, 45 St. Rep. 1557 (1988), and in St. v. Donnelly, 244 M 371, 798 P2d 89, 47 St. Rep. 1600 (1990). See also St. v. Imlay, 249 M 82, 813 P2d 979, 48 St. Rep. 588 (1991), which overruled Donnelly with regard to augmentation of sentence for failure to admit guilt.

Instructions: Where there was no specific reason to distrust the testimony of the complaining witness, it was not error to refuse an instruction that the witness's testimony should be viewed with caution since a sex offense is easily charged and difficult to disprove. St. v. Ballew, 166 M 270, 532 P2d 407 (1975).

Constitutionality: In light of specificity of the definitions in section 94-2-101, R.C.M. 1947 (now 45-2-101), of the terms used in this provision, this section could not be said to be unconstitutionally vague. St. v. Ballew, 166 M 270, 532 P2d 407 (1975).

Penetration:

The infamous crime against nature prohibited by 94-4118, R.C.M. 1947 (since repealed) could be committed by penetration of the mouth. St. v. Dietz, 135 M 496, 343 P2d 539 (1959).

Ambiguous testimony by 8-year-old victim as to whether anus was penetrated, uncorroborated by medical examination, was insufficient to support conviction of completed infamous crime against nature. St. v. Shambo, 133 M 305, 322 P2d 657 (1958).

Corroboration of Victim:

Corroborating evidence to the testimony of the victim showing only that victim, a young boy, slept with the defendant and stayed overnight at defendant's house on several occasions was insufficient to sustain conviction of violation of 94-4118, R.C.M. 1947 (since repealed), as it showed nothing more than opportunity to commit the crime. St. v. Gangner, 130 M 533, 305 P2d 338 (1957).

Evidence that defendant and a teenage boy spent a great deal of time together, that defendant had made many gifts to the boy, that the boy had been nervous and lost his appetite, that defendant and the boy were in separate beds in the same room when arrested, and that boy had relaxed sphincter muscles of the anus was insufficient to corroborate boy's testimony as to perpetration of crime against nature on him. St. v. Keckonen, 107 M 253, 84 P2d 341 (1938).

45-8-220. Criminal invasion of personal privacy.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

45-8-221. Predatory loitering by sexual offender.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Part 3
Weapons

Part Criminal Law Commission Comments

UNIFORM MACHINE GUN ACT
PREFATORY NOTE

A special committee on a "Uniform Act to Regulate the Sale and Possession of Firearms" was appointed at the Minneapolis meeting of the National Conference of Commissioners on Uniform State Laws in 1923. The subject having been brought to the attention of the Conference by the United States Revolver Association, it was quite natural that in its initial effort the committee submitted an act, finally approved in 1930 at Chicago, dealing solely with firearms of the revolver, pistol, or sawed-off shotgun type, which might readily be concealed.

But during the interim prior to approval of that act, the infant industry of racketeering grew to monstrous size, and with it the automatic pistol replaced the revolver, to be in turn displaced by a partly concealable type of machine gun—the Thompson .45 inch caliber submachine gun becoming most popular, equipped with either 100 or 50 shot drum magazine, or 20 shot clip magazine, using the ordinary .45 Colt automatic pistol cartridge.

In the 1930 report, it was stated the committee believed unanimously that the Firearms Act should be confined entirely to guns of the pistol type; reference to machine guns and other offensive weapons was therefore eliminated from previous tentative drafts, and the drafting of a separate act to cover the machine gun was recommended. In 1931, the committee presented a supplementary report, submitting a first tentative draft of such an act. This draft was largely based upon the Pennsylvania Act of 1929. At the 1932 meeting of the National Conference at Washington, D.C., the committee filed a second tentative draft, fully annotated. That the subject was considered of grave importance by state legislatures was evidenced by the fact that it had already merited action in sixteen states and the District of Columbia. Following a thorough study of the subject the Conference thereupon put the act in final form and approved it, and the act was subsequently approved by the American Bar Association. The act is intended not only to curb the use of the machine gun, but to make it unwise for any civilian to possess one of the objectionable type.

The act defines a machine gun so that it will exclude automatic or semi-automatic sporting rifles or shotguns.

A "crime of violence" is defined as in the Uniform Firearms Act, except that kidnapping is added.

Possession or use of a machine gun of any kind in the perpetration or attempted perpetration of a crime of violence, is declared to be a crime; following the similar provision in the Uniform Firearms Act. In this connection it may be proper to again call attention to experience in England, where it is still quite unusual to find crimes of violence committed by persons who are armed, undoubtedly because in that country a person found guilty of committing a crime of violence when armed receives, by a mandatory provision of the law, an additional sentence.

It is believed that this act has "teeth" enough in it to make it possible for the police departments throughout the nation to meet the challenge of the gangsters and racketeers who have been adopting the machine gun in criminal warfare. Particular attention is called to the fact that this act gives great aid to the police in enforcing it by reason of the presumptions which are made part of this proposed law. Heretofore, the police have been helpless in many instances, because it was legal to possess a machine gun. Under the provisions of the act, however, the mere possession of a machine gun is presumed to be for offensive and aggressive purposes, except as provided in the act, and the exceptions are very limited.

Possession or use of a machine gun of any kind for offensive or aggressive purpose is likewise declared to be a crime; and its possession or use for such purpose is presumed if the gun is found on premises not owned or rented for legitimate use by the possessor or user of the gun, or if the gun is in possession of, or used by, either an unnaturalized foreigner, or a person previously convicted of a crime of violence.

Possession for offensive or aggressive purpose is also presumed if the machine gun is of the kind most commonly used by criminals and has not been registered, or if shells adapted to use in that particular weapon are found in the immediate vicinity. As stated above, the Thompson submachine gun, with wooden butt-stock removed, using ordinary .45 caliber Colt automatic pistol shells, is now used almost exclusively by criminals in the United States. Although these cartridges have a limited range, the bullets have satisfactory "stopping" effect at short range, and therefore answer the purpose of the gangster, besides being easily purchased, at any hardware or sporting goods store, without arousing suspicion. It was at first intended to make the presumption apply only to the .45 caliber guns and cartridges; but lest criminals evade the law by using a smaller caliber the act now specifies any pistol shell of caliber larger than .30 inch, or its metric equivalent of 7.63 millimeters. Few, if any, pistol cartridges are on the market exceeding .45 caliber, and no pistol cartridge of less than .30 caliber is made with sufficient range and stopping power to answer the purpose of the gangster.

To overcome any danger of a presumption arising against one who has legitimate use for a machine gun, such person need only either avoid the use of ordinary pistol shells, or else use a type of gun not readily transported or concealable. There are many such on the market, more effective for defensive purpose than the Thompson submachine gun.

The presumption contained in Section 5 [45-8-305] is often found vital to successful prosecution of criminals.

The act requires manufacturers to keep a register of all machine guns handled, but only for purpose of inspection by police officers. On the other hand, all machine guns of the prohibited type (adapted to use pistol cartridges of .30 or larger caliber) must be registered in the office of the secretary of state, or other state official. Any failure to register raises the presumption of possession for offensive or aggressive purpose. The act further permits, in Section 9, search for, and seizure of, machine guns of the prohibited type.

If speedily adopted in a sufficient number of states, the act will doubtless have a very beneficent effect, particularly through its registration requirements.

It was necessary to make this act supplementary to the Uniform Firearms Act because of the technical difference in describing firearms, as distinguished from the machine gun, and it will help the administration of the law as to the use of firearms to have this act separate and distinct, or at least supplementary to whatever laws may already have been enacted with reference to firearms.

Part Compiler's Comments

Preamble: The preamble attached to Ch. 581, L. 1999, provided: "WHEREAS, the Second Amendment to the Constitution of the United States provides that "the right of the people to keep and bear arms shall not be infringed"; and

WHEREAS, documents written by the founding fathers clearly indicate that the right to keep and bear arms includes the keeping and bearing of firearms for personal use and protection unrelated to the necessity of a well-regulated militia to the security of a free state; and

WHEREAS, Article II, section 12, of the Montana Constitution provides that the "right of any person to keep or bear arms in defense of his own home, person, and property . . . shall not be called in question"; and

WHEREAS, Article II, section 3, of the Montana Constitution grants all persons the inalienable right of defending their lives and liberties and protecting property; and

WHEREAS, the Legislature seeks to facilitate the exercise of the above rights, expedite the purchase of firearms, and further the protection of the lives and property of the people."

Annotator's Note: Sections 45-8-301 through 45-8-307 constitute the "Uniform Machine Gun Act" approved by the National Conference of Commissioners of Uniform State Laws in 1932 and adopted in the states of Maryland, South Dakota, Virginia, and Wisconsin. South Dakota and Wisconsin repealed the Act.

The entire original Uniform Act is no longer in the Code. Repealed in 1973 were § 94-3109, which dealt with obtaining a warrant to search for and seize machine guns, and § 94-3111, which stated that the short title for the act was the Uniform Machine Gun Act, sec. 32, Ch. 513, L. 1973. The following sections were repealed in 1999: 45-8-306, making presence of a machine gun in a room, boat, or vehicle evidence of possession or use by each person in that place; 45-8-308, requiring machine gun manufacturers to keep a register of each gun manufactured; and 45-8-309, requiring each machine gun to be registered annually with the state Department of Justice and making failure to register a presumption of possession for aggressive purposes.

45-8-301. Uniformity of interpretation.

Criminal Law Commission Comments

Source: Uniform Machine Gun Act of 1932.

Compiler's Comments

1999 Amendment: Chapter 466 deleted reference to 45-8-306, 45-8-308, and 45-8-309; and made minor changes in style. Amendment effective October 1, 1999.

45-8-302. Definitions.

Criminal Law Commission Comments

Source: Uniform Machine Gun Act of 1932.

Compiler's Comments

1999 Amendment: Chapter 466 in introductory clause deleted reference to 45-8-306, 45-8-308, and 45-8-309; in definition of machine gun substituted "firearm designed to discharge more than one shot by a single function of the trigger" for "weapon of any description by whatever name known, loaded or unloaded, from which more than six shots or bullets may be rapidly, automatically, or semiautomatically discharged from a magazine by a single function of the firing device"; and made minor changes in style. Amendment effective October 1, 1999.

Annotator's Note: The 1977 amendment inserted the numbered subdivision designation, and added the introductory phrase. The amendment also substituted "any forcible felony" in subdivision (2) for "murder, manslaughter, kidnapping, rape, mayhem, assault to do great bodily harm", substituted "and criminal trespass" in subdivision (2) for "housebreaking, breaking and entering, and larceny"; and made minor changes in style, phraseology, and punctuation.

For a discussion of the applicability of federal law regarding the possession of machine guns and machine gun parts, including applicability of the commerce clause and due process considerations, see U.S. v. Evans, 712 F. Supp. 1435, 46 St. Rep. 950 (D.C. Mont. 1989).

45-8-303. Possession or use of machine gun in connection with a crime.

Criminal Law Commission Comments

Source: Uniform Machine Gun Act of 1932.

Compiler's Comments

Annotator's Note: This statute is merely a recodification of the original Uniform Machine Gun Act provision. The minimum 20-year sentence indicates the legislative view as to the seriousness of the offense.

45-8-304. Possession or use of machine gun for offensive purpose.

Criminal Law Commission Comments

Source: Uniform Machine Gun Act of 1932.

Compiler's Comments

Annotator's Note: This section is merely a recodification of the original Uniform Machine Gun Act provision. As in the preceding section, the severe penalty for mere possession of a machine gun reflects the degree of danger they represent to society in the eyes of the Legislature.

45-8-305. Presumption of offensive or aggressive purpose.

Criminal Law Commission Comments

Source: Uniform Machine Gun Act of 1932.

Compiler's Comments

1999 Amendment: Chapter 466 deleted former subsections (1), (3), and (4) providing that possession or use of a machine gun was presumed to be for an offensive or aggressive purpose "when the machine gun is on premises not owned or rented for bona fide permanent residence or business occupancy by the person in whose possession the machine gun may be found", "when the machine gun is of the kind described in 45-8-309 and has not been registered as required in that section", and "when empty or loaded pistol shells of 30 (.30 in. or 7.63 mm.) or larger caliber which have been or are susceptible of being used in the machine gun are found in the immediate vicinity thereof"; and made minor changes in style. Amendment effective October 1, 1999.

Annotator's Note: Statutory presumptions in the criminal law aid the proof of certain crimes which otherwise would be very difficult to establish. The statute provides that a combination of "suspicious" facts will give rise to the presumption of possession or use of a machine gun for offensive or aggressive purpose. This reflects the policy of the law, which is to ease the task of law enforcement officers in effectively hindering the use of highly dangerous machine guns.

The 1973 amendment renumbered the section and redesignated § 94-3108(c) R.C.M. 1947, as § 94-3-208, R.C.M. 1947.

The 1977 amendment changed subsections (a) through (d) to (1) through (4) and deleted "an unnaturalized foreign born person, or" before "a person" in subsection (2). The amendment also made minor changes in phraseology and punctuation.

45-8-307. Exceptions.

Criminal Law Commission Comments

Source: Uniform Machine Gun Act of 1932.

Compiler's Comments

1999 Amendment: Chapter 466 in introductory clause deleted reference to 45-8-306, 45-8-308, and 45-8-309; in (3) after "machine gun" deleted "other than one adapted to use pistol cartridges of 30 (.30 in. or 7.63 mm.) or larger caliber"; and made minor changes in style. Amendment effective October 1, 1999.

Annotator's Note: This section is simply a recodification of the original Uniform Machine Gun Act provision. It allows the possession of machine guns within the collection or hobby context, as long as they are rendered inoperable. The section also necessarily allows the military to use machine guns; to prohibit their use by the military would probably render the act unconstitutional under the supremacy clause.

It is not clear what "scientific purpose" a machine gun may be put to, but if one exists, it also exempts the user from the operation of 45-8-301 through 45-8-307.

45-8-310. Policy.

Compiler's Comments

Effective Date: Section 6, Ch. 218, L. 2019, provided: "If approved by the electorate, [this act] is effective January 1, 2021." Approved November 3, 2020.

45-8-312. Enhanced permit to carry concealed weapon — temporary restricted enhanced permit for individuals 18 to 20 years of age.

Compiler's Comments

Effective Date: Section 6, Ch. 526, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 18, 2023.

45-8-313. Unlawful possession of firearm by convicted person.

Compiler's Comments

2021 Amendment: Chapter 386 inserted (1)(c) concerning a felony for which the person is currently required to register for the sexual or violent offender registry; and made minor changes in style. Amendment effective October 1, 2021.

Applicability: Section 6, Ch. 555, L. 1995, provided: "(1) [Section 2(1)] [45-8-313(1)] does not apply to a person convicted of an offense referred to in [section 2(1)] [45-8-313(1)] before [the effective date of this act] [effective October 1, 1995].

(2) [Section 3] [45-8-314] applies only to sentences imposed after [the effective date of this act] [effective October 1, 1995].

(3) [Section 1] [46-18-801] applies retroactively, within the meaning of 1-2-109."

45-8-314. Lifetime firearms supervision of certain convicted persons.

Compiler's Comments

Applicability: Section 6, Ch. 555, L. 1995, provided: "(1) [Section 2(1)] [45-8-313(1)] does not apply to a person convicted of an offense referred to in [section 2(1)] [45-8-313(1)] before [the effective date of this act] [effective October 1, 1995].

(2) [Section 3] [45-8-314] applies only to sentences imposed after [the effective date of this act] [effective October 1, 1995].

(3) [Section 1] [46-18-801] applies retroactively, within the meaning of 1-2-109."

45-8-315. Definition.

Compiler's Comments

2017 Amendment: Chapter 230 substituted "a firearm" for "any weapon mentioned in 45-8-316 through 45-8-318 and 45-8-321 through 45-8-328" and at end after "weapon" deleted "except that for purposes of 45-8-321 through 45-8-328, concealed weapon means a handgun or a knife with a blade 4 or more inches in length that is wholly or partially covered by the clothing or wearing apparel of the person carrying or bearing the weapon"; and made minor changes in style. Amendment effective October 1, 2017.

1991 Amendment: Near beginning, after "through", substituted "45-8-318 and 45-8-321 through 45-8-328 that is" for "45-8-319 which shall be" and after "the weapon" inserted "except that for purposes of 45-8-321 through 45-8-328, concealed weapon means a handgun or a knife with a blade 4 or more inches in length that is wholly or partially covered by the clothing or wearing apparel of the person carrying or bearing the weapon"; and made minor changes in style.

Annotator's Note: This section is simply a recodification of prior Montana law. No comparable section was found in any of the criminal laws of New York, California, Pennsylvania, or Illinois, but cases from those states which have defined the term do so in a way very similar to Montana's definition. For example, see People v. Colson, 14 Ill. App. 3d 375, 302 N.E.2d 409, 410 (1973); People v. May, 33 C.A.3d 888, 109 Cal. Rptr. 396 (1973).

45-8-316. Carrying concealed firearms — exemption.

Compiler's Comments

2021 Amendment: Chapter 3 inserted (3) concerning nonapplicability to persons eligible under state or federal law to possess firearms. Amendment effective February 18, 2021.

Severability: Section 13, Ch. 3, L. 2021, was a severability clause.

2017 Amendment: Chapter 230 in (1) near middle substituted "firearm" for "dirk, dagger, pistol, revolver, slingshot, sword cane, billy, knuckles made of any metal or hard substance, knife having a blade 4 inches long or longer, razor, not including a safety razor, or other deadly weapon"; in (2) after "individual's person" substituted "a firearm" for "any of the weapons described in subsection (1)"; and made minor changes in style. Amendment effective October 1, 2017.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: The section, as it existed before the 1977 amendments, was enacted in 1919. A very similar version had been in effect since 1887. In 1977, two amendments to this section were passed. The Code Commissioner made a composite section embodying the changes made by both amendments since they did not appear to be in conflict.

The amendments substituted "prison" for "penitentiary" and minor changes in phraseology, punctuation, and style were adopted by Chapter 359. Chapter 411 deleted "within the limits of any city or town" after "every person who" at the beginning of the section; deleted "or may be punished by imprisonment in the state prison for a period not exceeding five years" at the end of the former section; designated the former section as subsection (1); and added subsection (2).

Formerly this statute only proscribed carrying concealed weapons in town, while R.C.M. 1947, § 94-3526 forbade carrying concealed weapons outside the city limits. The 1977 amendment combined the two and § 94-3526 was repealed by sec. 2, Ch. 411, L. 1977.

Case Notes

Investigatory Stop Based on Suspicion of Impersonation of Police Officer: Police stopped Bar-Jonah in the early hours of the morning near a school wearing a police-style jacket and stocking cap. The officer had prior knowledge of Bar-Jonah's history of crimes against children. Bar-Jonah asserted that he was simply walking a few blocks from his home, minding his own business, that the officer lacked a particularized suspicion of criminal activity to warrant the investigatory stop in violation of Bar-Jonah's right against unreasonable search and seizure, and that any evidence should thus be suppressed. The District Court denied the motion to suppress, and the Supreme Court affirmed. Relying on Fla. v. Bostick, 501 US 429 (1991), the District Court found that the initial stop was not an investigatory stop but merely a police-citizen encounter, but the Supreme Court held that the stop was not a mere police-citizen encounter because Bar-Jonah had no reason to believe that he could leave. Nevertheless, the officer reasonably suspected that Bar-Jonah had impersonated or was about to impersonate a police officer, and coupled with the officer's knowledge of Bar-Jonah's criminal history, the officer had a particularized suspicion of criminal activity warranting the investigative stop. Once Bar-Jonah was lawfully detained, a search of Bar-Jonah's person was justified based on Bar-Jonah's statement that he was carrying a stun gun. St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

Increased Penalty for Second Conviction Held Constitutional: The defendant was convicted of carrying a concealed weapon, was sentenced under the provisions allowing an increased penalty for persons with prior felony convictions, and appealed his sentence, claiming the statute violated Art. II, sec. 28, Mont. Const., providing for restoration of rights upon completion of state supervision. On appeal, the Supreme Court held that Art. II, sec. 28, only applied to ensure restoration of such prior civil rights as the right to serve on a jury and the right to vote and to hold public office, and did not prevent the Legislature or the courts from taking the defendant's background and history into account when he was sentenced for a violation. The court also held that the statute's implicit classification of felons and nonfelons for the purposes of sentencing was not invidiously discriminatory in violation of the constitutional guarantees to equal protection of the laws because it was based upon a reasonable legislative purpose and an assumption that previous felons present a greater danger to society than the ordinary person. St. v. Sanders, 208 M 283, 676 P2d 1312, 41 St. Rep. 338 (1984).

No Jury Finding of Previous Conviction Necessary for Increased Penalty: The defendant was convicted of carrying a concealed weapon, and after stipulating to his prior conviction and being sentenced to an increased penalty because of that conviction, argued on appeal that the District Court had no jurisdiction to sentence him to an increased penalty under subsection (2) of 45-8-316 because the jury had not found the fact of his previous felony. On appeal the Supreme Court held, under the rationale of St. v. Nelson, 178 M 280, 583 P2d 435 (1978), that the prerequisites for the heavier sentence were not an element of the crime and that no finding by the jury on the issue of the defendant's previous conviction was therefore necessary. St. v. Sanders, 208 M 283, 676 P2d 1312, 41 St. Rep. 338 (1984).

Constitutionality: This section, as in effect when defendant committed the crime of carrying a concealed weapon, was not unconstitutionally vague in that the judge could sentence the offense as either a felony or a misdemeanor. St. v. Maldonado, 176 M 322, 578 P2d 296 (1978), distinguished in St. v. Trimmer, 214 M 427, 694 P2d 490, 42 St. Rep. 77 (1985).

Nature of Punishment: A 20-year sentence imposed upon conviction for carrying a concealed weapon did not constitute cruel and unusual punishment as excessive and disproportionate to the offense because defendant was being sentenced as a persistent felony offender. St. v. Maldonado, 176 M 322, 578 P2d 296 (1978).

Permit: In assault prosecution based on use of a gun taken by defendant from his pocket, it was not error to instruct jury that it was a crime to carry a concealed weapon without a permit, even in the absence of evidence that defendant did not have a permit. Existence of a permit would have been an affirmative defense. St. v. Lewis, 157 M 452, 486 P2d 863 (1971).

Attorney General's Opinions

Authority of Railroad Peace Officers to Carry Concealed Weapons: Special peace officers of a class I railroad are exempt from the prohibition in this section against carrying concealed weapons, but they may carry a concealed weapon only when on duty and when necessary for protection of the property of the class I railroad by which they are employed. The special peace officer shall follow the permit procedure of 45-8-319 (repealed and replaced with 45-8-321 through 45-8-328) in order to carry a concealed weapon at any other time. 43 A.G. Op. 12 (1989).

45-8-318. Possession of deadly weapon by prisoner or youth in facility.

Compiler's Comments

2021 Amendment: Chapter 339 in (1)(b) before "correctional facility" deleted "state youth". Amendment effective October 1, 2021.

1999 Amendment: Chapter 491 in (1)(a) after "person committed to" substituted "a state prison" for "the Montana state prison"; and in (1)(a)(i) substituted "a state prison" for "the state prison". Amendment effective April 27, 1999.

1997 Amendment: Chapter 168 in (1), at beginning of introductory clause, substituted "A person commits the offense of possession of a deadly weapon by a prisoner if the person" for "Every prisoner committed to the Montana state prison or incarcerated in a county jail, city jail, or regional jail who, while at the state prison or a jail, while being conveyed to or from the Montana state prison or a jail, while at a state prison farm or ranch, while being conveyed to or from any such place, or while under the custody of prison or jail officials, officers, or employees", after "carries" deleted "upon his person", and at end substituted "while the person is" for "is guilty of a felony"; inserted (1)(a) and (1)(b) outlining categories of persons to whom the offense will apply; in (2), after "15 years", deleted "such term of imprisonment to commence from the time he would otherwise have been released from jail or prison, or shall be punished"; inserted (3) regarding court jurisdiction; and made minor changes in style.

Pursuant to sec. 78, Ch. 550, L. 1997, a coordination instruction, the Code Commissioner in (3) substituted "the charge is filed in" for "a youth's case is transferred to".

1987 Amendment: Throughout section inserted references to "jail"; in (1), near beginning, inserted "or incarcerated in a county jail, city jail, or regional jail" and inserted "purposely or knowingly" before "possesses"; and made minor changes in phraseology.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section is merely a reenactment of preexisting Montana law. It appears to be derived from California. Cal. Penal Code, § 4502 (West). The present section was enacted after the killing of the Deputy Warden at the state prison in 1959. A companion statute, also enacted in reaction to the events at the prison, made it a felony for a prisoner to hold a hostage. Under the new code this provision is incorporated in the aggravated kidnapping section, 45-5-303.

Case Notes

Sentence Under Plea Bargain Within Statutory Maximum Not Cruel and Unusual Punishment — Cruel and Unusual Punishment Claim Not Raised on Direct Appeal Barred in Postconviction Proceedings: In exchange for dismissal of a charge of assault with a bodily fluid, Basto entered a plea agreement to plead guilty of possession of a deadly weapon by a prisoner. Basto was sentenced to 5 years in prison and subsequently filed a timely petition for postconviction relief on grounds that the sentence was disproportionately severe when compared to the sentences of other defendants in the case, constituting cruel and unusual punishment. The state responded that there is no guarantee of proportionality under the constitutional prohibition against cruel and unusual punishment and that even if there were, Basto's sentence was still within statutory parameters. The Supreme Court agreed with the state. A sentence that is within maximum statutory guidelines does not violate the constitutional prohibition against cruel and unusual punishment. Basto received the sentence that he bargained for, and there was nothing in the plea agreement that indicated that Basto would receive the same sentence as the other defendants. Further, Basto failed to raise any cruel and unusual punishment argument on direct appeal, so the argument was barred in postconviction proceedings under 46-21-105. Basto v. St., 2004 MT 257, 323 M 80, 97 P3d 1113 (2004). See also St. v. DeSalvo, 273 M 343, 903 P2d 202 (1995), and St. v. Mingus, 2004 MT 24, 319 M 349, 84 P3d 658 (2004).

No Prejudice From Counsel's Failure to Notify Defendant of Minimum Sentence — Claim of Ineffective Assistance of Counsel Not Justifying Postconviction Relief — Petition Properly Denied as Matter of Law: In a petition for postconviction relief, Cobell asserted that he received ineffective assistance of counsel because his attorney did not inform him of the minimum 5-year imprisonment penalty for possession of a deadly weapon by a prisoner when Cobell entered a plea agreement wherein the state would recommend the minimum sentence in exchange for Cobell's guilty plea. The District Court summarily dismissed the petition, and the Supreme Court affirmed. The information charging Cobell informed him of the penalty, and Cobell accepted the plea agreement understanding that the sentencing court was free to reject the agreement and impose any appropriate sentence. Given the uncertainty in the agreement and the fact that Cobell received the benefit of the plea bargain, Cobell failed to show that he was prejudiced by counsel's alleged error. Absent a showing of prejudice, the District Court did not err in dismissing Cobell's petition for postconviction relief as a matter of law. St. v. Cobell, 2004 MT 46, 320 M 122, 86 P3d 20 (2004), followed in Lout v. St., 2005 MT 93, 326 M 485, 111 P3d 199 (2005).

Sharpened Eyeglass Armpiece as Dangerous Weapon: Evidence that Birthmark was an inmate at the state prison and that he was found in possession of an eyeglass armpiece that had been altered and sharpened into an object classified as a dangerous weapon by prison authorities was sufficient to support conviction under this section. St. v. Birthmark, 253 M 526, 833 P2d 1103, 49 St. Rep. 583 (1992).

Sufficient Evidence of Possession of Shank by State Prison Inmate: Three correctional officers testified that they saw a homemade knife, or shank, in the possession of a state prison inmate who refused to cooperate during a search of his cell. The inmate denied having a shank in his cell, and another inmate testified that the shank was planted by the correctional officers. Taking into account the witnesses' credibility and the chain of custody following seizure of the shank by the officers, evidence was sufficient to support the jury verdict of possession of a deadly weapon by a prisoner. St. v. Bousquet, 248 M 53, 808 P2d 506, 48 St. Rep. 320 (1991).

No Prejudicial Atmosphere in County Where State Prison Located: Defendant was charged with possession of a deadly weapon while an inmate at the state prison. He sought change of venue, contending that prejudice in the county where the prison was located was so great that a fair trial could not be had. The formation of a Citizen Protection Association and the fact that a large number of prison employees lived in the county did not constitute a prejudicial atmosphere. Also, upon review of the record of voir dire, the Supreme Court concluded an impartial jury had been empaneled, belying defendant's contention that all juries in the county were unalterably prejudiced. St. v. Palmer, 223 M 25, 723 P2d 956, 43 St. Rep. 1503 (1986).

Double Jeopardy: The charge of possession of a weapon by a prisoner does not constitute an offense included in the charge of aggravated assault. Therefore, a conviction on both charges does not violate prohibitions against double jeopardy. St. v. Perry, 180 M 364, 590 P2d 1129 (1979).

Metal Pipe as a Weapon: "Billy", as used in this section, means a club. A metal pipe wielded by defendant was clearly a club within the common understanding of the term. St. v. Perry, 180 M 364, 590 P2d 1129 (1979).

Incriminating Statements at Prison Disciplinary Hearing: When defendant uttered incriminating statements at a disciplinary hearing involving allegations of possession of a weapon by a prisoner, without benefit of Miranda cautionary statements, subsequent admission of the statements into evidence at defendant's trial was a violation of the privilege against self-incrimination. St v. Harris, 176 M 70, 576 P2d 257 (1978).

Admissibility and Sufficiency of Evidence: Where there was no evidence that defendant possessed a weapon except during an assault, he cannot properly be sentenced both under conviction for assault with a deadly weapon and under conviction for possession of same. People v. Duran, 16 Cal.3d 282, 27 Cal. Rptr. 618, 545 P2d 1322 (1976).

In General: Violation of this section does not depend on proof of guilty intent; its prohibition is absolute. People v. Evans, 2 C.A.3d 877, 82 Cal. Rptr. 877 (1969). California statutes providing for enhanced penalty for prisoners found guilty of possession of a deadly weapon or convicted of assault with a deadly weapon while undergoing life sentence require only that prisoner be serving a sentence, and it is not necessary that conviction and sentence be valid ones. Wells v. Calif., 352 F.2d 439 (9th Cir. 1969). Proof of knowing possession is sufficient for conviction under this section, and proof of intent or purpose for which the instrument was possessed is not necessary. People v. Steely, 266 C.A.2d 591, 72 Cal. Rptr. 368 (1968). Prison disciplinary measures taken against prisoner who allegedly possessed a knife did not bar subsequent prosecution under this section. People v. Vatelli, 15 C.A.3d 54, 92 Cal. Rptr. 763 (1971).

Burden of Proof: In prosecution under 4502, Cal. Penal Code, defendant has burden of proving as matter of defense that he did not carry weapon in violation of this section. People v. Wells, 68 C.A.2d 476, 156 P2d 979 (1945).

45-8-321. Permit to carry concealed weapon.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 474, L. 2023. Amendment effective October 1, 2023.

2017 Amendment: Chapter 171 in (1) in third sentence near beginning after "citizen" inserted "or permanent lawful resident". Amendment effective April 7, 2017.

2015 Amendment: Chapter 161 in (1)(g) and (2) substituted "mentally disordered" for "mentally defective". Amendment effective April 1, 2015.

2009 Amendment: Chapter 332 in (1)(c) at beginning inserted "subject to the provisions of subsection (6)"; in (1)(c)(ii) near middle after "homicide" deleted "violence, bodily or"; inserted (6) providing that certain convicted felons whose constitutional rights have been restored are entitled to concealed weapons permits if otherwise eligible; and made minor changes in style. Amendment effective April 27, 2009.

Preamble: The preamble attached to Ch. 332, L. 2009, provided: "WHEREAS, the Legislature declares that:

(1) the right of Montanans to defend their lives and liberties, as provided in Article II, section 3, of the Montana Constitution, and their right to keep or bear arms in defense of their homes, persons, and property, as provided in Article II, section 12, of the Montana Constitution, are fundamental and may not be called into question;

(2) the use of firearms for self-defense is recognized within the right reserved to the individual people of Montana in Article II, section 12, of the Montana Constitution;

(3) self-defense is a natural right under section 1-2-104, MCA, and is included in sections 49-1-101 and 49-1-103, MCA;

(4) the lawful use of firearms for self-defense is not a crime or an offense against the people of the state;

(5) in a criminal case in which self-defense is asserted, the burden of proof is as provided in [section 10] [actually section 9, Ch. 332, L. 2009, enacting 46-16-131];

(6) in self-defense, the use of justifiable force discourages violent crime and prevents victimization; and

(7) the purpose of [sections 1 through 3] [enacting 45-3-110 through 45-3-112] is to clarify and secure the ability of the people to protect themselves."

1999 Amendment: Chapter 581 in (3)(e) after "evidence" deleted "that the sheriff may or may not accept" and at end substituted "firearms, including handguns" for "handguns". Amendment effective October 1, 1999.

1995 Amendment: Chapter 408 at end of (2) inserted requirement that if an application is denied, the Sheriff must give the applicant a written statement of the reasonable cause upon which the denial is based, unless the applicant is the subject of a criminal investigation; inserted (3)(e) relating to evidence that the applicant was found during military service to be qualified to operate handguns; inserted (5) allowing firearm familiarity to be demonstrated by passing to the satisfaction of the Sheriff or the Sheriff's designee a physical test in which the applicant demonstrates familiarity with a firearm; and made minor changes in style.

Existing Permits: Section 12, Ch. 759, L. 1991, provided: "A permit to carry a concealed weapon issued before October 1, 1991, is valid until the expiration date of the permit." The law relating to carrying of concealed weapons is effective October 1, 1991, and could not apply retroactively to permits issued prior to that date.

Case Notes

Issuance of Concealed Weapon Permit to Statutorily Specified Persons Prohibited: The federal District Court certified the question to the Supreme Court whether this section prohibits a county sheriff from issuing a concealed weapon permit to a person described in 45-8-321(1)(c) or whether a sheriff has discretion to issue a permit to a person in that category. The Supreme Court held that, based on the language and structure of this section, the eight categories listed under subsections (1)(a) through (1)(h) describe applicants to whom issuance of a concealed weapon permit is prohibited, so a county sheriff is prohibited from issuing a concealed weapon permit to a person described in 45-8-321(1)(c). Van der hule v. Mukasey, 2009 MT 20, 349 M 88, 217 P3d 1019 (2009).

No Specified Time Within Which Denial of Concealed Weapon Permit Must Issue — Writ of Mandate Properly Denied: Smith applied for a concealed weapon permit in October 1995, but the Sheriff denied the application in April 1996. Smith reapplied in April 1997, and the second application was denied in August 1997. Smith applied for a writ of mandate, which was also denied. Smith contended that because he was qualified under subsection (1) of this section, the Sheriff had 60 days within which to exercise the discretion, pursuant to subsection (2) of this section, or else Smith was entitled to a permit as a matter of law. The District Court concluded that the Sheriff had no legal duty to issue Smith a permit. The Supreme Court agreed because subsection (2) of this section describes the circumstances in which a Sheriff may deny a permit but does not specify a time within which a denial must issue. Further, it was not error for the District Court to deny the writ of mandate or mandamus because there was no clear legal duty by the Sheriff, acting discretionarily, to issue the permit. Smith v. Missoula County, 1999 MT 330, 297 M 368, 992 P2d 834, 56 St. Rep. 1318 (1999), distinguishing Phillips v. Livingston, 268 M 156, 885 P2d 528, 51 St. Rep. 1227 (1994). See also Becky v. Butte-Silver Bow School District No. 1, 274 M 131, 906 P2d 193, 52 St. Rep. 1154 (1995).

Sheriff Entitled to Consider Confidential Criminal Justice Information in Deciding Whether to Grant Permit for Concealed Weapon: Smith was involved in an incident in 1993 resulting in charges for a number of felonies to which he pleaded guilty. Smith received a deferred imposition of sentence, and after satisfying the conditions of the sentence, the charges were dismissed. In 1995 and 1997, Smith applied for a permit to carry a concealed weapon, but each request was denied by the County Sheriff because of the 1993 incident and because of Smith's criminal history. Smith contended that the Sheriff improperly relied on evidence from Smith's criminal file to establish reasonable cause to deny the applications, because the District Court had dismissed the 1993 charges and ordered the records expunged. However, 46-18-204 does not provide for record expungement when a charge is dismissed, but rather provides that the record be considered confidential criminal justice information. Pursuant to 44-5-303, the Sheriff was entitled to receive the information and to consider it when exercising the discretion in this section regarding whether or not to grant a concealed weapon permit. Smith v. Missoula County, 1999 MT 330, 297 M 368, 992 P2d 834, 56 St. Rep. 1318 (1999).

45-8-322. Application, renewal, permit, and fees.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 290, L. 2023. Amendment effective October 1, 2023.

2019 Amendments — Composite Section: Chapter 44 in (5) substituted "45-8-321 through 45-8-324" for "45-8-321 through 45-8-325". Amendment effective October 1, 2019.

Chapter 121 in (1) made reporting of an applicant's social security number optional; and made minor changes in style. Amendment effective October 1, 2019.

2015 Amendment: Chapter 134 in (4) at end inserted "A renewal does not require repeat fingerprinting." Amendment effective October 1, 2015.

2013 Amendment: Chapter 111 inserted (7) concerning confidential application material. Amendment effective October 1, 2013.

2007 Amendment: Chapter 180 in (3) near end of third sentence after "driver's license" inserted "number" and inserted "or tribal identification card number"; and made minor changes in style. Amendment effective October 1, 2007.

1999 Amendment: Chapter 581 in (1) in form in section requiring reasons for requesting permit at beginning of caption deleted "IN COMPLETE DETAIL"; inserted fourth sentence in (3) providing that submitting pictures of front of military identification card and driver's license by member of armed forces satisfies requirement to submit picture; in (4) before "background" deleted "criminal record and" and after "applicant" inserted "to determine whether the applicant is eligible for a permit under 45-8-321"; and made minor changes in style. Amendment effective October 1, 1999.

Attorney General's Opinions

Depositing Concealed Weapon Permit Fees: A county attorney requested an Attorney General opinion on the proper deposit of concealed weapon permit fees. Section 45-8-322 requires Sheriffs to collect fees for issuing and renewing the permits, allows Sheriffs to collect fees for fingerprinting, and allows the Sheriff to retain the fees to implement certain concealed weapon permit statutes. An audit in the County Attorney's county identified that the County Sheriff was depositing the fees into an account not controlled by the county. The Attorney General noted that 7-4-2511 requires salaried county officers to pay into the county treasury all fees allowed by law, and that 7-6-2111(3) requires County Treasurers to keep separate and distinct accounts for separate funds or specific appropriations. The Attorney General opined that concealed weapon permit fees must be deposited in the county treasury: in the general fund if the Sheriff does not intend to use the funds to implement concealed weapon permit statutes, and in a separate and distinct account if the Sheriff does intend to use the funds to implement the statutes. 57 A.G. Op. 5 (2020).

45-8-323. Denial of renewal — revocation of permit.

Compiler's Comments

2015 Amendment: Chapter 134 at end inserted "A decision to deny an applicant a renewal must be made within 60 days after the filing of an application." Amendment effective October 1, 2015.

45-8-324. Appeal.

Compiler's Comments

1995 Amendment: Chapter 408 in first sentence inserted "which may consider and determine facts as well as law and which is not bound by any factual, legal, or other determination of the sheriff"; and at end inserted "To the extent applicable, Title 25, chapter 33, governs the appeal."

45-8-326. Immunity from liability.

Compiler's Comments

Immunity From Suit: Section 13, Ch. 759, L. 1991, mandating a two-thirds vote of each house of the Legislature to enact 45-8-326, which granted a Sheriff, employee of a Sheriff's office, or county immunity from suit by a person claiming death or injury or property damage arising from improper granting of, renewal of, or failure to revoke a permit to carry a concealed weapon, was not codified because the section was purely procedural.

45-8-327. Carrying concealed weapon while under influence.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

45-8-328. Carrying concealed weapon in prohibited place — penalty.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 526, L. 2023. Amendment effective May 18, 2023.

2021 Amendment: Chapter 3 in (1) at beginning substituted "Except for a person issued a permit pursuant to 45-8-321 or a person recognized pursuant to 45-8-329" for "Except for legislative security officers authorized to carry a concealed weapon in the state capitol as provided in 45-8-317(1)(k)"; deleted former (1)(b) and (1)(c) (see 2021 Session Law for former text); in (2) deleted former first sentence that read: "It is not a defense that the person had a valid permit to carry a concealed weapon"; and made minor changes in style. Amendment effective February 18, 2021.

Severability: Section 13, Ch. 3, L. 2021, was a severability clause.

2011 Amendment: Chapter 384 in (1) inserted exception clause; and made minor changes in style. Amendment effective October 1, 2011.

1999 Amendment: Chapter 572 in (1)(a) substituted "portions of a building used for state or local government offices and related areas in the building that have been restricted" for former text that read: "a building owned or leased by the federal, state, or local government"; in (1)(b) near beginning of introductory clause after "similar institution" inserted "during the institution's normal business hours. It is not an offense under this section to carry a concealed weapon while:

(i) using an institution's drive-up window, automatic teller machine, or unstaffed night depository; or

(ii) at or near a branch office of an institution in a mall, grocery store, or other place unless the person is inside the enclosure used for the institution's financial services or is using the institution's financial services"; and made minor changes in style. Amendment effective October 1, 1999.

45-8-329. Concealed weapon permits from other states recognized.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 104, L. 2023. Amendment effective April 18, 2023.

1999 Amendment: Chapter 476 substituted (1) through (3) regarding validity of concealed weapon permit from another state for former text that read: "The governor may negotiate concealed weapon permit reciprocity agreements with other states that have concealed weapon permit laws similar to those of Montana"; in (4) at end after "pursue" substituted "concealed weapon permit issues" for "reciprocity issues and agreements"; and made minor changes in style. Amendment effective October 1, 1999.

45-8-330. Exemption of concealed weapon permittee from federal handgun purchase background check and waiting period.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 526, L. 2023. Amendment effective May 18, 2023.

Purported Enactment — Coordination Instruction: Section 3, Ch. 289, L. 1995, provided: "If House Bill No. 232 is passed and approved with a provision exempting a concealed weapon permittee from the federal handgun purchase background check and 5-day waiting period, then [this act] [approved as Ch. 289, L. 1995] is void." House Bill No. 232 was approved April 13, 1995, as Ch. 408, L. 1995, and included a section exempting a concealed weapon permittee from the federal handgun purchase background check and 5-day waiting period; therefore, sec. 1, Ch. 289, L. 1995, which purported to enact a section waiving the 5-day handgun purchase waiting period, is void.

Reference in Text: The reference in subsection (1) to 18 U.S.C. 921 through 925A is to part of the federal statute commonly known as the "Brady Bill".

45-8-332. Definitions.

Compiler's Comments

Name Change — Code Commissioner Correction: Section 1, Ch. 706, L. 1991, provided: "(1) The name of the state fire marshal is changed to the state fire prevention and investigation program of the department of justice.

(2) Unless inconsistent with [sections 1 through 36] [Ch. 706, L. 1991], wherever the term "state fire marshal" or "fire marshal" appears in the Montana Code Annotated, the code commissioner shall change the term to the "state fire prevention and investigation program of the department of justice", "fire prevention and investigation program" (of the department of justice), or "program", as appropriate. The code commissioner shall also conform internal references and grammar to these changes". As directed, the Code Commissioner has changed the term, as appropriate, wherever it appears in this section. Amendment effective April 29, 1991.

1985 Amendment: In (2) substituted "rules adopted by the state fire marshal pursuant to 50-3-102(3)" for "50-38-101".

Annotator's Note: Statutes relative to the noncriminal regulation of explosives are now in Title 50, ch. 38. This section and 45-8-334 were formerly a part of that chapter [formerly Title 69, ch. 19, R.C.M. 1947], but were transferred to the criminal code in 1973. At the same time, R.C.M. 1947, § 94-6-105 [now M.C.A. 1978, § 45-8-335], dealing with possession of explosives, was amended and transferred to this section of the criminal code. Two new statutes, R.C.M. 1947, §§ 94-8-209.4 and 94-8-209.5 [45-8-336 and 45-8-337], on possession of a silencer and possession as evidence of unlawful purpose, were enacted and R.C.M. 1947, §§ 94-8-223 through 94-8-225 were repealed. Those statutes dealt with sale and manufacture of silencers and explosives and the presumption to be derived from possession thereof, and were, therefore, substantively similar to statutes transferred or added to the code at the time. These sections are, therefore, essentially a recodification of prior Montana law on the subject. 1977 amendment added "similar" before "chemical substance" in (1)(a) and (1)(d), and made minor stylistic changes.

Attorney General's Opinions

"Explosives" Not to Include Small Arms Ammunition or Fireworks: The term "explosives" in 45-5-623 does not include small arms ammunition or fireworks permitted to be sold to the public under 50-37-104. 42 A.G. Op. 83 (1988).

45-8-333. Reckless or malicious use of explosives.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This section was not part of the criminal code of 1973, and did not become part of it until the recodification of the Montana Code Annotated in 1978. Formerly found in Title 69, ch. 19 of R.C.M. 1947, it is merely a recodification of preexisting Montana law.

Case Notes

Injured Employee's Remedies: Plaintiff's complaint, alleging that a violation of the penal statute abrogates an employer's immunity from a common-law action where the injured employee is covered by workers' compensation, fails to make a claim for relief if it does not allege intentional injury in the sense of a deliberate infliction of harm by the defendant. Enberg v. Anaconda Co., 158 M 135, 489 P2d 1036 (1971).

45-8-334. Possession of destructive device.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This statute is merely a recodification of preexisting Montana law, formerly codified in the section of the code dealing with noncriminal regulation of explosives, R.C.M. 1947, Title 69, ch. 19 [Title 50, ch. 38]. It is substantially similar to Cal. Penal Code, § 12303.2 (West).

The amendment by the 1977 Legislature removed "or any explosive" after "destructive device" in subsection (1); replaced "the offense of possession of a destructive device" at the end of subsection (1) with "a felony"; added "(2)" before the penalty clause; added "A person convicted of the offense of possession of a destructive device" to subsection (2); replaced "imprisoned" in subsection (2) with "punishable by imprisonment"; and made minor stylistic changes.

45-8-335. Possession of explosives.

Criminal Law Commission Comments

Source: Ill. C.C. 1962, Chapter 38, § 20-2.

This section is intended to consolidate R.C.M. 1947, section 94-3304, "Destruction of buildings by explosive—punishment", and the various applicable provisions included in Title 69, ch. 19 [now Title 50, ch. 38], Explosives, Regulation of Manufacture, Storage and Sale. The act is prohibited only when it is done with the intent to commit an offense or with knowledge that another intends to use the explosives to commit an offense.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section was amended in 1977. The amendment added "buys, or sells" and "flammable material" in subsection (1); added "similar" before "device" in subsection (1); added "material" in subsections (1)(a) and (1)(b); and made minor stylistic changes. Section 69-1916, R.C.M. 1947, prohibited the possession of shells or bombs for unlawful use.

Case Notes

Not Necessary to Allege Every Element of Offense to Support Finding of Probable Cause for Search Warrant: A search warrant application alleged that Meyer violated this section by illegally possessing explosives. Meyer contended that the application was insufficient because it did not allege a violation of every element of this section, so probable cause did not exist. The Supreme Court disagreed. Probable cause to believe that an offense has been committed is a separate question from whether probable cause exists to search a suspect's residence, and evidence sufficient to support probable cause for a warrant is significantly less than that required to support a conviction. In this case, the warrant application stated facts supporting probable cause to believe that contraband connected with the offense of illegal possession of explosives would be found at Meyer's residence, described with particularity the place to be searched and what was to be seized, was based on observations of a reliable informant, and alleged a specific timeframe related by the informant as to when the continuing possession occurred. Under the totality of the circumstances, the application was sufficient when viewed on its four corners to support a finding of probable cause. St. v. Meyer, 2004 MT 272, 323 M 173, 99 P3d 185 (2004).

Amended Information Not Violative of Double Jeopardy Guarantee: Dixon built a pipe bomb and used it to blow up a traffic sign. Dixon pleaded guilty to criminal endangerment, possession of a destructive device, and criminal mischief. An amended information was filed, dropping the criminal endangerment charge to negligent endangerment and changing the possession of a destructive device to possession of explosives. Dixon pleaded not guilty and moved to dismiss, contending that he was placed in double jeopardy by the amended information. The District Court concluded that under Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932), the amended information did not violate Dixon's double jeopardy rights because each offense charged required proof of a fact that the other offenses did not. The Supreme Court affirmed, finding that Dixon was not subjected to multiple prosecutions for the same offense and did not receive multiple punishments for the same offense, nor was his sentence enhanced on the basis of a factor for which he had already received punishment. Dixon's right against double jeopardy was not abridged. St. v. Dixon, 2000 MT 82, 299 M 165, 998 P2d 544, 57 St. Rep. 354 (2000).

Explosives Possession Statute Not Overbroad or Vague: Dixon built a pipe bomb and used it to blow up a traffic sign. Dixon pleaded guilty to criminal endangerment, possession of a destructive device, and criminal mischief. An amended information was filed, dropping the criminal endangerment charge to negligent endangerment and changing the possession of a destructive device charge to possession of explosives. Dixon pleaded not guilty and moved to dismiss, contending that the explosives charge was unconstitutionally overbroad and vague, but the motion to dismiss was denied. On appeal, the Supreme Court determined that this section is not overbroad because it does not reach a substantial amount of constitutionally protected conduct. Dixon did not have a constitutional right to manufacture and possess pipe bombs, and the prohibition against possessing explosives for the purpose of committing an offense did not reach a substantial amount of constitutionally protected conduct. Further, the statute could not be considered vague simply because the word "explosives" is not defined. A pipe bomb clearly falls within a reasonable understanding of an explosive, and a reasonable person of average intelligence would clearly understand that using a pipe bomb to destroy public property falls within the scope of the statute. The law provides sufficient guidelines to prevent arbitrary and discriminatory enforcement and is not vague simply because Dixon could have been charged with misdemeanor reckless or malicious use of explosives rather than felony possession of explosives. Thus, Dixon lacked standing to make a facial challenge to the statute, and his conviction was affirmed. St. v. Dixon, 2000 MT 82, 299 M 165, 998 P2d 544, 57 St. Rep. 354 (2000).

Statute Regarding Conviction for Crime of Preparation Not Prohibitive of Charging Multiple Offenses Arising From Same Transaction: Dixon built a pipe bomb and used it to blow up a traffic sign. Dixon pleaded guilty to criminal endangerment, possession of a destructive device, and criminal mischief. An amended information was filed, dropping the criminal endangerment charge to negligent endangerment and changing the possession of a destructive device to possession of explosives. Dixon pleaded not guilty and moved to dismiss, contending that the amended information violated 46-11-410(2)(b) because the charge of possession of explosives is a crime of preparation. The Supreme Court noted that although 46-11-410(2) prohibits the state from convicting a defendant of more than one offense if one offense consists only of a form of preparation to commit the other, 46-11-410(1) expressly allows a person to be charged with and prosecuted for multiple offenses arising out of the same transaction. Dixon was not convicted of multiple offenses, so 46-11-410 was not violated. St. v. Dixon, 2000 MT 82, 299 M 165, 998 P2d 544, 57 St. Rep. 354 (2000).

Possession of Explosives and Criminal Mischief — Neither an Inchoate Crime: Wolfe argued that he had been subjected to double jeopardy in being convicted of both possession of explosives and criminal mischief. The Supreme Court held that the statute prohibiting double jeopardy applied only to inchoate crimes and that neither of the two crimes Wolfe was convicted of was inchoate. The Supreme Court also held that under the test used in Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932), Wolfe had not been subjected to double jeopardy. St. v. Wolfe, 250 M 400, 821 P2d 339, 48 St. Rep. 1001 (1991).

Absence of Victim's Consent: Section 94-8-223, R.C.M. 1947 (since repealed), was not unconstitutionally vague and ambiguous in failing to specify that the destruction of person or property be without the consent of the victims nor was it impliedly repealed by recent legislation dealing with criminal conduct by use of explosives; thus the section was effective when the offense was committed, although subsequently expressly repealed. St. v. McBenge, 175 M 362, 574 P2d 260 (1978).

Information or Indictment: When the State charges that on a certain day at a certain time defendant had possession of explosives with intent that the same be used for the destruction of named persons and property, clearly the facts constituting the offense are stated so that a person of common understanding would know what is intended and the information is therefore sufficient and should not have been quashed. St. v. McBenge, 175 M 362, 574 P2d 260 (1978).

In General: Possession of explosives with intent to use them for unlawful purpose gives rise to presumption that explosives were procured for that purpose. People v. Catuara, 358 Ill. 414, 193 N.E. 199 (1935).

Admissibility and Sufficiency of Evidence: Sale of bombs where seller had reasonable grounds to believe buyer intended unlawful use completed offense, though buyer's intention be lawful. People v. Ficke, 343 Ill. 367, 175 N.E. 543 (1931).

45-8-336. Possession of silencer.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: This statute replaces R.C.M. 1947, §§ 94-8-223 and 94-8-224, which prohibited the possession, manufacture, sale or transport of any Maxim silencer or any bomb. The part of the old statute relating to bombs is now covered by 45-8-333 through 45-8-335.

Case Notes

Constitutionality: R.C.M. 1947, section 94-8-223 which dealt with the possession, sale, or manufacture of silencers and explosives and which is in substance similar to 45-8-335 and 45-8-336, was held not to be unconstitutionally vague because it did not specify that the destruction of person or property be without consent of the victim. St. v. McBenge, 175 M 362, 574 P2d 260 (1978).

45-8-337. Possession of unregistered silencer or of bomb or similar device prima facie evidence of unlawful purpose.

Compiler's Comments

1999 Amendments — Composite Section: Chapters 466 and 581 after "Possession of a silencer" inserted "that is not registered under federal law". Amendments effective October 1, 1999.

Annotator's Note: This section replaces section 94-8-225, R.C.M. 1947, which provided that possession of any Maxim silencer or bomb gave rise to a presumption that it was to be used for an unlawful purpose. Section 94-8-225 was a recodification of prior Montana law. It was first passed by sec. 3, Ch. 6, Laws of Extraordinary Legislative Session, 1918.

Case Notes

Presumption — Effect on Due Process: In answer to defendant's contention that the presumption in 94-8-225 (since repealed) shifted the burden of proof of lack of intent to the defendant, the Supreme Court stated that if the existence of the proven fact would convince a rational juror of the existence of the inferred fact beyond a reasonable doubt, the statute comports with due process. St. v. McBenge, 175 M 362, 574 P2d 260 (1978).

45-8-338. Firearms certificates for qualified retired law enforcement officers.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 18, Ch. 481, L. 2023. Amendment effective October 1, 2023.

Effective Date: This section is effective October 1, 2021.

Codification Change: Section 2, Ch. 301, L. 2021, provided that this section was to be codified as an integral part of Title 44. The code commissioner has codified this section in Title 45, chapter 8, part 3, to more closely reflect the subject matter.

45-8-340. Sawed-off firearm — penalty.

Compiler's Comments

2017 Amendment: Chapter 275 in (3)(f) substituted "tobacco, firearms and explosives" for "tobacco, and firearms". Amendment effective October 1, 2017.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

45-8-343. Firing firearms.

Compiler's Comments

1983 Amendment: At end of (1), inserted "or such greater fine or a term of imprisonment, or both, as the city or town may impose".

1981 Amendment: Inserted "Except as provided in subsections (2) and (3)" in (1); inserted (2) allowing, under certain conditions, the discharge of firearms at shooting ranges located in town or city or located in a private dwelling; and inserted (3) allowing for discharge of firearms if a justifiable use of force.

Annotator's Note: This statute is merely a recodification of a very old Montana law. The 1895 amendment consolidated former subdivision (1) and (2); eliminated "that all fines collected under the provisions of this act shall be paid into the county treasury, for the benefit of the school fund"; eliminated the reference to the effective date, and made stylistic changes. The 1977 amendment added "other" before "firearm", and made minor stylistic changes.

Case Notes

Cities and Towns: An illustration is found in this section of legislative use of "city or town" under circumstances which would render it absurd to hold that only incorporated cities and towns are meant. State ex rel. Powers v. Dale, 47 M 227, 131 P 670 (1913).

45-8-344. Use of firearms by children under 14 years of age prohibited — exceptions.

Compiler's Comments

1993 Amendment: Chapter 600 near middle, after "firearms", deleted "of any description loaded with powder and lead" and near end, after "instructor", inserted "or an adult".

Annotator's Note: This section is merely a recodification of preexisting Montana law. The 1963 amendment added "or under the supervision of a qualified firearms safety instructor, who has been duly authorized by such parent or guardian" at the end of the section. The 1977 amendment replaced "in the company of such parent or guardian" with "accompanied by a person having charge or custody of the child".

45-8-345. Criminal liability of parent or guardian — prosecution.

Compiler's Comments

Annotator's Note: This section is simply a recodification of preexisting Montana law.

45-8-351. Restriction on local government regulation of firearms.

Compiler's Comments

2021 Amendment: Chapter 3 deleted former (2)(c) that read: "(c) A local ordinance enacted pursuant to this section may not prohibit a legislative security officer who has been issued a concealed weapon permit from carrying a concealed weapon in the state capitol as provided in 45-8-317." Amendment effective February 18, 2021.

2020 Amendment by Referendum: Ch. 218, L. 2019, in (2)(a) in second sentence substituted "the carrying of unpermitted concealed weapons or the carrying of unconcealed weapons to a publicly owned and occupied building under its jurisdiction" for "the carrying of concealed or unconcealed weapons to a public assembly, publicly owned building, park under its jurisdiction, or school, and the possession of firearms by convicted felons, adjudicated mental incompetents, illegal aliens, and minors". Amendment effective January 1, 2021.

Severability: Section 13, Ch. 3, L. 2021, was a severability clause.

2011 Amendment: Chapter 384 inserted (2)(c) exempting legislative security officer from local ordinance prohibiting carrying concealed weapon; and made minor changes in style. Amendment effective October 1, 2011.

1991 Amendment: In (1), near end before "rifle", inserted "weapon, including a" and after "handgun" inserted "or concealed handgun"; in (2)(a), after "concealed", substituted "or unconcealed" for "weapons, the carrying of"; and made minor changes in style.

Case Notes

Harmonizing Different Statutes to Give Effect to All: The city of Missoula passed an ordinance impacting the sale of firearms, the Attorney General issued an opinion against the ordinance, and litigation between those parties resulted. Missoula relied on 45-8-351(2), an exception allowing localities certain authority regarding firearms. The District Court ruled against the Attorney General. The Supreme Court reversed, finding that the city's justification would lead to the absurd result of allowing the exception in a statute to swallow the rest of the statute. The Supreme Court further explained that its reading of 45-8-351 is consistent with 7-1-111(9). Missoula v. Fox, 2019 MT 250, 397 Mont. 388, 450 P.3d 898.

Attorney General's Opinions

Ordinance Requiring Background Checks for Firearms Transfers Within City — Prohibited: The city of Missoula adopted an ordinance requiring that a transferee to any firearm transfer conducted within the city limits submit to a background check. The Attorney General concluded that the ordinance violated Montana law and that a city with self-governing powers, such as the city of Missoula, is prohibited under 7-1-111 from enforcing a local regulation or ordinance that requires background checks on firearms sales or transfers within its borders. 57 A.G. Op. 1 (2017).

Enforceability of Ordinance Regulating Discharge of Firearms Within Three Miles of City: A city may adopt an ordinance prohibiting disorderly conduct resulting from the discharge of firearms and enforce the ordinance within 3 miles of the city limits pursuant to 7-32-4302. 42 A.G. Op. 8 (1987).

Ordinance Regulating Discharge of Firearms Not Health Ordinance: A city ordinance regulating the discharge of firearms outside the city limits may not be enacted as a health ordinance and enforced pursuant to the extraterritorial powers granted to a mayor under 7-4-4306. 42 A.G. Op. 8 (1987).

45-8-352. Restriction on local government regulation of knives.

Compiler's Comments

Effective Date: Section 4, Ch. 119, L. 2019, provided: "[This act] is effective on passage and approval." Approved April 3, 2019.

45-8-353. Purpose.

Compiler's Comments

Effective Date: Section 15, Ch. 3, L. 2021, provided that this section is effective on passage and approval. Approved February 18, 2021.

Severability: Section 13, Ch. 3, L. 2021, was a severability clause.

45-8-354. Legislative intent.

Compiler's Comments

Effective Date: Section 15, Ch. 3, L. 2021, provided that this section is effective on passage and approval. Approved February 18, 2021.

Severability: Section 13, Ch. 3, L. 2021, was a severability clause.

45-8-355. Legislative findings.

Compiler's Comments

Effective Date: Section 15, Ch. 3, L. 2021, provided that this section is effective on passage and approval. Approved February 18, 2021.

Severability: Section 13, Ch. 3, L. 2021, was a severability clause.

45-8-356. Where concealed weapon may be carried — exceptions.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 4, Ch. 526, L. 2023. Amendment effective May 18, 2023.

Effective Date: Section 15, Ch. 3, L. 2021, provided that this section is effective on passage and approval. Approved February 18, 2021.

Severability: Section 13, Ch. 3, L. 2021, was a severability clause.

45-8-357. Prohibition on infringement of constitutional rights.

Compiler's Comments

Effective Date: Section 15, Ch. 3, L. 2021, provided that this section is effective on passage and approval. Approved February 18, 2021.

Severability: Section 13, Ch. 3, L. 2021, was a severability clause.

45-8-358. Regulation of firearms prohibited for certain people — exceptions.

Compiler's Comments

Effective Date: Section 15, Ch. 3, L. 2021, provided that this section is effective June 1, 2021.

Severability: Section 13, Ch. 3, L. 2021, was a severability clause.

45-8-359. Remedy for violations.

Compiler's Comments

Effective Date: Section 15, Ch. 3, L. 2021, provided that this section is effective on passage and approval. Approved February 18, 2021.

Severability: Section 13, Ch. 3, L. 2021, was a severability clause.

45-8-360. Establishment of individual licensure.

Compiler's Comments

1997 Amendment: Chapter 29 at end, after "Act", deleted "of 1990".

45-8-361. Possession or allowing possession of weapon in school building — exceptions — penalties — seizure and forfeiture or return authorized — definitions.

Compiler's Comments

2021 Amendment: Chapter 541 in (3)(a) after "apply to law enforcement personnel" inserted "or to a school marshal in the school district where the school marshal is contracted or employed". Amendment effective July 1, 2021.

1999 Amendment: Chapter 581 in definition of weapon inserted second sentence expanding term to include article or instrument possessed with purpose to commit a criminal offense. Amendment effective October 1, 1999.

Effective Date: Section 3, Ch. 435, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 30, 1997.

45-8-365. Short title.

Compiler's Comments

Effective Date: Section 7, Ch. 282, L. 2021, provided: "[This act] is effective on passage and approval." Approved April 23, 2021.

Retroactive Applicability: Section 8, Ch. 282, L. 2021, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to a federal law, executive order, rule, or regulation adopted or enacted on or after January 1, 2021, or a new and more restrictive interpretation of a law that existed on January 1, 2021."

Codification Change: Section 6, Ch. 282, L. 2021, provided that this section was to be codified as an integral part of Title 45, chapter 7. The Code Commissioner has codified this section in Title 45, chapter 8, to more closely reflect the subject matter.

Severability: Section 5, Ch. 282, L. 2021, was a severability clause.

45-8-366. Declaration of authority.

Compiler's Comments

Effective Date: Section 7, Ch. 282, L. 2021, provided: "[This act] is effective on passage and approval." Approved April 23, 2021.

Retroactive Applicability: Section 8, Ch. 282, L. 2021, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to a federal law, executive order, rule, or regulation adopted or enacted on or after January 1, 2021, or a new and more restrictive interpretation of a law that existed on January 1, 2021."

Codification Change: Section 6, Ch. 282, L. 2021, provided that this section was to be codified as an integral part of Title 45, chapter 7. The Code Commissioner has codified this section in Title 45, chapter 8, to more closely reflect the subject matter.

Severability: Section 5, Ch. 282, L. 2021, was a severability clause.

45-8-367. Definitions.

Compiler's Comments

Effective Date: Section 7, Ch. 282, L. 2021, provided: "[This act] is effective on passage and approval." Approved April 23, 2021.

Retroactive Applicability: Section 8, Ch. 282, L. 2021, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to a federal law, executive order, rule, or regulation adopted or enacted on or after January 1, 2021, or a new and more restrictive interpretation of a law that existed on January 1, 2021."

Codification Change: Section 6, Ch. 282, L. 2021, provided that this section was to be codified as an integral part of Title 45, chapter 7. The Code Commissioner has codified this section in Title 45, chapter 8, to more closely reflect the subject matter.

Severability: Section 5, Ch. 282, L. 2021, was a severability clause.

45-8-368. Prohibition of enforcement.

Compiler's Comments

Effective Date: Section 7, Ch. 282, L. 2021, provided: "[This act] is effective on passage and approval." Approved April 23, 2021.

Retroactive Applicability: Section 8, Ch. 282, L. 2021, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to a federal law, executive order, rule, or regulation adopted or enacted on or after January 1, 2021, or a new and more restrictive interpretation of a law that existed on January 1, 2021."

Codification Change: Section 6, Ch. 282, L. 2021, provided that this section was to be codified as an integral part of Title 45, chapter 7. The Code Commissioner has codified this section in Title 45, chapter 8, to more closely reflect the subject matter.

Severability: Section 5, Ch. 282, L. 2021, was a severability clause.

Part 4
Montana Street Terrorism Enforcement and Prevention Act

Part Compiler's Comments

Preamble: The preamble attached to Ch. 285, L. 1997, provided: "WHEREAS, the Legislature finds and declares that it is the right of every person to be secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals; and

WHEREAS, it is not the intent of the Legislature to interfere with the exercise of the constitutionally protected rights of freedom of expression and association; and

WHEREAS, the Legislature hereby recognizes the constitutional right of every citizen to harbor and express beliefs on any lawful subject whatsoever, to lawfully associate with others who share similar beliefs, to petition lawfully constituted authority for a redress of perceived grievances, and to participate in the electoral process; and

WHEREAS, the Legislature further finds that the State of Montana is in a situation of rising crisis caused by the entry into the state of criminal street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods; and

WHEREAS, these activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected; and

WHEREAS, the Legislature finds that several out-of-state criminal street gangs have established a presence in Montana's larger cities, that these criminal street gangs are attracting and recruiting members in Montana, and that identifiable criminal street gang-related crimes are beginning to appear and increase in Montana communities that have recognizable criminal street gang-related presences; and

WHEREAS, the Legislature finds that when these criminal street gangs establish a presence in Montana cities, the quality of Montana citizens' safety, welfare, and enjoyment of life begins to decline; and

WHEREAS, the Legislature wishes to deter the growing influx of violent criminal street gangs and criminal street gang-related activity in its communities and to protect Montana citizens from the terror associated with violent criminal street gangs; and

WHEREAS, it is the intent of the Legislature in enacting [sections 1 through 8] [45-8-401 through 45-8-408] to seek the eradication of activity of criminal street gangs by focusing on the patterns of criminal street gang activity and on the organized nature of criminal street gangs.

THEREFORE, the Legislature finds it appropriate to enact [sections 1 through 8] [45-8-401 through 45-8-408]."

Severability: Section 11, Ch. 285, L. 1997, was a severability clause.

Effective Date: Section 12, Ch. 285, L. 1997, provided: "[This act] [45-8-401 through 45-8-408] is effective on passage and approval." Approved April 16, 1997.

Source: This chapter is based on the California Street Terrorism and Prevention Act, sec. 186.20 through 186.28 of the California Penal Code.

45-8-405. Pattern of criminal street gang activity.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 21, Ch. 167, L. 2023. Amendment effective April 19, 2023.

Severability: Section 38, Ch. 167, L. 2023, was a severability clause.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1999 Amendment: Chapter 432 substituted (2)(b) concerning assault with a weapon for "felony assault, as defined in 45-5-202". Amendment effective October 1, 1999.

Retroactive Applicability: Section 13, Ch. 285, L. 1997, provided: "For purposes of determining a pattern of criminal street gang activity, the provisions of [section 5] [45-8-405] apply retroactively, within the meaning of 1-2-109, to an offense that occurred before [the effective date of this act] [effective April 16, 1997] if the second or subsequent offense occurred after [the effective date of this act]."

CHAPTER 9
DANGEROUS DRUGS

Chapter Compiler's Comments

Annotator's Note: The law in Montana dealing with drug offenses was originally not part of the criminal code at all, but was rather included within the section of the code dealing with the regulation of narcotic drugs. See R.C.M. 1947, Title 54. From 1937 to 1969, Montana's narcotic drug law was essentially the Uniform Narcotic Drug Act which was also adopted by a majority of the states. The Act became outmoded with the passage of time and in 1969, a new act was drafted and enacted, Montana's Dangerous Drug Act, R.C.M. 1947, §§ 54-129 through 54-138. Within a year, a new uniform law was also promulgated by the National Conference of Commissioners on Uniform Laws, the Uniform Controlled Substances Act of 1970. Montana's Dangerous Drug Act was amended in 1973 to adopt substantially the definitions, procedures, standards, schedules and regulatory provisions of the Uniform Controlled Substances Act, which has also been substantially adopted by a majority of the states. The Act, as recodified, is now found in Title 50, ch. 32, Controlled Substances, which is primarily regulatory in nature, but which also defines the drugs to which the criminal provisions, Title 45, ch. 9, refer. The criminal provisions were retained to a great extent, as originally drafted and enacted in 1969, with modifications being made to harmonize that portion of Montana's drug laws with the newly passed regulatory and definitional sections of the Uniform Controlled Substances Act. Title 45, ch. 9, uses the same terms as are used throughout Title 45, but makes reference to Title 50, ch. 32, for the definition of the prohibited narcotic drugs.

Annotator's Note — Source: The compiler's comments entitled "Annotator's Note" are taken from the Montana Criminal Code of 1973 Annotated (1980 rev. ed.) produced by the Montana Criminal Law Information Research Center (MONTCLIRC) and printed under cosponsorship of the State Bar of Montana. Minor revisions have been made to conform to the style and format of the annotations.

Chapter Law Review Articles

America's Drug War and the Right to Privacy, Stamper, 68 Mont. L. Rev. 285 (2007).

Part 1
Offenses Involving Dangerous Drugs

Part Administrative Rules

Title 24, chapter 174, subchapter 14, ARM Dangerous Drug Act.

45-9-101. Criminal distribution of dangerous drugs.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 543, L. 2023. Amendment effective May 18, 2023.

Applicability: Section 7, Ch. 543, L. 2023, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective May 18, 2023.

2021 Amendments — Composite Section: Chapter 295 in (3) near middle substituted "subsection (1), (2), (4), or (5)" for "subsection (1), (2), or (4)"; inserted (5) providing for a maximum prison term and maximum fine for an offense that results in the death of an individual from the use of a dangerous drug; and made minor changes in style. Amendment effective October 1, 2021.

Chapter 576 in (1) deleted reference to Title 50, chapter 46. Amendment effective January 1, 2022.

Severability: Section 113, Ch. 576, L. 2021, was a severability clause.

2020 Amendment by Initiative: Initiative Measure No. 190 in (1) near beginning inserted "Title 16, chapter 12, or"; deleted former (2) that read: "(2) A person convicted of criminal distribution of marijuana or its derivatives in an amount the aggregate weight of which does not exceed 60 grams of marijuana or 1 gram of hashish shall be imprisoned in the state prison for a term not to exceed 5 years and may be fined not more than $5,000"; and made minor changes in style. Amendment effective January 1, 2021.

Severability: Section 55, Initiative Measure No. 190, was a severability clause.

2017 Amendment: Chapter 321 in (2) and (3) substituted current text for former text that read: "(2) A person convicted of criminal distribution of a narcotic drug, as defined in 50-32-101(19)(d), or an opiate, as defined in 50-32-101, shall be imprisoned in the state prison for a term of not less than 2 years or more than life and may be fined not more than $50,000, except as provided in 46-18-222.

(3) (a) A person convicted of criminal distribution of a dangerous drug included in Schedule I or Schedule II pursuant to 50-32-222 or 50-32-224, except marijuana or tetrahydrocannabinol, who has a prior conviction for criminal distribution of such a drug shall be imprisoned in the state prison for a term of not less than 10 years or more than life and may be fined not more than $50,000, except as provided in 46-18-222.

(b) Upon a third or subsequent conviction for criminal distribution of such a drug, the person shall be imprisoned in the state prison for a term of not less than 20 years or more than life and may be fined not more than $50,000, except as provided in 46-18-222.

(c) The exception for marijuana or tetrahydrocannabinol in subsection (3)(a) does not apply to synthetic cannabinoids listed as dangerous drugs in 50-32-222"; in (4) inserted reference to subsection (1) and substituted "a term not to exceed 25 years" for "a term of not less than 1 year or more than life"; and in (5) substituted current text for former text that read: "(5) A person who was an adult at the time of distribution and who is convicted of criminal distribution of dangerous drugs to a minor shall be sentenced as follows:

(a) If convicted pursuant to subsection (2), the person shall be imprisoned in the state prison for not less than 4 years or more than life and may be fined not more than $50,000, except as provided in 46-18-222.

(b) If convicted of the distribution of a dangerous drug included in Schedule I or Schedule II pursuant to 50-32-222 or 50-32-224 and if previously convicted of such a distribution, the person shall be imprisoned in the state prison for not less than 20 years or more than life and may be fined not more than $50,000, except as provided in 46-18-222.

(c) If convicted of the distribution of a dangerous drug included in Schedule I or Schedule II pursuant to 50-32-222 or 50-32-224 and if previously convicted of two or more such distributions, the person shall be imprisoned in the state prison for not less than 40 years or more than life and may be fined not more than $50,000, except as provided in 46-18-222.

(d) If convicted pursuant to subsection (4), the person shall be imprisoned in the state prison for not less than 2 years or more than life and may be fined not more than $50,000, except as provided in 46-18-222." Amendment effective July 1, 2017.

Applicability: Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

2013 Amendment: Chapter 135 in (2) substituted "50-32-101(19)(d)" for "50-32-101(18)(d)" and "50-32-101" for "50-32-101(19)". Amendment effective October 1, 2013.

2011 Amendment: Chapter 156 inserted (3)(c) excluding synthetic cannabinoids from exception in (3)(a); and made minor changes in style. Amendment effective April 8, 2011.

2004 Amendment by Initiative: Initiative Measure No. 148, proposed by initiative petition and approved at the general election held November 2, 2004, in (1) at beginning inserted exception clause. Amendment effective November 2, 2004.

Severability: Section 18, I.M. No. 148, was a severability clause.

2003 Amendment: Chapter 114 in (6) after "Practitioners" inserted "as defined in 50-32-101" and after "a professional practice" deleted "as defined by 50-32-101". Amendment effective October 1, 2003.

1999 Amendment: Chapter 432 throughout section substituted references to criminal distribution and distribution for references to criminal sale and sale. Amendment effective October 1, 1999.

1993 Amendment: Chapter 448 near end of (1), after "gives away", deleted "or manufactures, prepares, cultivates, compounds, or processes"; and made minor changes in style.

1989 Amendment: In (2) inserted "a narcotic drug, as defined in 50-32-101(18)(d), or". Amendment effective April 20, 1989.

1987 Amendment: At end of (3) deleted "Whenever a conviction under this subsection is for criminal sale of such a drug to a minor, the sentence shall include the restriction that the defendant be ineligible for parole and participation in the supervised release program while serving his term"; in (4) inserted reference to subsection (5); and inserted (5) establishing civil and criminal penalties for adult convicted of criminal sale of dangerous drugs to minor.

1985 Amendment: In (2) changed "50-32-101(18)" to "50-32-101(19)".

1983 Amendment: In (3), increased minimum sentence for second offense from 5 to 10 years and for third offense from 10 to 20 years.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section was originally enacted as R.C.M. 1947, § 54-132. It has been amended several times since then. Chapter 55, L. 1973, deleted from subsection (b) a second sentence reading "Any person of age twenty-one years or under convicted of a first violation under this section shall be presumed to be entitled to a deferred imposition of sentence"; and made a minor change in style. Chapter 412, L. 1973, deleted "and does not come within the exceptions of section 3" from the end of subsection (a); and deleted from subsection (b) the same sentence deleted by Ch. 55. The 1974 amendment inserted in subsection (2) "barters, exchanges, gives away, or offers to sell, barter, exchange or give away"; and added subsection (c). Chapter 359, L. 1977, redesignated subsections (a) to (c) as subsections (1) to (3); substituted "54-301" at the end of subsection (1) for "this act"; inserted "as defined by 54-301" in subsection (3); and made minor changes in phraseology, punctuation and style. Chapter 584, L. 1977, redesignated subsection (a) as subsection (1); inserted subsection (2); redesignated subsections (b) and (c) as subsections (3) and (4); inserted "not otherwise provided for in subsection (2)" in subsection (3); and made minor changes in phraseology, punctuation and style. Chapter 587, L. 1979 enacted subsection (3) to provide increased penalties for second and third offenses of criminal sale of dangerous drugs and for sales to minors. Former subsection (3) became subsection (4) with an addition of the words "or (3)" following "subsection (2)", and former subsection (4) became subsection (5).

This section includes all types of transfers and activities preparatory to actual sale, such as manufacture, preparation, cultivation, compounding or processing of dangerous drugs. This section consolidates two statutes under prior Montana law: R.C.M. 1947, § 54-103, prohibited the manufacture, compounding, mixing, cultivating and growing of narcotic drugs and R.C.M. 1947, § 54-102, overlapped somewhat but also prohibited the possession and sale of narcotic drugs. This statutory expansion of the offense intitled "criminal sale" was approved and held to be constitutionally permissible. State ex rel. LeMieux v. District Court, 166 M 115, 531 P2d 665 (1975), appeal dismissed, 422 US 1030 (1975). However, that decision was overruled in State ex rel. Zander v. District Court, 180 M 548, 591 P2d 656 (1979), at least as to its approval of the inclusion of "cultivation" as an act prohibited as criminal "sale". The court held that in defining sale to include cultivation, the Legislature had created a conclusive presumption of criminal sale from the cultivation of a dangerous drug. That presumption was held to be constitutionally impermissible because the fact proved (cultivation of marijuana) bears no rational connection to the fact presumed (sale of marijuana); the presumption was held to be arbitrary and violative of due process and that part of the statute was, therefore, held to be unconstitutional on its face. It therefore appears that a separate statute must again be enacted prohibiting the cultivation of dangerous drugs if the intent of the Legislature is to be carried out, or that the title of this section must be amended to prohibit criminal sale, transfer, preparation, cultivation, etc., of dangerous drugs. The enactment of a separate statute would probably most clearly counteract the effect of the Zander decision.

Severability: Section 12, Ch. 583, L. 1981, was a severability section.

Case Notes

Sufficient Evidence to Convict on Charge of Providing Methamphetamine to Minor: The defendant was charged with providing methamphetamine to a minor. After a jury convicted him, the defendant appealed, arguing that there had been insufficient evidence to convict him. The Supreme Court affirmed, ruling that much of the minor's testimony was corroborated by the defendant and that the jury could rationally choose to believe the minor over the defendant where their testimony conflicted. St. v. McCoy, 2021 MT 303, 406 Mont. 375, 498 P.3d 1266.

Physician Convicted Over Prescriptions of Dangerous Drugs — Actions Outside Course of Professional Practice — Affirmed in Part, Reversed in Part: The defendant, a general physician who practiced in Montana, was convicted of 2 counts of negligent homicide, 9 counts of criminal endangerment, and 11 counts of criminal distribution of dangerous drugs, all relating to pain medication prescriptions he administered. On appeal, the defendant raised multiple issues relating to his prosecution, including arguing that 45-9-101 did not prohibit "prescribing" of dangerous drugs and that 45-5-207 was unconstitutionally vague. The Supreme Court held that the plain language of 45-9-101 did not prohibit the defendant from being prosecuted, that 45-5-207 was not unconstitutionally vague, and that the District Court properly instructed the jury as to the offense of criminal distribution. However, the Supreme Court reversed and vacated the defendant's conviction for two counts of negligent homicide because the state did not meet its burden that the defendant was the cause-in-fact of the victims' deaths. St. v. Christensen, 2020 MT 237, 401 Mont. 247, 472 P.3d 622.

Use of Confidential Treatment Court Information to Charge Felony Drug Offenses — Violation of Right Against Self-Incrimination: While the defendant was a participant in Treatment Court, he had a positive drug test. Subsequently, the defendant provided incriminating information in three interviews with the Treatment Court probation officer, believing that he had to be honest to comply with Treatment Court requirements and fearing that he would receive sanctions if he refused to answer questions. Based on incriminating information obtained in the interviews, the defendant was charged with distribution of dangerous drugs and possession of dangerous drugs. The District Court denied the defendant's motions to suppress and dismiss. On appeal, the Supreme Court reversed, concluding that the state violated Treatment Court confidentiality by disclosing the incriminating information to law enforcement in order to investigate new drug offenses and that the defendant's right against self-incrimination was violated when he was compelled to provide the incriminating information or face sanctions or discharge from Treatment Court. St. v. Plouffe, 2014 MT 183, 375 Mont. 429, 329 P.3d 1255.

Alerting State to Charging Error Through Motion to Preclude Evidence — Appointed Counsel Not Ineffective — Defendant Not Entitled to Wait to Object to Charging Errors Midtrial: The defendant was charged with criminal distribution of dangerous drugs. His court-appointed attorney filed a motion to preclude evidence of the defendant's accountability for the same charge. The state subsequently filed an amended information to include an accountability charge. After the defendant unsuccessfully objected to the filing of the amended information, he was convicted of accountability. On appeal, the defendant claimed ineffective assistance of counsel, alleging that his attorney had improperly alerted the state to its initial charging error by filing a motion to preclude evidence of accountability. The Supreme Court rejected the notion that a defendant is allowed to wait until midtrial to object to the state's charges and affirmed his conviction. St. v. Carter, 2014 MT 65, 374 Mont. 206, 320 P.3d 451.

Insufficient Evidence that Substance Was Dangerous Drug — Motion to Dismiss Improperly Denied: The defendant was charged with distribution of dangerous drugs after allegedly giving marijuana to a woman in exchange for babysitting. Except for the woman's testimony that the substance was green with orange hairs and that she knew it was marijuana because she had smoked it before, the state offered no evidence that the substance was, in fact, a dangerous drug. The witness never testified that the drug had made her high. At the end of the trial, the defendant moved to dismiss the charge on the grounds that the evidence presented by the state was insufficient to support a guilty verdict, which the District Court denied. Following his conviction, the defendant appealed, arguing that the state had not proved that the substance was a dangerous drug. The Supreme Court agreed that the evidence was insufficient to allow a rational trier of fact to conclude beyond a reasonable doubt that the substance was a dangerous drug and reversed. St. v. Burwell, 2013 MT 332, 372 Mont. 401, 313 P.3d 119.

Convictions for Possession of Dangerous Drugs Vacated Given Convictions for Possession of Dangerous Drugs With Intent to Distribute Same Drugs — Remand for Resentencing: Wing was convicted of criminal distribution of dangerous drugs, two counts of criminal possession of dangerous drugs, and two counts of criminal possession of dangerous drugs with intent to distribute. On appeal, Wing asserted that because the two counts of possession and two counts of possession of dangerous drugs with intent to distribute involved the same drugs, a conviction under all four counts would unconstitutionally permit multiple punishments for the same offense. The Supreme Court agreed and remanded with instructions to vacate Wing's convictions for criminal possession of dangerous drugs and to resentence Wing in accordance with the remaining convictions. St. v. Wing, 2008 MT 218, 344 M 243, 188 P3d 999 (2008).

Ten-Year Sentence for Criminal Distribution of Dangerous Drugs Affirmed Despite Finding of Impaired Mental Capacity: Novak was sentenced to 10 years with 6 years suspended for selling 0.06 grams of methamphetamine to an undercover informant, despite a finding that Novak was eligible for an exception to the mandatory minimum sentence because of impaired mental capacity. Novak appealed the sentence, but the Supreme Court affirmed. The fact that Novak was eligible for a sentence exception did not mean that he was entitled to it. The sentencing court's oral pronouncement of sentence complied with statutory requirements by providing adequate reasons for imposing the sentence, and the sentence fell within the parameters of 45-9-101(4) and was not illegal. St. v. Novak, 2008 MT 157, 343 M 292, 183 P3d 887 (2008).

Failure of Defense Counsel to Question Jurors Regarding Ethnic and Racial Bias Not Considered Ineffective Assistance Warranting New Trial: Defendant was convicted of distribution of dangerous drugs and appealed on grounds that because of defendant's ethnicity, defense counsel's failure to question potential jurors regarding ethnic or racial bias constituted ineffective assistance of counsel and deprived defendant of a fair trial. The Supreme Court found no indication that: (1) ethnic or racial issues were intertwined with the drug offense; (2) the offense was racially motivated; (3) an ethnic issue was connected with the trial in any way; and (4) any witness, an attorney, the trial judge, a member of the court staff, or any member of the venire panel was ethnically or racially biased. Thus, defendant was not denied the right to an impartial jury. Defense counsel's performance did not fall below the range of competence required of attorneys in criminal cases simply because jurors were not questioned about ethnic or racial bias, so defendant was not denied effective assistance of counsel. St. v. Ibarra-Salas, 2007 MT 173, 338 M 191, 164 P3d 898 (2007). See also Rosales-Lopez v. U.S., 451 US 182 (1981).

Determination That Jury Might Find That Defendant Induced Into Criminal Transaction Not Proof of Entrapment as Matter of Law: Smith moved for a directed verdict on grounds that she was induced into selling a dangerous drug and entrapped as a matter of law. The trial court held that the evidence could support a verdict that Smith was predisposed to make the sale but also found that cross-examination of the state's witnesses presented evidence that Smith was induced to make the sale, so the court denied the motion and sent the case to the jury, concluding that the state would be required to prove beyond a reasonable doubt that Smith was not induced to make the sale. Following conviction, Smith appealed on grounds of entrapment, but the Supreme Court affirmed. After setting out the elements of entrapment enumerated in St. v. Karathanos, 158 M 461, 493 P2d 326 (1972), the court concluded that the trial court's determination that the circumstances of the sale could be interpreted to mean that Smith was induced, therefore imposing an additional burden of proof on the prosecution, did not mean that Smith was entrapped as a matter of law. Thus, the trial court did not err in denying the motion for a directed verdict and sending the case to the jury. St. v. Smith, 2006 MT 145, 332 M 386, 138 P3d 799 (2006). See also St. v. Harney, 160 M 55, 499 P2d 802 (1972), and St. v. Sweet, 1998 MT 30, 287 M 336, 954 P2d 1133 (1998).

Interpretation of Distribution of Dangerous Drugs: Rathbun was convicted of intent to distribute dangerous drugs and appealed on grounds that there was insufficient evidence to support a guilty verdict because the term "distribute" is not specifically defined in 45-9-103 or in the criminal code definitions in 45-2-101. The Supreme Court held that the lack of a definition is not a fatal flaw. Rather, the crime of intent to distribute in 45-9-103 can be interpreted and the legislative intent of the statute discerned based on this section, which defines the offense of criminal distribution to include one who sells, barters, exchanges, gives away, or offers to sell, barter, exchange, or give away any dangerous drug. Rathbun admitted that he gave away marijuana on occasion. Thus, the elements of 45-9-103 were met, and the distribution conviction was affirmed. St. v. Rathbun, 2003 MT 210, 317 M 66, 75 P3d 334 (2003).

Admissibility of Inmate Testimony Regarding Jail Drug Use — Criminal Drug Sale Conviction Affirmed: Defendant was convicted of sale of dangerous drugs after a jail inmate testified that he observed defendant and another inmate taking drugs that could have come only from defendant's prescription in the jail medication box. Defendant contended that the testimony should have been excluded on grounds of relevance, relying on Havens v. St., 285 M 195, 945 P2d 941 (1997). The Supreme Court distinguished Havens because the testimony here was based on eyewitness testimony that was clearly relevant to the state's case against defendant. The exception in Rule 403, M.R.Ev. (Title 26, ch. 10), for the exclusion of relevant evidence because of prejudicial effect or potentially misleading impact on the jury did not embrace competent eyewitness testimony describing the commission of defendant's offense. The trier of fact is in the best position to determine the weight of the evidence and credibility of witnesses, and a witness's appreciation of the duty to tell the truth is not necessarily diminished by prior violations of the law. Thus, the testimony was properly before the trial court, and defendant's motion in limine to exclude the testimony was properly denied. St. v. Vandersloot, 2003 MT 179, 316 M 405, 73 P3d 174 (2003), followed in St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005).

Admissibility of Jail Medication Sign-Out Sheet to Show Inmate Drug Availability — Jail Drug Sale Conviction Affirmed: Defendant was convicted of sale of dangerous drugs after a jail inmate testified that he observed defendant and another inmate taking drugs that could have come only from defendant's prescription in the jail medication box. Defendant contended that admission of the jail medication sign-out sheet was improper because the prosecution failed to qualify the officer as custodian of or knowledgeable of the record. The Supreme Court noted that after the District Court overruled defense counsel's nonspecific objection to the officer's direct testimony, counsel then failed to assert any new objection on the basis of inadequate foundation, hearsay, or other grounds. By remaining silent, defendant waived any objection to admission of the medication sign-out sheet and failed to preserve the issue for appeal. The medication sign-out sheet was properly admitted absent a timely objection. St. v. Vandersloot, 2003 MT 179, 316 M 405, 73 P3d 174 (2003).

Sufficient Evidence to Affirm Jail Drug Sale Conviction: Defendant was convicted of sale of dangerous drugs after a jail inmate testified that he observed defendant and another inmate taking drugs that could have come only from defendant's prescription in the jail medication box. On appeal, defendant contended that insufficient evidence supported the jury verdict. The Supreme Court disagreed and affirmed, concluding that the jury could have reasonably found that the capsules that the inmates admitted taking were in fact drugs that could have been obtained only from defendant. St. v. Vandersloot, 2003 MT 179, 316 M 405, 73 P3d 174 (2003).

Failure to Include Written Findings of Fact Regarding Exceptions From Mandatory Minimum Sentence — Reversible Error: The District Court sentenced Sprinkle to 20 years for felony drug offenses pursuant to the mandatory minimum sentence requirement in this section, concluding that none of the exceptions to mandatory minimum sentencing in 46-18-222 applied. However, the court failed to comply with 46-18-223, which requires the sentencing court to state in the judgment the reasons for its decision in writing and to identify the facts relied upon in making the decision. On appeal, Sprinkle asserted that he was entitled to an exception to mandatory minimum sentencing because his participation in the drug transaction was relatively minor. Without the required written findings of fact, the Supreme Court had no basis upon which to review the judgment, so the judgment was vacated and remanded for entry of findings of fact to support the conclusion that exceptions to mandatory minimum sentencing did not apply. St. v. Sprinkle, 2000 MT 188, 300 M 405, 4 P3d 1204, 57 St. Rep. 746 (2000).

Sale of Marijuana — Conviction by Accountability Upheld: Long, an agent of the state Criminal Investigation Bureau who posed as a Butte resident, made several purchases of marijuana from Skarland. Tower, a friend of Skarland, was also present during the purchases and assisted Skarland. Tower maintained that he could not be convicted by accountability of sale of a dangerous drug because his participation in the sale was minimal. The Supreme Court found that Tower understood the purposes of Skarland's meetings with Agent Long, passed samples of marijuana between Skarland and Long, counted the money Long paid for the marijuana, carried packages of marijuana, and accompanied Skarland in the delivery of the marijuana. Based upon this evidence, the Supreme Court found that a rational trier of fact could have found Tower guilty of criminal sale of a dangerous drug. St. v. Tower, 267 M 63, 881 P2d 1317, 51 St. Rep. 946 (1994).

Substantial Relevant Evidence to Support Conviction:

The following evidence presented at trial, although circumstantial, constituted substantial evidence that Licht sold drugs to LaMere: (1) several officers observed Licht enter a tavern and then exit the tavern with LaMere about 1 minute later; (2) the observers witnessed an exchange take place between Licht and LaMere; (3) although it could not be seen what the two men exchanged, one witness testified that he saw LaMere put the object into his right front pants pocket, the same pocket in which officers later found marijuana; and (4) the two men were acting suspiciously and were looking around as if scanning the area. Coupled with the fact that Licht was arrested for selling marijuana to a third person on the same day as the transaction with LaMere took place, a rational jury could have found all the essential elements of the offense of criminal sale of dangerous drugs (now criminal distribution of dangerous drugs). St. v. Licht, 266 M 123, 879 P2d 670, 51 St. Rep. 686 (1994).

The Supreme Court found as substantial relevant evidence accomplice's testimony that defendant sold him drugs accompanied by evidence that: (1) defendant resided in the apartment accomplice emerged from in possession of the drugs; (2) defendant was in the apartment at the time of sale; (3) defendant touched money used by accomplice to buy drugs; and (4) defendant possessed equipment used to measure and contain drugs. St. v. Holzapfel, 230 M 105, 748 P2d 953, 45 St. Rep. 53 (1988).

Evidence Irrelevant and Inadmissible Regarding Drug-Related Activities Beyond Scope of Offense: Facts relevant to the charge of criminal sale of dangerous drugs (now criminal distribution of dangerous drugs) were whether defendant was in a certain place at a certain time and whether he sold drugs at that time and place. Evidence of matters not pertaining to those facts was irrelevant and inadmissible. The District Court erred in admitting testimony regarding defendant's associates and their drug-related activities, the presence of juveniles at an unrelated drug sale, and places at which defendant may have spent time on occasion, such as bars known to be drug hangouts. A defendant on trial for one offense should be convicted, if at all, by evidence that shows he is guilty of that offense alone. St. v. Webb, 252 M 248, 828 P2d 1351, 49 St. Rep. 236 (1992).

Direct Evidence of Informant Sufficient to Show Accountability for Sale of Dangerous Drugs (now Criminal Distribution of Dangerous Drugs): Testimony by an informant constituted direct evidence that defendant aided or abetted his wife in the commission of the sale of dangerous drugs (now criminal distribution of dangerous drugs) when the testimony showed that defendant drove his wife to the informant's house, was present during the transaction, and made no attempt to terminate his efforts to facilitate the sale. The evidence was at least sufficient for a rational trier of fact to find the essential elements of accountability. St. v. Gommenginger, 242 M 265, 790 P2d 455, 47 St. Rep. 681 (1990).

Two Sales of Dangerous Drugs Charged as One Offense, but Only One Sale Proved — Conviction Stands: Defendant claimed that because he was charged with one offense of criminal sale of dangerous drugs (now criminal distribution of dangerous drugs), committed on two separate occasions, the state must prove his connection with both sales and that failure to prove his connection with one of the sales should result in dismissal of the entire charge. The Supreme Court relied on U.S. v. Bruno, 809 F2d 1097 (5th Cir. 1987), in holding that it is unnecessary to prove independently defendant's involvement in both sales when proof of either sale is sufficient to satisfy a prima facie case. Superfluity in an information does not vitiate; therefore, every charge in an information need not be proved to convict defendant of the offense, but only a sufficient number of charges in each count so as to make out a violation of the statute relied on. St. v. McColley, 239 M 466, 781 P2d 280, 46 St. Rep. 1836 (1989).

Possession Not Element of Criminal Sale: Possession is not an element of the offense of criminal sale of dangerous drugs (now criminal distribution of dangerous drugs); therefore, in a trial charging violation of this section, the trial court did not err in refusing to give offered instructions on criminal possession of dangerous drugs and criminal possession with intent to sell (now criminal possession with intent to distribute) St. v. Bartnes, 234 M 522, 764 P2d 1271, 45 St. Rep. 2101 (1988).

Criminal Sale of Dangerous Drugs (now Criminal Distribution of Dangerous Drugs) Not Absolute Liability Offense: Defendant contended her sentence was excessive because this section is an absolute liability offense, requiring no mental state, and that pursuant to 45-2-103 and 45-2-104, the maximum penalty is a $500 fine. The Supreme Court held that this section is not an absolute liability offense because the state must prove that defendant knowingly or purposely committed the crime. St. v. Brown, 232 M 1, 755 P2d 1364, 45 St. Rep. 818 (1988).

Proper Entrapment Instruction: A jury instruction stated that where a person has no previous intent or purpose to commit a crime by selling dangerous drugs and is induced or persuaded to do so by police or their agents, he is a victim of entrapment. It also stated that: (1) if a person already has the readiness and willingness to engage in the crime, the mere fact that police or their agents provide a favorable opportunity is not entrapment; (2) it is not entrapment for police to pretend to be someone else and offer to purchase drugs from a suspected seller; and (3) what the law forbids is for police to originate a criminal design or implant it in the suspect's mind. Giving this instruction was not error. St. v. Walker, 225 M 415, 733 P2d 352, 44 St. Rep. 363 (1987).

Purchaser of Illegal Drugs Not Accomplice of Seller: On the issue of whether a purchaser is an accomplice to a seller of dangerous drugs thereby requiring independent corroboration of the purchaser's testimony to sustain the seller's conviction, the Supreme Court noted a definite distinction between a seller and buyer. Because the parties do not share the same criminal purpose as required for accountability under 45-2-302, the purchaser may not be considered an accomplice of the seller even though their separate acts may result in a single transaction. St. v. Stokoe, 224 M 461, 730 P2d 415, 43 St. Rep. 2336 (1986), followed in St. v. Lyons, 254 M 360, 838 P2d 397, 49 St. Rep. 730 (1992).

Conflict in Evidence — Defendant a Visitor at or Overseeing Sale: Defendant contends that he did not participate in sale of marijuana because his involvement was subsequent to the time the marijuana-for-money exchange was completed. Although there was some conflicting evidence as to whether defendant was just a visitor at the time of the sale or a passive participant because he was overseeing the transaction, the court concluded that resolution of the conflict was for the jury. When viewed in a light most favorable to the state, there clearly was substantial evidence to support the conviction. St. v. Martinez, 216 M 270, 700 P2d 991, 42 St. Rep. 798 (1985). See also St. v. Brown, 232 M 1, 755 P2d 1364, 45 St. Rep. 818 (1988).

Defendant's Sentence Greater Than Accomplice's — No Abuse of Discretion: Defendant argued that his sentence of 15 years with 5 years suspended was unfair because Rivera received only 10 years with 7 years suspended. However, as pointed out by the District Court, defendant was both a supplier and drug dealer. This along with other factors made it appropriate to sentence him to 15 years with 5 years suspended. There is no basis for comparison of that sentence, imposed after trial, to the plea bargain sentence of Rivera. The sentence imposed upon the defendant is well within the provision of 45-9-101, which would allow life imprisonment. The Supreme Court held that the District Court did not abuse its discretion by sentencing defendant to a prison term greater than that imposed upon his accomplice. St. v. Martinez, 216 M 270, 700 P2d 991, 42 St. Rep. 798 (1985).

Circumstantial Evidence Insufficient to Sustain Conviction of Attempted Sale of Narcotics — Chemical Tests Inconclusive — Burden of Proof: Where the defendant offered to sell an undercover agent a pound of cocaine and field tests conducted on the substance offered for sale proved the substance could be either cocaine or a prescription drug called lidocaine, the District Court erred in convicting the defendant of felony sale of dangerous drugs (now criminal distribution of dangerous drugs), as there was insufficient evidence to support a conviction. Under St. v. Stoddard, 147 M 402, 412 P2d 827 (1966), circumstantial evidence must not only be entirely consistent with guilt, it must be inconsistent with any other rational theory. Here, the field test failed to prove the drug was a dangerous drug. St. v. Starr, 204 M 210, 664 P2d 893, 40 St. Rep. 796 (1983).

Statute Not Unconstitutionally Vague: Where the defendant was charged with unlawful sale of a dangerous drug and both the defendant and his wife testified that the drug he offered for sale was not cocaine but a prescription drug called lidocaine, the statute under which the defendant was charged was not unconstitutionally vague in its failure to specify the type of criminal intent required to be proven by the State. Since the adoption of the Criminal Code in 1973, the law under which the defendant was charged does not concern itself with "specific intent" but only with the general mental states of "purposely" and "knowingly", and these elements are supplied when the statute is read in conjunction with 45-2-101. St. v. Starr, 204 M 210, 664 P2d 893, 40 St. Rep. 796 (1983). See also St. v. Brown, 232 M 1, 755 P2d 1364, 45 St. Rep. 818 (1988).

Sentence Vacated — Judge's Mistaken Belief That Complete Deferral or Suspension Prohibited: An offense committed in violation of subsection (4) of this section is not included in the list of offenses set forth in subsection (4) of 46-18-201 for which there may be no suspension or deferral of the first 2 years of the sentence. Defendant was sentenced to 5 years in prison, with all but 2 years suspended by a judge who mistakenly believed that suspension or deferral of the entire sentence was prohibited by 46-18-201. The Supreme Court vacated the sentence and remanded the case for resentencing, ruling the District Court's belief that the charge required imprisonment was prejudicial to defendant. St. v. Arbgast, 202 M 220, 656 P2d 828, 40 St. Rep. 45 (1983).

Exercise of Control Over Drug Given Away — Evidence as Supporting Conviction: Where the arresting officer discovered a bag of marijuana on the front seat of the defendant's car and the defendant was convicted of possession and sale of a dangerous drug, the Supreme Court found sufficient evidence to support the conviction in that the defendant exercised control over the marijuana by offering to give and giving some of it to a juvenile who testified that the marijuana was not his. St. v. Godsey, 202 M 100, 656 P2d 811, 39 St. Rep. 2354 (1982), overruled in part in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Testimony of Accomplice — Corroborating Evidence Consonant With Innocence or Guilt — Jury Question: The defendant was convicted of criminal sale of dangerous drugs (now criminal distribution of dangerous drugs). His conviction was based on the testimony of an undercover agent and an accomplice. The testimony of the undercover agent tended to connect the defendant with the commission of the offense. The defendant argued that the agent's testimony was equally consonant with a reasonable explanation pointing toward innocent conduct and is not the corroboration needed to support an accomplice's testimony. The court held that whether or not the defendant's explanation was believable was a factual question for the jury. As a matter of law, the testimony of the undercover agent was sufficient to corroborate the accomplice's testimony. St. v. Anderson, 197 M 374, 643 P2d 564, 39 St. Rep. 629 (1982).

Warrantless Arrest — Evidence Obtained Pursuant to Arrest — Collective Police Information Considered — Exceptional Circumstances: On appeal from a conviction for conspiracy to sell dangerous drugs, the defendant attacked his arrest as being without probable cause and unlawfully warrantless. The Supreme Court found the arrest was based on probable cause and lawful. Therefore, the evidence seized after the arrest was admissible at trial. An officer could make an arrest without a warrant when he believed on reasonable grounds that the person had committed an offense and the existing circumstances required immediate arrest. "Reasonable grounds" to arrest is synonymous with "probable cause" to arrest. Probable cause may be found in a case such as this by evaluating the collective information of the police, not just that of the arresting officer. Here the court found more than the defendant's mere presence at the scene of a crime, and it found probable cause had existed. On the issue of the necessity of immediate arrest, the court compared the situation to the "exceptional circumstances" that allow police to enter a residence without a warrant to search and arrest. Considering the possibilities of the defendant's fleeing and the likelihood that the evidence of the buy, which easily could have been destroyed or disposed of, might be found on the defendant because he was present at delivery, the court held that the officers were reasonable in their belief that an immediate arrest was necessary. St. v. Davis, 190 M 285, 620 P2d 1209, 37 St. Rep. 1958 (1980).

What Is Criminal Sale — When Sale Is Complete: In appealing his conviction for conspiracy to sell dangerous drugs, the defendant contended that such count as well as counts for attempt to sell dangerous drugs and sale of dangerous drugs (now criminal distribution of dangerous drugs) should have been dismissed. The defendant had not participated in the agreement to buy drugs or the accompanying exchange of money. He argued that the criminal offense had been completed before his participation. The Supreme Court found that defendant's assumption that the act of agreement to buy and the exchange of money constituted the entire sale transaction was too restrictive a view of "criminal sale". The court concluded that the Legislature had not intended that such a sale be complete merely upon the exchange of money. Delivery appears to be an integral part of the sale of drugs, particularly when it is considered that the statutes were aimed primarily at stopping the transfer and distribution of dangerous drugs. Accordingly, the trial judge properly determined that the sale did not necessarily conclude with the payment of money. The defendant's motion to dismiss was properly denied by the trial court. St. v. Davis, 190 M 285, 620 P2d 1209, 37 St. Rep. 1958 (1980), followed in St. v. Chapman, 209 M 57, 679 P2d 1210, 41 St. Rep. 550 (1984).

Entrapment Found as a Matter of Law: The facts of the present case fall within the scope of earlier cases in which the Supreme Court held entrapment as a matter of law. The criminal intent or design to sell marijuana did not originate with the defendant but with the undercover officers who induced defendant to give them a minute quantity of marijuana. The officers did more than merely afford Kamrud the opportunity to commit the offense by making a casual offer to buy. They befriended him on more than one occasion for the purpose of soliciting drugs. St. v. Kamrud, 188 M 100, 611 P2d 188 (1980), following St. v. Grenfell, 172 M 345, 564 P2d 171 (1977).

Proof of Elements of Crime — Sandstrom-Type Jury Instruction — Retrial Ordered: Defendant appealed his conviction for criminal sale of dangerous drugs (now criminal distribution of dangerous drugs). The only issue he raised which had substantive merit was the challenge to a jury instruction similar to the Sandstrom instruction which had been found defective previously. This case is the first considered in Montana since the Sandstrom decision that has been found to be controlled by Sandstrom. To sustain the charge against the defendant, the State needed to prove beyond a reasonable doubt that the defendant purposely or knowingly manufactured a dangerous drug. The voluntary act here is manufacturing. The ordinary consequence is a dangerous drug. Under this framework, the challenged jury instruction directed the jury to presume intent, purposely or knowingly, upon proof by the State of a voluntary act, manufacturing, and that act's ordinary consequence, a dangerous drug. Given the lack of qualifying instructions, a reasonable jury may have interpreted the instruction in either of two impermissible ways, as a conclusive presumption or as a shifting to the defendant of the burden of proving lack of intent upon proof by the State of the defendant's voluntary act and its ordinary consequences. The court could not agree that the offensive instruction could not have contributed reasonably to the jury's verdict because the State's case was entirely circumstantial and the evidence of intent was not overwhelming. Therefore, they could not find the error harmless. St. v. Wogamon, 188 M 34, 610 P2d 1161, 37 St. Rep. 840 (1980).

Unconstitutional Cultivation Provision: That part of 45-9-101 which provides that a person commits a criminal sale of dangerous drugs (now criminal distribution of dangerous drugs) if he cultivates marijuana is unconstitutional on its face because it offends due process by creating a conclusive presumption of a criminal sale of marijuana from its cultivation which is a purely arbitrary presumption. (See 1993 amendment.) State ex rel. Zander v. District Court, 180 M 548, 591 P2d 656, 36 St. Rep. 489 (1979).

"Plain View" Doctrine — Elements: A warrantless seizure of evidence under the "plain view" doctrine is justified only if the police officer had a prior justification for an intrusion in the course of which he inadvertently viewed contraband and exigent circumstances existed to render immediate seizure imperative. In this case the officer's valid visual observation merely furnished probable cause for issuance of a warrant; thus the court was correct in granting a motion to suppress evidence. St. v. Lane, 175 M 225, 573 P2d 198 (1977), overruled in part in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Admissibility and Sufficiency of Evidence: Evidence which included direct testimony by principal in narcotics transaction that defendant had provided the pound of marijuana which was ultimately given to a police informant and defendant's admission that he had intended to sell the informant an additional 14 pounds of marijuana was sufficient to support conviction for selling and possession of marijuana. St. v. Hill, 170 M 71, 550 P2d 390 (1976).

Definitions: Montana does not have two separate drug acts in force. Title 50, ch. 32, is intended to amend and be included as part of Title 45, ch. 9, and term "dangerous drug" as used in this section and 45-9-102 is defined in 50-32-101. State ex rel. Lance v. District Court, 168 M 297, 542 P2d 1211 (1975).

Federal Drug Law — No Preemption of Montana Drug Law: Federal Controlled Substances Act, 21 U.S.C. § 903, does not preempt Montana law on narcotic drugs. State ex rel. Lance v. District Court, 168 M 297, 542 P2d 1211 (1975).

Transfer of Marijuana: The testimony of witnesses was sufficient to support the act of giving or transferring marijuana, which without even considering evidence of a cash transfer establishes the crime beyond a reasonable doubt. St. v. Thomas, 166 M 265, 532 P2d 405 (1975).

Constitutionality: This statute is not unconstitutional just because the Legislature defined the offense of criminal sale of dangerous drugs (now criminal distribution of dangerous drugs) in terms of several types of conduct that might constitute that offense, and although the Montana Legislature could have set forth a separate statute prohibiting the cultivation of marijuana and could have labeled it accordingly, defendant who cultivated marijuana was guilty of the offense of criminal sale of dangerous drugs (now criminal distribution of dangerous drugs). (See 1993 amendment.) State ex rel. LeMieux v. District Court, 166 M 115, 531 P2d 665 (1975), overruled by State ex rel. Zander v. District Court, 180 M 548, 591 P2d 656 (1979).

Dismissal of Charge: Alternative motion to amend information from preparation of drugs to sale of drugs in order to conform with the affidavit or to dismiss and refile charges would have been tantamount to amending the charge as a matter of substance and was properly denied by the trial court. St. v. Tropf, 166 M 79, 530 P2d 1158 (1975).

Possession Only: Trial court's instruction to jury that law implies knowledge that drug was a prohibited drug from mere possession of the drug was an incorrect statement of the law, confusing to the jury, and entitled defendant to new trial. St. v. Anderson, 159 M 344, 498 P2d 295 (1972).

Sale of Drug Dispensed by Physician: Defendant could be convicted of unlawful sale of drug which he possessed lawfully as having been dispensed by physician. St. v. Karathanos, 158 M 461, 493 P2d 326 (1972).

Information Insufficient: Information charging offense under this section was insufficient where it contained neither identity of informer nor specific facts concerning the offense and identity of time and place to protect accused from double jeopardy. State ex rel. Offerdahl v. District Court, 156 M 432, 481 P2d 338 (1971).

Dangerous Drug: Defendant was not entitled to have words "and none others" added at end of jury instructions defining dangerous drugs in words of statute. St. v. Dunn, 155 M 319, 472 P2d 288 (1970).

Nature of Drug: Evidence that victims hallucinated following ingestion of drugs furnished by defendant and described by him as "acid" established dangerous nature of drugs to support conviction, despite absence of proof of exact type of drug, and the possibility that hallucinations might have been flashback from previous trips did not necessarily create reasonable doubt. St. v. Dunn, 155 M 319, 472 P2d 288 (1970).

Repeal Pending Prosecution: Where defendant was charged with selling narcotics in violation of 54-102, R.C.M. 1947 (since repealed), and between date of commission of crime and time information was filed Legislature repealed 54-102, R.C.M. 1947, and passed this section, such repeal did not bar prosecution under former section since general statutory saving clause, 1-2-205, operated to sustain jurisdiction of subject matter in District Court. State ex rel. Huffman v. District Court, 154 M 201, 461 P2d 847 (1969).

45-9-102. Criminal possession of dangerous drugs.

Compiler's Comments

2021 Amendment: Chapter 576 in (1) near beginning deleted reference to Title 50, chapter 46. Amendment effective January 1, 2022.

Severability: Section 113, Ch. 576, L. 2021, was a severability clause.

2020 Amendment by Initiative: Initiative Measure No. 190 in (1) near beginning inserted "Title 16, chapter 12" and after "50-32-101" inserted "greater than permitted or for which a penalty is not specified under Title 16, chapter 12"; deleted former (2) that read: "(2) A person convicted of criminal possession of marijuana or its derivatives in an amount the aggregate weight of which does not exceed 60 grams of marijuana or 1 gram of hashish is, for the first offense, guilty of a misdemeanor and shall be punished by a fine not to exceed $500.

(a) A person convicted of a second offense under this subsection (2) shall be fined an amount not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(b) A person convicted of a third or subsequent offense under this subsection (2) shall be fined an amount not to exceed $1,000 or be imprisoned in the county jail for a term not to exceed 1 year, or both.

(c) This subsection does not apply to the possession of synthetic cannabinoids listed as dangerous drugs in 50-32-222"; in (2) after "dangerous drugs" deleted "not otherwise provided for in subsection (1) or (2)"; and made minor changes in style. Amendment effective January 1, 2021.

Code Commissioner Correction: In (1) the code commissioner inserted brackets around "in an amount" to indicate that the words were apparently deleted in error.

Severability: Section 55, Initiative Measure No. 190, was a severability clause.

2017 Amendments — Composite Section: Chapter 253 in (1) near beginning inserted "50-32-609 or". Amendment effective May 3, 2017.

Chapter 321 in (2) substituted "a fine not to exceed $500" for "a fine of not less than $100 or more than $500 and by imprisonment in the county jail for not more than 6 months. The minimum fine must be imposed as a condition of a suspended or deferred sentence"; in (2)(a) substituted current text for former text that read: "A person convicted of a second or subsequent offense under this subsection is punishable by a fine not to exceed $1,000 or by imprisonment in the county jail for a term not to exceed 1 year or in the state prison for a term not to exceed 3 years or by both"; inserted (2)(b) concerning convictions of a third or subsequent offense; deleted former (3), (4), and (5) that read: "(3) A person convicted of criminal possession of an anabolic steroid as listed in 50-32-226 is, for the first offense, guilty of a misdemeanor and shall be punished by a fine of not less than $100 or more than $500 or by imprisonment in the county jail for not more than 6 months, or both.

(4) A person convicted of criminal possession of an opiate, as defined in 50-32-101, shall be imprisoned in the state prison for a term of not less than 2 years or more than 5 years and may be fined not more than $50,000, except as provided in 46-18-222.

(5) (a) A person convicted of a second or subsequent offense of criminal possession of methamphetamine shall be punished by:

(i) imprisonment for a term not to exceed 5 years or by a fine not to exceed $50,000, or both; or

(ii) commitment to the department of corrections for placement in an appropriate correctional facility or program for a term of not less than 3 years or more than 5 years. If the person successfully completes a residential methamphetamine treatment program operated or approved by the department of corrections during the first 3 years of a term, the remainder of the term must be suspended. The court may also impose a fine not to exceed $50,000.

(b) During the first 3 years of a term under subsection (5)(a)(ii), the department of corrections may place the person in a residential methamphetamine treatment program operated or approved by the department of corrections or in a correctional facility or program. The residential methamphetamine treatment program must consist of time spent in a residential methamphetamine treatment facility and time spent in a community-based prerelease center.

(c) The court shall, as conditions of probation pursuant to subsection (5)(a), order:

(i) the person to abide by the standard conditions of probation established by the department of corrections;

(ii) payment of the costs of imprisonment, probation, and any methamphetamine treatment by the person if the person is financially able to pay those costs;

(iii) that the person may not enter an establishment where alcoholic beverages are sold for consumption on the premises or where gambling takes place;

(iv) that the person may not consume alcoholic beverages;

(v) the person to enter and remain in an aftercare program as directed by the person's probation officer; and

(vi) the person to submit to random or routine drug and alcohol testing"; in (3) substituted "subsection (1) or (2)" for "subsections (2) through (5)", and substituted "$5,000" for "$50,000"; and made minor changes in style. Amendment effective July 1, 2017.

Applicability: Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

Preamble: The preamble attached to Ch. 253, L. 2017, provided: "WHEREAS, according to data from the United States Centers for Disease Control and Prevention (CDC), more than 28,000 deaths in the United States in 2014 involved opioid-related overdoses. In 2015, nationwide overdose deaths involving opioids rose to more than 33,000. The CDC also reports that deaths involving heroin have more than tripled since 2010, with more than 10,500 persons dying in

2014 and almost 13,000 dying in 2015. More than 60% of the opioid-related overdose deaths in 2015 were attributed to primarily illicit opioids, including heroin, to synthetic opioids other than methadone, or to a mixture of the two. The CDC calls opioid-related deaths a national epidemic; and

WHEREAS, many opioid-related overdose deaths could be prevented by the timely administration of an opioid antagonist, such as naloxone hydrochloride. Naloxone is a prescription medication that, when administered to a person experiencing an opioid-related overdose, restores the person to consciousness and normal breathing. Naloxone has been in use for more than 30 years and is virtually always effective when administered correctly. Furthermore, naloxone is nonaddictive and has no potential for abuse; and

WHEREAS, treatment of a suspected opioid-related drug overdose must be performed by someone other than the person overdosing, and, for this reason, the United States Food and Drug Administration labels naloxone for third-party administration. Naloxone can be successfully administered outside of a clinical setting or facility by friends, family members, or bystanders who have received minimal training in overdose recognition and naloxone administration; and

WHEREAS, it is common for a family member or friend to be the first one to find a person who is experiencing a drug overdose. It is also common for first responders, such as law enforcement officers or firefighters, to be among the first persons on the scene of a reported drug overdose. Studies show widespread success in preventing deaths from opioid-related overdoses through timely administration of naloxone. It is imperative, therefore, that persons who are in a position to render timely assistance to an overdose victim have immediate access to naloxone when it is needed; and

WHEREAS, overdose education and naloxone distribution programs that train family members, friends, and others in a position to assist someone experiencing an opioid-related overdose can effectively reduce opioid overdose death rates. Moreover, naloxone distribution for administration by nonmedical experts can be highly cost-effective; and

WHEREAS, an opioid-related overdose is a medical emergency. After the administration of naloxone, it is critical to summon emergency medical assistance. However, persons who witness an overdose are sometimes reluctant to call 9-1-1 for fear of being arrested and prosecuted for a crime. Thirty-six states and the District of Columbia have passed laws providing limited immunity to persons who call for help when someone has experienced an opioid-related overdose; and

WHEREAS, numerous state and national public health and other organizations support increased access to naloxone, including the American Medical Association, the American Society of Addiction Medicine, the American Pharmacists Association, the United States Conference of Mayors, the National Governors Association, the federal Office of National Drug Control Policy, the American Public Health Association, the Harm Reduction Coalition, the National Association of State Alcohol and Drug Abuse Directors, the American Association of Poison Control Centers, and state and local law enforcement and other organizations representing first responders."

2013 Amendment: Chapter 135 in (4) substituted "50-32-101" for "50-32-101(19)". Amendment effective October 1, 2013.

2011 Amendment: Chapter 156 in (2) inserted last sentence regarding exclusion of possession of synthetic cannabinoids from application of (2). Amendment effective April 8, 2011.

2005 Amendment: Chapter 277 inserted (5) relating to a conviction for a second or subsequent offense of criminal possession of methamphetamine; and made minor changes in style. Amendment effective October 1, 2005.

2004 Amendment by Initiative: Initiative Measure No. 148, proposed by initiative petition and approved at the general election held November 2, 2004, in (1) at beginning inserted exception clause. Amendment effective November 2, 2004.

Severability: Section 18, I.M. No. 148, was a severability clause.

2003 Amendment: Chapter 114 in (7) after "practitioners" inserted "as defined in 50-32-101" and after "a professional practice" deleted "as defined by 50-32-101"; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 100 in (6) after "person" deleted "of the age of 21 years or under"; and made minor changes in style. Amendment effective October 1, 2001.

1991 Amendment: Inserted (3) establishing penalty for possession of anabolic steroids; in (5) inserted reference to subsection (4); and made minor changes in style.

1985 Amendment: In (3) changed "50-32-101(18)" to "50-32-101(19)".

1983 Amendment: In (2), substituted first offense punishment of fine of not less than $100 or more than $500 and by imprisonment in county jail for not more than 6 months for former text that read: "punishable by a fine not to exceed $1,000 or imprisonment in the county jail for a term not to exceed 1 year or both such fine and imprisonment"; and in (5) inserted "of imprisonment" at end.

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: For general background on the law in Montana as to drug offenses, see the compiler's comment to Title 45, ch. 9. This section has also been the subject of numerous amendments.

The 1971 amendment inserted "other than criminal possession of marijuana and its derivatives as hereinafter provided" in the first sentence of subsection (b); added new second and third sentences to subsection (b); redesignated the former second sentence of subsection (b) as the first sentence of subsection (d); added the second sentence of subsection (d); and made minor changes in phraseology. The 1973 amendment deleted "and does not come within the exceptions of section 3" from the end of subsection (a). The 1974 amendment deleted from the beginning of subsection (b) "A person convicted of criminal possession of dangerous drugs, other than criminal possession of marijuana and its derivatives as hereinafter provided, shall be imprisoned by imprisonment in the state prison not to exceed five (5) years"; inserted subsection (c); and redesignated former subsection (c) as subsection (d). Chapter 359, L. 1977, redesignated former subsections (a) through (d) as subsections (1) through (4); deleted a former final sentence which read "Jurisdiction under this section shall be exclusively in the district courts"; added a subsection now designated subsection (6); and made minor changes in phraseology, punctuation and style. Chapter 584, L. 1977, redesignated former subsections (a) and (b) as subsections (1) and (2); inserted subsection (3); redesignated former subsections (c) and (d) as subsections (4) and (5); substituted "subsection (2) or (3)" in subsection (4) for "subsection (b)"; and made minor changes in punctuation and style.

To establish an offense under this section, the state must prove (1) knowing (2) control of a (3) dangerous drug for a sufficient time to be able to terminate control. The mental state element of the offense, "knowingly" is included as part of the definition of "possession" as used in the code. § 45-2-101. This section distinguishes between possession of marijuana or hashish in relatively small amounts and possession of opiates or other dangerous drugs. A lesser penalty is provided for offenses involving small amounts of hashish and marijuana and a distinction is made as to the penalty to be imposed for a first offense and that to be imposed for subsequent offenses. Subsection (5) [now (6)] also provides a presumption in favor of deferred imposition of sentence where an under 21-year-old is prosecuted for a first offense under this section. This provision allows youthful first offenders to wipe the slate clean and avoid a criminal record [under a 1991 amendment, the record is confidential and can only be seen by the public on a court order] by complying with the conditions of the deferred sentence and avoiding subsequent charges for an offense under this section. 46-18-204. Additionally, it should be noted that an offender under this section who is shown to be an excessive or habitual user of dangerous drugs, may, in lieu of imprisonment, be committed to the custody of any institution for rehabilitative treatment for not less than 6 months or more than 2 years under 45-9-202.

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SEARCH WITH WARRANT

Failure to Prove Falsity of Warrant Application — Motion to Suppress Properly Denied: Shelton moved to suppress evidence from a drug search based on the assertion that the warrant application mischaracterized statements upon which the application was based. The Supreme Court found that the alleged mischaracterization was merely a difference in semantics, not proof of a false statement in the application. The trial court gave Shelton the opportunity to challenge the veracity of the application but denied the motion to suppress, and the Supreme Court affirmed. St. v. Shelton, 2008 MT 282, 345 M 330, 191 P3d 420 (2008).

Following conviction on drug charges in a different county but stemming from the same incident, Shelton raised an identical claim of the insufficiency of the search warrant based on false information. Having considered and dismissed the argument in Shelton, id., the Supreme Court denied review of the claim under res judicata. Further, there was no indication that the District Court in the subsequent case considered information not contained in the warrant application, so Shelton's second conviction was also affirmed in St. v. Shelton, 2008 MT 321, 346 M 114, 193 P3d 943 (2008).

Suspect's Conduct and Officer's Knowledge of Suspect's Criminal History Sufficient Probable Cause for Warrant to Search Vehicle for Drugs: When officers arrested Frasure on an outstanding warrant, Frasure acted jittery and nervous, spoke with choppy, accelerated speech, and was sweating. Based on their training, the officers knew Frasure's actions were consistent with a person under the influence of methamphetamine. The officers also knew from previous contact that Frasure was a methamphetamine addict who had previously been arrested for methamphetamine offenses. A pat-down search incident to the arrest revealed a marijuana pipe in Frasure's pocket. Frasure denied consent to search the vehicle that he was in when arrested, but the vehicle was impounded and a warrant was obtained to search the vehicle. The search revealed drugs and paraphernalia, and Frasure moved to suppress the evidence on grounds that there was insufficient probable cause for the search warrant. The motion was denied, and on appeal, the Supreme Court affirmed. The officers' knowledge and Frasure's conduct constituted sufficient evidence to support the officers' belief that Frasure had committed an offense, so sufficient probable cause existed to support the vehicle search, and denial of Frasure's motion to suppress was not erroneous. St. v. Frasure, 2004 MT 242, 323 M 1, 97 P3d 1101 (2004).

Sufficient Probable Cause for Search Warrant Based on Tip From Confidential Informant — Corroboration Required — Defendant's Burden to Show False Information in Warrant Application: A confidential informant told police that Gray was conducting a marijuana growing operation in his home. Based on the allegations, officers surveyed the exterior of the home and discovered a newly installed chimney and vents consistent with such an operation. Known drug offenders were observed frequenting the residence. An investigative subpoena of Gray's utility records showed an increase in power consumption consistent with a growing operation. Based on this information, officers obtained a search warrant and discovered 77 marijuana plants and associated growing paraphernalia. Gray moved unsuccessfully to suppress the evidence on grounds of insufficient probable cause to support the warrant, arguing that the warrant application contained unreliable hearsay, insufficient detail, and unsupported conclusory statements. The Supreme Court affirmed. In St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), the court reiterated that corroboration of an informant's tip through other sources is necessary when the information is hearsay or the informant is anonymous. In this case, even though the informant was not anonymous, the informant lacked personal knowledge of the operation, so the information was hearsay and required corroboration. Nevertheless, the information could still be considered with other factors in determining probable cause under the totality of the circumstances test. The officers made several attempts to corroborate the information, including verification of the physical description of Gray and the residence, although that innocuous information alone provided no indicia of suspicious human conduct to substantiate the allegations, as required in St. v. Griggs, 2001 MT 211, 306 M 366, 34 P3d 101 (2001). However, the officers' other observations did provide sufficient corroboration to support probable cause, despite Gray's attempt to offer seemingly innocent explanations for the suspicious conduct. When a defendant challenges the veracity of information in a warrant application, the defendant must make a substantial preliminary showing that the application or affidavit in support of the application contained false information. If that showing is made, a hearing must be held and the defendant must prove by a preponderance of the evidence that the information is untrue, and if proved untrue, that information must be excised from the application and a determination made as to whether sufficient probable cause exists without the excised information (see St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968 (1999)). Here, Gray did challenge the veracity of some, but not all, of the information, but the Supreme Court declined to disturb the trial court's findings regarding the reasonableness and prudence of the investigation or its judgment regarding the credibility of the witnesses. The court found that at some point, credence must be lent to the judgment of law enforcement whose training and experience invoke common sense conclusions about human behavior, and as long as officers provide reasonable justifications for their conclusions, the court will not disturb a finding of probable cause for issuance of a search warrant. The information here was sufficiently corroborated, and in light of the totality of the circumstances, the conclusion that probable cause existed was affirmed. St. v. Gray, 2001 MT 250, 307 M 124, 38 P3d 775 (2001). See also St. v. Rinehart, 262 M 204, 864 P2d 1219 (1993).

Facts Provided by Nonconfidential Informant Self-Authenticating — Omissions and Misstatements Raised by Defendant Held Immaterial for Purposes of Determining Necessity for Franks Hearing — Issues Not Raised on Appeal Held Nonreviewable: Dotts was arrested for assault and disorderly conduct and, in the course of an interview with a detective, offered information on a marijuana-growing operation that was being run by Adams, in exchange for leniency on the charges. Dotts subsequently disclosed, without any commitments from the police, that Adams ran the marijuana-growing operation at a certain location, which Dotts himself helped establish, and that Adams and his son drove certain vehicles described by Dotts. The house and the vehicles were subsequently confirmed by detectives, a search warrant was obtained, a marijuana-growing operation was discovered, and Adams was arrested. Adams sought to suppress the evidence, arguing that a detective's statement in the warrant application that "Mr. Dotts asked for nothing ... and I have offered him nothing...." in the way of leniency was untrue and that certain facts contained statements that were made by Dotts and that turned out to be incorrect. The Supreme Court distinguished St. v. Valley, 252 M 489, 830 P2d 1255 (1992), and St. v. Kaluza, 272 M 404, 901 P2d 107 (1995), explaining that, unlike those cases, the case before it involved a nonconfidential informant whose identification was known to the police. Declining to follow a procedure urged by defendant Adams that would establish a policy of "zero tolerance" for intentional misstatements or omissions in applications for search warrants because the argument was raised for the first time on appeal, the Supreme Court followed the procedure outlined in Franks v. Del., 438 US 154 (1978), and applied in Montana in St. v. Sykes, 194 M 14, 663 P2d 691 (1983), which requires a defendant to make a substantial showing that false statements were knowingly or intentionally made, requires the reviewing court to disregard any such statements, and then requires the court to determine if the remaining facts demonstrate probable cause. Following St. v. Garberding, 245 M 356, 801 P2d 583 (1990), and other cases, the Supreme Court found that the misstatements and omissions in the warrant application raised by Adams did not, in light of Dotts' admission against interest that he helped set up the marijuana-growing operation, cast doubt on the credibility of the other information given by Dotts. For these reasons, the Supreme Court held that the misstatements and omissions were immaterial in determining Dotts' credibility and that, even if Dotts had been a confidential informant, the information that he gave was sufficiently corroborated to establish probable cause. Adams also raised the issue that the search warrant was overbroad, but relying upon St. v. Henderson, 265 M 454, 877 P2d 1013 (1994), the Supreme Court held that because the issue had been raised by Adams for the first time on appeal, the Supreme Court would not consider the issue. St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997), followed in St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998), and St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968, 56 St. Rep. 225 (1999).

No Showing of Informants' Veracity and Reliability or Basis for Information — Search Warrant Improperly Issued: A search warrant application that failed to establish the veracity and reliability of the informants and that, in addition, failed to indicate the basis for any of the informants' knowledge regarding defendant's criminal activities in relation to the residence to be searched could not be said to corroborate or verify the information with regard to the residence and thus provided no value in establishing probable cause for the issuance of the search warrant. St. v. Kaluza, 272 M 404, 901 P2d 107, 52 St. Rep. 795 (1995), distinguished in St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997).

Search of Home for Marijuana Based on Informant's Knowledge and Police Suspicions of Marijuana-Growing Operation: Probable cause to search a home was established when there was a fair probability of finding incriminating evidence. The search warrant and affidavit stated that the affiant was trained and experienced in the field of drug crimes, that a confidential informant had seen marijuana-growing operations in the home a number of times and had spoken with the occupants about the operations, and that two other officers had been to the home's front door on other matters and suspected that the operations were ongoing. In addition, the information supporting the warrant, which consisted mainly of events occurring during the 3 months prior to the warrant, was not stale, especially in view of the continuing nature of a marijuana-growing operation. St. v. Sarbaum, 270 M 176, 890 P2d 1284, 52 St. Rep. 133 (1995).

Anonymous Telephone Calls Sufficient to Issue Search Warrant: The authorities had received a series of anonymous calls and one anonymous Crimestoppers tip indicating that the defendant was involved in drug dealing. The warrant, without identifying the source, also stated that two individuals seen in the defendant's company had been charged with drug-related crimes, resulting in the arrest of one and a dismissal with respect to the other. The Supreme Court stated that in examining the "totality of circumstances", the facts were sufficient for the warrant's issuance. St. v. Rydberg, 239 M 70, 778 P2d 902, 46 St. Rep. 1519 (1989). See also St. v. Rinehart, 262 M 204, 864 P2d 1219, 50 St. Rep. 1517 (1993), St. v. Siegal, 281 M 250, 934 P2d 176, 54 St. Rep. 158 (1997), and St. v. Oleson, 1998 MT 130, 289 M 139, 959 P2d 503, 55 St. Rep. 517 (1998).

Exclusive Nature of Statute: Marijuana seized in private residence under search warrant issued by Justice of Peace was unlawfully seized and warrant was void, since under 54-112, R.C.M. 1947 (since repealed), only District Judge could issue search warrant for narcotics and no search warrant could be issued to search private residence for narcotics. The provisions of former Uniform Drug Act were sole and exclusive provisions governing issuance of search warrants authorizing lawful search and seizure of narcotic drugs, and State's contentions that statute applied only to in rem proceedings to seize and destroy contraband narcotics and did not apply to in personam proceedings against possessor which are governed by Criminal Code could not be sustained. St. v. Langan, 151 M 558, 445 P2d 565 (1968), accord, St. v. Kurland, 151 M 569, 445 P2d 570 (1968), (marijuana inadmissible in criminal prosecution for possession against social guest), distinguished in St. v. Hull, 158 M 6, 487 P2d 1314 (1971).

WARRANTLESS SEARCH

Valid Traffic Stop — Contraband in Vehicle in Plain Sight of Officer — Warrantless Search Constitutional: A police officer stopped the defendant for driving over the center line. When the defendant retrieved paperwork from his sun visor, a baggie dropped onto his lap in front of the officer. The defendant was charged with possession of drugs. At trial, the defendant moved to exclude evidence obtained from the traffic stop, arguing that the officer did not have the lawful right of access to seize the baggie without a warrant. The District Court denied the motion and the defendant was convicted. On appeal, the Supreme Court affirmed, noting that the contraband had dropped within inches of the officer's arm and was fully visible to the officer. Given these facts, the Supreme Court held that the warrantless search was constitutional. St. v. Tenold, 2020 MT 263, 401 Mont. 532, 474 P.3d 829.

Methamphetamine Found in Lawfully Seized Syringe — No Expectation of Privacy — No Private Possessory Interest: The defendant was arrested for driving with a suspended driver's license among other traffic offenses, and the officer located a used syringe in the defendant's pocket that tested positive for methamphetamine during a chemical field test. The District Court denied the defendant's motion to suppress on the grounds of an unlawful search, and the Supreme Court affirmed, holding that a field test of residue in a syringe lawfully seized from the defendant pursuant to a search incident to arrest did not constitute a search requiring law enforcement to first obtain a warrant. The defendant had no reasonable expectation of privacy violated by a test for the presence of methamphetamine in a syringe lawfully seized from his person and could not assert the constitutional protections afforded to a search. Moreover, a person's private possessory interest in methamphetamine has been declared illegitimate by both the U.S. Congress and the Montana Legislature. St. v. Funkhouser, 2020 MT 175, 400 Mont. 373, 467 P.3d 574.

Warrantless Search for Drugs Upheld — Defendant Freely Consented: The police received a tip that the defendant had drugs in her possession. Officers approached the defendant at a train station and asked if they could search her luggage. The defendant allowed the search and officers found prescription pills in unmarked containers. The interaction lasted approximately 10 to 15 minutes and the defendant was allowed to leave. The defendant was eventually charged with criminal possession of dangerous drugs. On appeal, the defendant argued that the tip failed to establish particularized suspicion and the consent to search was involuntary. Distinguishing St. v. Pratt, 286 Mont. 156, 951 P.2d 37 (1997), as applicable to DUI-type offenses, the Supreme Court held that the officers had particularized suspicion and that the defendant freely consented to the search. St. v. Dupree, 2015 MT 103, 378 Mont. 499, 346 P.3d 1114.

Defendant Unconscious in Public Place, Unresponsive to Medical Care — Search of Purse Lawful — Motion to Suppress Properly Denied — Community Caretaker Doctrine Correctly Applied: A store employee called 9-1-1 to report the defendant was in the store, unconscious and face down on the floor. Emergency personnel, after attempting to rouse her and determining that she was breathing but unresponsive, asked a police officer to check her purse for identification or medical information. The officer located small baggies containing what he believed might be methamphetamine. The defendant was taken to the hospital and the officer took the baggies back to the police station, where a field test on the baggies confirmed they contained meth. By the time the officer called the hospital to report his findings to assist with her medical treatment, however, and without his knowledge, the defendant had regained consciousness, refused medical treatment, and left the hospital. After being charged with possession of a dangerous drug, she filed a motion to suppress the evidence located in her purse. The state claimed that the search was lawful pursuant to the community caretaker doctrine. The defendant claimed that the community caretaker doctrine did not apply because, at the time the officer searched her purse, she was already being treated by two EMTs and a fireman and therefore was not in peril. The District Court denied the motion to suppress and the defendant appealed. The Supreme Court affirmed, agreeing that the community caretaker doctrine applied because there were objective facts showing that the defendant was in peril at the time of the search, which included her being unconscious in a public place and unresponsive to medical care. St. v. Anders, 2012 MT 62, 364 Mont. 316, 274 P.3d 720.

Elements of Crime: Whether several ingredients besides amphetamine are present within a pill is immaterial in a prosecution under this chapter. St. v. Hull, 158 M 6, 487 P2d 1314 (1971).

No Capacity or Actual Authority of Youth to Consent to Search of Parent's Home: While conducting a search for Lowe, officers learned that Lowe was staying at Schwarz's home and drove to Schwarz's residence to initiate an arrest. Schwarz was not home, but Schwarz's 13-year-old daughter answered the door and consented to a search of the residence. Without attempting to contact Schwarz, the officers entered the home without a warrant and discovered drugs. When Schwarz arrived home, she was arrested for possession of dangerous drugs. Following conviction, Schwarz appealed on grounds that the search was illegal because the minor daughter did not have authority to consent to a search of the home. The Supreme Court agreed and reversed, adopting a per se rule that a youth under the age of 16 years has neither the capacity nor the actual authority to relinquish a parent's privacy rights and consent to a search of the parent's home. St. v. Schwarz, 2006 MT 120, 332 M 243, 136 P3d 989 (2006). See also St. v. Melees, 2000 MT 6, 298 M 15, 994 P2d 683 (2000).

Probable Cause for Warrantless Seizure of Vehicle — Odor of Marijuana Coupled With Defendant's Admission That Marijuana Had Been Smoked in Vehicle: Following a single-vehicle accident, the investigating officer discovered that Pierce had over $8,000 in outstanding warrants. Pierce was arrested and placed in the patrol car and then requested that the officer retrieve a telephone book from Pierce's vehicle. When the officer entered the vehicle, he noticed the strong odor of burnt marijuana. Pierce subsequently admitted that someone had smoked marijuana in the vehicle. The officer impounded the vehicle, sealing it with evidence tape. Following an alert by a canine officer 2 days later, the officer obtained a search warrant, discovered drugs and paraphernalia, and arrested Pierce on drug charges. Pierce contended that the state lacked probable cause to impound the vehicle and search it and moved to suppress the evidence. The Supreme Court disagreed. The officer used the marijuana odor in conjunction with Pierce's admission that someone had unlawfully smoked marijuana in the vehicle to establish probable cause to seize the truck, and the affidavit for a warrant to search the vehicle contained sufficient information to support a reasonable belief that the offense of possession of dangerous drugs had been committed and that evidence or contraband might be found in the vehicle. Pierce's motion to suppress the evidence was properly denied. St. v. Pierce, 2005 MT 182, 328 M 33, 116 P3d 817 (2005), following St. v. Broell, 249 M 117, 814 P2d 44 (1991), and distinguishing St. v. Schoendaller, 176 M 376, 578 P2d 730 (1978), and St. v. Olson, 180 M 151, 589 P2d 663 (1979).

Justifiable Stop for Daytime Check of Temporary Window Sticker Warranted — Further Police Intrusion Not Warranted Once Limited Purpose of Stop Accomplished: Following weeks of surveillance instigated by a confidential tip intimating drug activities, the Billings police observed no suspicious drug-related activities conducted by defendants, but after receiving a tip that defendants would be driving from Billings to Bozeman to sell marijuana, officers stopped defendants' vehicle because there were no license plates displayed, although a temporary sticker could be seen but not read in the tinted rear window. When the officers approached the vehicle, they noticed that the temporary sticker properly displayed in the window was current. Nevertheless, in a short time, additional officers arrived with a drug-sniffing dog. The dog indicated the presence of drugs, the vehicle was searched, marijuana was found, and defendants were arrested. Defendants contended that the evidence should be suppressed because there was no particularized suspicion to make the stop. The Supreme Court agreed that the investigative stop was warranted because the officers' inability to read the expiration date on the temporary sticker provided an objective basis to infer that the sticker was not valid. However, a quick check of the properly displayed sticker in bright daylight confirmed the sticker's validity. Defendants had committed no traffic offense or violated any other criminal law of which the officers were aware. An investigative stop is a temporary detention that may not last longer than necessary to effectuate the purpose of the stop. Once the limited purpose of the investigative stop was accomplished, no further police intrusion was warranted, and the investigative stop related to drug possession was not justified. The District Court committed reversible error in refusing to suppress the evidence of the subsequent vehicle search. St. v. Martinez, 2003 MT 65, 314 M 434, 67 P3d 207 (2003), following St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137 (1998). See also St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

POSSESSION

Noncardholder Not Exempt from Prosecution for Possession or Cultivation of Marijuana Under Exemption for Being in Vicinity of Registered Medical Marijuana Cardholder's Authorized Use: The defendant was not exempted from prosecution for possession of marijuana solely because she was in the vicinity of authorized use of marijuana by a registered medical marijuana cardholder. On appeal to the Supreme Court, the defendant argued she was protected from prosecution under the Montana Medical Marijuana Act because her partner was a registered medical marijuana cardholder and she could not be prosecuted for constructive possession under 50-46-319(5)(a) (now repealed). The Supreme Court disagreed. Even if she was protected from being found in constructive possession of marijuana, the charges against her were not based only on that constructive possession. Because the defendant engaged in activities related to the production and cultivation of marijuana plants and exercised control over both the plants and the house the plants were found in, the defendant was still subject to prosecution for criminal production or manufacture of dangerous drugs. St. v. Sutton, 2018 MT 143, 391 Mont. 485, 419 P.3d 1201.

Evidence of Clean Urinalysis Six Days After Arrest Held Irrelevant to Charge of Criminal Possession of Dangerous Drugs: Clark was charged with criminal possession of a dangerous drug. Six days after his arrest, the results of a urinalysis showed no presence of the drugs in Clark's body. The District Court excluded the results of the urinalysis, and Clark appealed. The Supreme Court held that the results of the urinalysis were properly excluded from Clark's trial because the results were not relevant to the charge of his possession of the drugs. St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

Presence of Drugs in Borrowed Vehicle Sufficient Evidence for Conviction of Possession of Dangerous Drugs: Clark was loaned a vehicle by his supervisor so that he could report promptly for fire suppression duty. Over the course of the summer, Clark treated the vehicle virtually as his own, even loaning it to a friend for a month. Clark was later stopped on the highway by a highway patrol officer. Dangerous drugs, for which Clark didn't have a prescription but the person to whom Clark loaned the vehicle did, were found in the vehicle, and Clark was charged with and convicted of unlawful possession of a dangerous drug. The Supreme Court held that there was sufficient evidence of Clark's control over everything in the borrowed vehicle to support his conviction. St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

Sufficient Circumstantial Evidence of Possession of Dangerous Drugs: Although no drugs were found in his possession, Rosling was charged with criminal possession of dangerous drugs when committing deliberate homicide. At trial, Rosling moved to dismiss the charge based on insufficient evidence. The motion was denied, and on appeal, the Supreme Court affirmed. Rosling admitted to an investigating officer that he purchased methamphetamine the weekend before the murder and used methamphetamine on the night of the murder, the forensic report on Rosling's urine sample showed the presence of methamphetamine in Rosling's system, and a witness testified that Rosling used methamphetamine the night of the murder. This evidence, though circumstantial, was sufficient for a trier of fact to find the essential elements of criminal possession of dangerous drugs beyond a reasonable doubt, and the trial court did not err in denying the motion to dismiss. St. v. Rosling, 2008 MT 62, 342 M 1, 180 P3d 1102 (2008).

Ingestion of Dangerous Drugs Considered Constructive Possession When Accompanied by Evidence of Knowing and Voluntary Possession: The state sought to revoke a juvenile youth's probation on grounds that the youth's urinalysis tested positive for methamphetamines, opiates, and marijuana. The youth argued that once the drugs were ingested, the youth no longer had dominion or control over them and thus could not be considered to be in possession of drugs. In a case of first impression, the Supreme Court considered whether constructive possession can be proved by a positive urinalysis. The court agreed with the youth that once a substance is ingested and then assimilated into a person's bloodstream, the person who ingested it ceases to exercise dominion and control over the substance, but the court also concluded that the presence of an illegal substance in the body constitutes circumstantial evidence of prior possession of that substance, if even for a short time. However, based on statutory definitions, the presence of a dangerous drug in one's body, standing alone, is insufficient to sustain a conviction for possession of dangerous drugs because possession also requires proof that the drug was knowingly or voluntarily ingested. Thus, the presence of a controlled substance in a person's blood or urine constitutes sufficient circumstantial evidence to prove prior possession beyond a reasonable doubt only when accompanied by other corroborating evidence of knowing and voluntary possession, such as admission of drug use. Here, the youth admitted using methamphetamine, which provided direct evidence that the youth knowingly and voluntarily possessed methamphetamine as charged. However, the youth made no admission of using opiates or marijuana, so there was no corroborating evidence to support the positive urinalysis for those substances. Thus, the determination that the youth illegally possessed opiates and marijuana was reversed. In re R.L.H., 2005 MT 177, 327 M 520, 116 P3d 791 (2005), distinguished in St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

Criminal Possession of Dangerous Drugs, but Not Possession of Precursors to Dangerous Drugs, Considered Lesser Included Offense of Criminal Production or Manufacture of Dangerous Drugs by Accountability: Becker was convicted of criminal possession of dangerous drugs, accountability for criminal production or manufacture of dangerous drugs, and criminal possession of precursors to dangerous drugs. However, because the production or manufacture of dangerous drugs cannot be a criminal act until the drug has been created, the state had to first prove that Becker or one of his codefendants possessed drugs in order to convict Becker on the charge of producing or manufacturing those same drugs. Read together, 46-1-202(9)(a) and 46-11-410(2)(a) barred Becker's conviction for both criminal possession of dangerous drugs and accountability for criminal production or manufacture of dangerous drugs because criminal possession is a lesser included offense of criminal production or manufacture of dangerous drugs. However, criminal possession of precursors to dangerous drugs is not a lesser included offense of accountability for criminal production or manufacture of dangerous drugs. Thus, the Supreme Court reversed the criminal possession conviction and ordered resentencing on only the criminal possession of precursors and accountability for criminal production or manufacture. St. v. Becker, 2005 MT 75, 326 M 364, 110 P3d 1 (2005). See also St. v. Peterson, 227 M 511, 744 P2d 870 (1987).

Proper Venue for Prosecution of Common Scheme to Manufacture Methamphetamine in Several Counties — Possession Charge Dismissed for Improper Venue: Following arrest in Sanders County, Galpin was charged in Ravalli County with possession of methamphetamine in Sanders County, operating a methamphetamine lab in Ravalli County, possessing methamphetamine precursors in Ravalli and Missoula Counties, and criminal endangerment in Ravalli County. Citing venue grounds, Galpin questioned the evidence on the endangerment charge and moved to dismiss the possession charge and the Missoula County precursor charge because there was no evidence that the crimes were committed in Ravalli County where the charges were filed. The Supreme Court agreed that possession has but one requisite act, which is possession of the drug itself, and because neither the state's information nor trial testimony established that Galpin possessed methamphetamine anywhere but Sanders County, Ravalli County was not the proper venue for the possession charge, so it was dismissed. However, in pursuit of the common scheme to manufacture methamphetamine, Galpin kept precursors in storage facilities in both Ravalli and Missoula Counties and knowingly or purposely prepared, processed, or manufactured the drug as he traveled between Ravalli and Missoula Counties, so venue was proper in Ravalli County for the precursor charges. Ravalli County was also a proper venue for the criminal endangerment charges based on witness testimony that Galpin manufactured methamphetamine on at least three occasions at the witness's home in Ravalli County when children were present. St. v. Galpin, 2003 MT 324, 318 M 318, 80 P3d 1207 (2003).

Evidence of Knowing Control to Be Weighed by Jury: Lopez and Curitan were guests in Harper's home near Helena and, during their stay with him, divided part of a bag of methamphetamine for sale. After a probation search by police officers disclosed the drugs in Harper's freezer and after a bag of marijuana was found in Harper's underwear, Harper was charged with possession of a dangerous drug. Harper contended that there was insufficient proof of "knowing control" of the drugs to uphold his conviction. The Supreme Court noted that Officer Jungers testified as to statements made by others that tended to prove Harper's knowledge of the drugs in his home and that if Harper wanted to be rid of the drugs, all he had to do was to ask Lopez and his companion to leave his home or at least to remove the drugs. Based upon the testimony of the police officer, which the jury was free to believe or to disregard, the Supreme Court held that there was sufficient evidence from which the jury could find beyond a reasonable doubt that Harper committed the offense of possession. St. v. Harper, 284 M 185, 943 P2d 1255, 54 St. Rep. 837 (1997).

Knowing Control of Content of Unopened Box Containing Marijuana Proved From Circumstances: After police discovered that an undelivered UPS package contained marijuana, they delivered the package to Arthun's home and it was accepted by his wife. Police later observed Arthun at his home but did not see the package disposed of. When officers later went to the home, they observed drug paraphernalia in the house and Arthun led police to an unopened box hidden behind farm tools in another building. Arthun's motion to suppress was denied by the District Court, and the denial was affirmed by the Supreme Court. The Supreme Court held that although possession is not alone sufficient to prove knowing control, that control may be inferred by the trier of fact from the totality of the circumstances. St. v. Arthun, 274 M 82, 906 P2d 216, 52 St. Rep. 1133 (1995).

Evidence of Possession of Methamphetamine in Cocaine Container Sufficient to Support Guilty Verdict of Possession of Methamphetamine: During a pat-down search for weapons, the arresting officer felt a round container in Bernhardt's clothing, which he assumed to be a tobacco container. On the ride to the station, Bernhardt was moving around and rocking back and forth in the back seat of the squad car. On arrival at the jail parking lot, the officer heard a noise that sounded like a hard container dropping against metal. During the search at the jail, paraphernalia customarily used for taking drugs was found in Bernhardt's pocket. The officer returned to the back seat of the squad car where he found a round plastic container, which contained residue that later tested for cocaine, and two bindles, which contained residue that later tested for methamphetamine. Upon subsequent conviction for possession of methamphetamine, Bernhardt maintained that evidence could support a conviction for possession of cocaine because that was what was found in the container but maintained that evidence did not directly link him with the bindles of methamphetamine. The evidence, although circumstantial, was nevertheless substantial enough to support the jury's verdict of guilt for methamphetamine possession. St. v. Bernhardt, 249 M 30, 813 P2d 436, 48 St. Rep. 563 (1991).

Drugs Found in Stored Travel Trailer Inconclusive Proof of Knowing Possession of Drugs: Officers searching defendant's stored travel trailer, which had not been occupied for some time, discovered 1/20 gram of cocaine in a folded $10 bill. Defendant was subsequently convicted of possession of dangerous drugs. Testimony at trial indicated that the drugs and bill were left in the trailer by an out-of-state visitor, unbeknownst to defendant. The mere fact that the drugs were found in defendant's unoccupied trailer would not allow any rational trier of fact to conclude that defendant had knowing possession of drugs. Defendant's conviction was reversed and charges were dismissed as unsupported by the evidence. St. v. Gorder, 248 M 336, 811 P2d 1291, 48 St. Rep. 460 (1991), distinguished in St. v. Neely, 261 M 369, 862 P2d 1109, 50 St. Rep. 1363 (1993). See also St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

Possession of Drugs on Person and on Property as Separate Acts of Possession: Defendant was charged and convicted of one count of criminal possession of methamphetamine on his person and one count of criminal possession of methamphetamine on his premises—charges he contended should have been merged into one charge of possession arising from the same transaction. The Supreme Court, while recognizing that the prohibition against double jeopardy protects a defendant both from multiple punishments imposed at a single prosecution for the same offense and from multiple prosecutions for offenses arising from the same transaction, nevertheless found that the Legislature intended to punish both "actual" possession of drugs on the person and "constructive" possession on the premises. Each count required proof of a fact that the other did not. Under the rationale of Blockburger v. U.S., 284 US 299, 76 L Ed 2d 306, 52 S Ct 180 (1932), conviction on both counts was affirmed. St. v. Crowder, 248 M 169, 810 P2d 299, 48 St. Rep. 376 (1991), followed, with regard to multiple offenses of issuing a bad check, common scheme, in Stilson v. St., 278 M 20, 924 P2d 238, 53 St. Rep. 572 (1996), and followed, with regard to issuing bad checks in several thefts, common scheme, in St. v. Savaria, 284 M 216, 945 P2d 24, 54 St. Rep. 852 (1997). However, see U.S. v. Johnson, 909 F2d 1517 (D.C. Cir. 1990), in which it was held that when a defendant possesses the same controlled substance in the same place at the same time, he commits only one act of possession.

Joint Husband-Wife Possession of Sixty Plus Grams of Marijuana: Two persons can jointly possess a controlled substance, and where it is found in a place subject to joint dominion and control, possession may be imputed to both persons. Where marijuana in excess of the 60-gram weight necessary to support a felony conviction was found in the pantry and in a stoneware glass on the television in a house occupied by husband and wife defendants and both testified they knew where it was and used it, they could both be convicted of felony possession of dangerous drugs. St. v. Scheffelman, 225 M 408, 733 P2d 348, 44 St. Rep. 357 (1987).

Unopened Package — Knowledge and Control: Defendant obtained a bank loan of $2,000 for the stated purpose of repaying his parents. On that date, his own resources together with the loan were insufficient to allow him to accumulate cash in the amount of nearly the $4,000 that he wired to Florida. A police informant told police that defendant was sending money to Florida to buy drugs. A package containing marijuana was sent from Florida to defendant. The return address on the package was nonexistent. The postmaster informed police the package had arrived. Defendant contended that since he was taken into custody at the post office before the package was opened, he did not have sufficient time to terminate control over the package. The court found that defendant's control of the contraband began at the time he wired the money to Florida. He could have terminated control at any time thereafter. The court found there was substantial credible evidence to support the finding that defendant knew of the contents of the package and that he controlled the contents for a sufficient time to have the opportunity to terminate control. St. v. Smith, 203 M 346, 661 P2d 463, 40 St. Rep. 494 (1983).

Relevance of Evidence Showing Control Over Premises in Possessory Crime: Two license plates bearing the defendant's nickname and a letter to the defendant addressed to the premises at which prohibited drugs were discovered were properly admitted as evidence tending to show defendant's dominion and control over the residence. St. v. Meader, 184 M 32, 601 P2d 386, 36 St. Rep. 1747 (1979).

Sufficiency of Evidence to Show Constructive Possession: There was sufficient evidence to support the jury's finding that the defendant had constructive possession of drugs found in a residence leased to another. The defendant was found hiding in a bedroom where drugs were found, and mail addressed to the defendant at the residence, license plates bearing the defendant's nickname, and men's clothing that would fit the defendant were found at the residence. In addition, the landlady of the residence testified that she believed the defendant was occupying the residence. St. v. Meader, 184 M 32, 601 P2d 386, 36 St. Rep. 1747 (1979), followed in St. v. Caekaert, 1999 MT 147, 295 M 42, 983 P2d 332, 56 St. Rep. 583 (1999).

Sufficiency of Evidence: In prosecution for felony possession of marijuana, analysis of random samples from each of 15 1-pound packages was sufficient to establish that the amount involved in transaction which led to arrest was in excess of 60 grams and thus that a felony charge was warranted, despite contention that conviction was improper because less than 60 grams were tested. St. v. Hill, 170 M 71, 550 P2d 390 (1976).

Constructive Possession — Sufficiency of Evidence: Evidence was sufficient to support finding of constructive possession of dangerous drugs on part of defendant who was stopped for traffic offenses, who slid over to passenger side of his vehicle and crawled out of passenger side on his hands and knees, whose hands touched the ground, who was taken to police station for booking on traffic offenses, and who was returned to area by police officer who then found beneath automobile on passenger side a bottle and bag which contained drugs and which were not frost-covered like surrounding area. St. v. Ruona, 159 M 507, 499 P2d 797 (1972). See also St. v. Stemple, 198 M 409, 646 P2d 539, 39 St. Rep. 1085 (1982).

Quantity in Possession: As this chapter did not require proof of any specific quantity of a dangerous drug in order to constitute violation, it was unnecessary for the jury to find that the defendant possessed an amphetamine pill in sufficient quantity to be dangerous. St. v. Hull, 158 M 6, 487 P2d 1314 (1971).

Constructive Possession: Possession of airline baggage claim tag was constructive possession of contraband contained in suitcase. St. v. Trowbridge, 157 M 527, 487 P2d 530 (1971).

Probable Cause for Arrest: Where relators were arrested and charged under this section, allegation that probable cause did not exist for their arrest without warrant was without merit in regard to three who were present and lived in house where drugs were found; but probable cause did not exist concerning fourth party arrested who was present on premises but did not live there, notwithstanding later finding of drugs on this party, since mere presence in place where search was made without further proof of probable cause was insufficient to justify arrest. State ex rel. Glantz v. District Court, 154 M 132, 461 P2d 193 (1969), distinguished in St. v. Hull, 158 M 6, 487 P2d 1314 (1971).

SENTENCING

Deferred Sentence Erroneously Denied — State Failed to Overcome Presumption of Entitlement — Abuse of Discretion: The defendant was convicted of a first offense of criminal possession of dangerous drugs and argued that she was entitled to a deferred sentence. The state argued that it had met the four factors set forth in Campus v. St., 157 Mont. 321, 483 P.2d 275 (1971), that are necessary to overcome the presumption of entitlement to a deferred sentence. The

District Court sentenced the defendant to a 4-year commitment with all 4 years suspended. On appeal, the Supreme Court found that the state had not met the four Campus factors. While acknowledging that the fourth factor — requirement of a hearing — had been met, the Supreme Court disagreed that the other three factors were demonstrated. It found that the defendant's prior and postconviction interactions with law enforcement should not be considered aggravating circumstances because the defendant was never arrested or charged in conjunction with those incidents and her attempt to conceal and divert blame for her possession of methamphetamine was insufficient to overcome the presumption pursuant to St. v. Burris, 168 Mont. 195, 542 P.2d 1223 (1975). The Supreme Court also observed that the suspended sentence that the defendant received served the same purpose of long-term supervision as the deferred sentence would have served and noted that the District Court did not evidently believe incarceration to be necessary or appropriate. The Supreme Court found that the District Court had abused its discretion by finding that the state had sufficiently met the Campus factors to overcome the defendant's presumed entitlement to a deferred sentence. St. v. Doubek, 2021 MT 76, 403 Mont. 514, 483 P.3d 1095.

Presumption of Eligibility for Deferred Sentence Overcome — Suspended Sentence Properly Imposed: The defendant was tried on charges of first-offense criminal possession of dangerous drugs and criminal possession with intent to distribute. The jury found her guilty of possession of methamphetamine and paraphernalia but not guilty of distribution. The District Court sentenced her to a 5-year term of commitment, fully suspended for placement in a treatment facility, and fines. The defendant appealed, arguing that the state had not met its burden to overcome the statutory presumption of a deferred sentence. The Supreme Court affirmed, finding that the District Court gave appropriate consideration of the aggravating factors and noted that it was proper to consider the extraordinary quantity of meth in the defendant's possession and circumstances surrounding her arrest even though the state was unable to convict her of intent to distribute. St. v. Wilkes, 2021 MT 27, 403 Mont. 180, 480 P.3d 823.

Conditions Including Restrictions on Alcohol Consumption and Entering Casinos Related to Drug Possession — Affirmed: As conditions of Winkel's suspended sentence for felony possession of dangerous drugs, the sentencing court prohibited Winkel from consuming alcohol and from entering any place where intoxicants were the chief item of sale and prohibited Winkel from entering casinos or playing games of chance. Winkel contended that the conditions should be stricken because alcohol and gambling were not related to the drug offense. The Supreme Court noted that sentencing conditions must be reasonably connected to the underlying offense and to the offender and concluded that in this case, that connection existed. The alcohol prohibition was connected to the drug-related nature of Winkel's drug offense and was called for, given Winkel's recent and chronic history of substance abuse and chemical dependency. Thus, the sentencing court did not err in finding that Winkel's rehabilitation would be jeopardized if Winkel had access to intoxicants like alcohol. Additionally, because alcohol is inseparable from gambling in Montana casinos, the prohibition against entering casinos achieved the same objectives of rehabilitation and protection and was also warranted. The conditions of Winkel's suspended sentence were affirmed. St. v. Winkel, 2008 MT 89, 342 M 267, 182 P3d 54 (2008), followed in St. v. Teets, 2008 MT 130, 343 M 73, 183 P3d 45 (2008), St. v. Deshazo, 2008 MT 131, 343 M 77, 183 P3d 47 (2008), St. v. Corbin, 2008 MT 146, 343 M 211, 184 P3d 287 (2008), and St. v. Sadowsky, 2008 MT 405, 347 M 192, 197 P3d 1018 (2008). See also St. v. Ashby, 2008 MT 83, 342 M 187, 179 P3d 1164 (2008).

Remand to Determine Credit for Prejudgment Time Served — Failure to Object Not Fatal to Appeal: The District Court gave Erickson credit for time served on charges for two separate crimes. Erickson did not object to the credit at sentencing, but instead contested the credit on appeal. Following St. v. Eaton, 2004 MT 283, 323 M 287, 99 P3d 661 (2004), the Supreme Court applied the exception to the rule that failure to timely object to a sentence risks waiver of a sentencing issue on appeal because giving Erickson less credit than he was entitled to would violate statutory mandates. A defendant's sentence may be credited with incarceration time only if the incarceration was directly related to the offense for which the sentence was imposed. The record on appeal was unclear regarding whether Erickson's bond was revoked on one of the charges and whether Erickson received proper presentence credit, so the case was remanded to determine whether Erickson was given proper credit for time served for each offense. St. v. Erickson, 2005 MT 276, 329 M 192, 124 P3d 119 (2005), following St. v. Kime, 2002 MT 38, 308 M 341, 43 P3d 290 (2002), and followed in St. v. Henderson, 2008 MT 230, 344 M 371, 188 P3d 1011 (2008). Henderson was followed in St. v. Allison, 2008 MT 305, 346 M 6, 192 P3d 1135 (2008).

On remand, the District Court determined that Erickson's bond was not formally revoked on the first charge and properly credited Erickson with 267 days served on the first charge and for 457 days served from arrest to the sentencing hearing on the second charge. St. v. Erickson, 2008 MT 50, 341 M 426, 177 P3d 1043 (2008).

Remand of Erroneous Ten-Year Sentence: The Supreme Court remanded a 10-year sentence, with 3 years suspended, for criminal cocaine possession as excessive under the maximum sentence allowable under this section. St. v. Willson, 250 M 241, 818 P2d 1199, 48 St. Rep. 907 (1991).

Evidence Necessary to Overcome Presumption for Deferred Imposition of Sentence: Where the appellant, a 20-year-old male, was charged and convicted of possession of a dangerous drug while serving two concurrent 5-year felony sentences at the Swan River Youth Forest Camp (now Swan River Forest Camp), the District Court did not err in holding, upon reconsideration, that the presumption in favor of a deferred imposition of sentence was overcome by the appellant's prior felony convictions for burglary and criminal mischief. Under the rationale of Campus v. St., 157 M 321, 483 P2d 275 (1971), the District Court properly found that the four criteria for overcoming the presumption in favor of deferred imposition of sentence had been met, and it is unnecessary to restrict the evidence admissible for such purposes only to evidence relative to the crime charged (possession of a dangerous drug). Rather, the presumption is to be weighed against all other evidence relevant to sentencing. St. v. Bolt, 204 M 261, 664 P2d 322, 40 St. Rep. 832 (1983), followed in St. v. Upshaw, 2006 MT 341, 335 M 162, 153 P3d 579 (2006), and St. v. Doubek, 2021 MT 76, 403 Mont. 514, 483 P.3d 1095.

Fine Imposed — Unreasonable: The fine provision in 45-9-102, in itself, does not allow the sentencing court to make payment of a fine a condition to suspended execution of a sentence. Additionally, the Supreme Court found no reasonable association between the fines imposed and the offenses committed, nor did it find the fines to be reasonable or necessary conditions of probation or for the protection of the public. St. v. Cripps, 177 M 410, 582 P2d 312 (1978).

Unsatisfactory Answers of Defendant: Trial judge's belief that 19-year-old defendant lied to him when he asked where defendant got marijuana is not the type of aggravated circumstances necessary to overcome the presumption of a deferred sentence as the aggravating circumstances should be supported by substantial evidence over and above the simple facts of a prima facie crime. St. v. Burris, 168 M 195, 542 P2d 1223, 32 St. Rep. 1016 (1975).

Sentencing:

Under subsection (4), a defendant may not be sentenced to a term in jail; and at the termination of the time of deferment or stayed imposition, the sentencing statute (46-18-204) authorizes the court to accept a plea withdrawal or to strike the verdict of guilty and order the charge dismissed. St. v. Drew, 158 M 214, 490 P2d 230 (1971), distinguished in State ex rel. Woodbury v. District Court, 159 M 128, 495 P2d 1119 (1972).

Once the presumption provided for in subsection (4) has been found by the trial judge not to have been overcome, the court's discretion is limited by this act to defer the imposition of sentence as provided under 46-18-201. St. v. Drew, 158 M 214, 490 P2d 230 (1971), distinguished in State ex rel. Woodbury v. District Court, 159 M 128, 495 P2d 1119 (1972).

Deferred Sentence: Trial court improperly sentenced 21-year-old defendant to 3 years imprisonment for violation of this section where there was no evidence to overcome the statutory presumption that defendant was entitled to deferred sentence. St. v. Simtob, 154 M 286, 462 P2d 873 (1969).

JURY INSTRUCTIONS

Erroneous Instruction — Defendant Not Prejudiced: In a prosecution for felony criminal possession of a dangerous drug, the state is only obligated to prove "knowing" control of the dangerous drug. When the trial court instructed the jury that the state had to prove that the defendant "purposely" possessed the drug, the result was that the state had to prove that the defendant was both purposely and knowingly in control of a dangerous drug. In this case, the state carried its burden of proof on both instructions, and no prejudice to the defendant can be found in the erroneous placement of this additional burden on the state. St. v. Krum, 238 M 359, 777 P2d 889, 46 St. Rep. 1334 (1989).

Possession of Dangerous Drugs as Lesser Included Offense of Possession With Intent to Sell — Instruction on Lesser Offense Required: It was reversible error for the District Court to deny defendant's instruction on the offense of possession of dangerous drugs as a lesser included offense of possession of dangerous drugs with intent to sell (now criminal possession with intent to distribute). St. v. Peterson, 227 M 503, 741 P2d 392, 44 St. Rep. 1268 (1987).

CONSTITUTIONAL ISSUES

Denial of Directed Verdict on First Trial Proper — Sufficient Evidence to Convict — No Double Jeopardy on New Trial: The District Court did not err in denying the defendant's motion for directed verdict during his first jury trial. There was sufficient evidence for the District Court to submit the case to the jury to determine if the elements of criminal possession of dangerous drugs with the intent to distribute were met. The state presented more than sufficient evidence from which a rational trier of fact could have found beyond a reasonable doubt that the defendant knew about the methamphetamine under his passenger seat, was in possession of the methamphetamine, and had intended to distribute the methamphetamine. Additionally, since the Supreme Court agreed with the state's argument that the District Court did not err by denying the defendant's motion for directed verdict in the first trial, the Supreme Court declined to address the substance of the defendant's double jeopardy argument. St. v. Ellerbee, 2019 MT 37, 394 Mont. 289, 434 P.3d 910.

Use of Confidential Treatment Court Information to Charge Felony Drug Offenses — Violation of Right Against Self-Incrimination: While the defendant was a participant in Treatment Court, he had a positive drug test. Subsequently, the defendant provided incriminating information in three interviews with the Treatment Court probation officer, believing that he had to be honest to comply with Treatment Court requirements and fearing that he would receive sanctions if he refused to answer questions. Based on incriminating information obtained in the interviews, the defendant was charged with distribution of dangerous drugs and possession of dangerous drugs. The District Court denied the defendant's motions to suppress and dismiss. On appeal, the Supreme Court reversed, concluding that the state violated Treatment Court confidentiality by disclosing the incriminating information to law enforcement in order to investigate new drug offenses and that the defendant's right against self-incrimination was violated when he was compelled to provide the incriminating information or face sanctions or discharge from Treatment Court. St. v. Plouffe, 2014 MT 183, 375 Mont. 429, 329 P.3d 1255.

Convictions for Possession of Dangerous Drugs Vacated Given Convictions for Possession of Dangerous Drugs With Intent to Distribute Same Drugs — Remand for Resentencing: Wing was convicted of criminal distribution of dangerous drugs, two counts of criminal possession of dangerous drugs, and two counts of criminal possession of dangerous drugs with intent to distribute. On appeal, Wing asserted that because the two counts of possession and two counts of possession of dangerous drugs with intent to distribute involved the same drugs, a conviction under all four counts would unconstitutionally permit multiple punishments for the same offense. The Supreme Court agreed and remanded with instructions to vacate Wing's convictions for criminal possession of dangerous drugs and to resentence Wing in accordance with the remaining convictions. St. v. Wing, 2008 MT 218, 344 M 243, 188 P3d 999 (2008).

Reasonable Expectation of Privacy in Lost Wallet — Evidence Obtained From Search of Lost Wallet Subject to Suppression: Hamilton's lost wallet was turned into the Bozeman police, who opened it to determine ownership. In doing so, the police discovered prescription drugs. Hamilton confessed that the drugs were not prescribed for her, and she was arrested and convicted. On appeal, Hamilton asserted that she retained an expectation of privacy in the lost wallet and that the fruits of the search of the wallet should be suppressed. The Supreme Court agreed. In determining whether an unlawful search of the wallet occurred, the court applied St. v. Scheetz, 286 M 41, 950 P2d 722 (1997), looking at whether Hamilton had an actual expectation of privacy that society was willing to recognize as objectively reasonable and at the nature of the state's intrusion. When a person intentionally abandons property, the expectation of privacy is abandoned as well. However, when property is not intentionally or voluntarily abandoned, the expectation of privacy remains substantially intact. Thus, Hamilton's expectation of privacy was diminished only to the extent necessary for the police to determine ownership. The police search exceeded what was necessary to determine ownership of the wallet and was not justified by any exception to the warrant requirements. Therefore, the warrantless search was illegal, and the evidence obtained as a result of the search should have been suppressed. Hamilton's conviction was reversed. St. v. Hamilton, 2003 MT 71, 314 M 507, 67 P3d 871 (2003), distinguished in St. v. Demontiney, 2014 MT 66, 374 Mont. 211, 324 P.3d 344.

Lack of Evidence That Investigating Officers Went Above High-Water Mark to Obtain Photograph of Marijuana Plant on Private Property — Motion to Suppress Properly Denied: An anonymous caller informed the Rosebud County Sheriff's office that Mogen was growing marijuana on Mogen's private land abutting the Yellowstone River. A Sheriff's officer and a game warden traveled by boat down the river to begin surveillance operations. The officers did not have a search warrant or permission to be on Mogen's property, nor was the property posted along the river. The Sheriff testified that the game warden came along to identify and prevent trespass above the ordinary high-water mark, below which public access is allowed pursuant to Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). The officers used binoculars to view the suspected marijuana plant and took photographs of the plant from a point that they testified was below the ordinary high-water mark. Mogen moved to suppress the evidence, asserting that the officers must have crossed above the ordinary high-water mark, without an invitation or warrant, to observe and take the photographs in a portion of his property where he had an expectation of privacy and that the evidence was thus illegally seized. The District Court denied the motion to suppress. The Supreme Court affirmed, finding nothing in the record to indicate that the District Court's finding of fact was clearly erroneous or incorrectly applied. St. v. Mogen, 2000 MT 14, 298 M 87, 993 P2d 699, 57 St. Rep. 82 (2000), following St. v. Siegal, 281 M 250, 934 P2d 176, 54 St. Rep. 158 (1997).

Statute Not Cruel and Unusual Punishment or Violative of Equal Protection Rights: Tadewaldt argued that the statute on which his conviction for possession of dangerous drugs was based constituted cruel and unusual punishment and denied equal protection because it did not provide for different punishments based on the quantity of drugs in the defendant's possession. The Supreme Court held that Tadewaldt's rights were not violated because everyone in his class was treated the same under the statute. Therefore, he was not treated differently based on an impermissible classification. The Supreme Court also held that Tadewaldt had received a sentence that was substantially less severe than the maximum sentence. Therefore, his sentence did not constitute cruel and unusual punishment. St. v. Tadewaldt, 277 M 261, 922 P2d 463, 53 St. Rep. 635 (1996), followed, for rationale that sentence imposed for assault was not cruel or unusual, in St. v. Johnson, 2002 MT 251, 312 M 164, 58 P3d 172 (2002).

Constitutionality of Routine, Administrative Inventory Search — Compelling State Interest: Under Montana's Constitution, the right of individual privacy is a fundamental right, but the guarantee of individual privacy is not absolute. That right may not be infringed without a showing of a compelling state interest, which must be closely tailored to effectuate only that compelling state interest. With regard to a routine, administrative inventory search of personal property on or in the possession of an arrestee at the station following a lawful arrest, the compelling state interest is the protection of the arrestee, the police, other inmates and persons, and property in and around the station from harm and the potential for harm posed by weapons, dangerous instrumentalities, or hazardous substances that might be concealed on or in the possession of the arrestee. In these instances, the "less intrusive means rule" discussed in St. v. Sawyer, 174 M 512, 571 P2d 1131 (1977), and St. v. Sierra, 214 M 472, 692 P2d 1273 (1985), is not mandated because it is impractical and unreasonable to expect police to make decisions on a daily basis about which containers to search and what, if any, would be the least intrusive means to inventory an arrestee's personal property on or in his possession. Further, the state has an interest in protecting an arrestee's property by accounting for money and articles to protect police against false claims for items taken while the arrestee is in custody, and an inventory search is a reasonable way to ensure protection of the arrestee's property during detention. Sawyer continues to be law regarding routine automobile searches when a defendant has been arrested and the vehicle impounded and when there are no exigent circumstances or other recognized exceptions from warrant requirements that justify a warrantless search. However, police may conduct a routine, administrative inventory search of an arrestee and of closed containers in the arrestee's possession at the time of arrest if the search is conducted pursuant to standardized policy or procedures adopted by police and routinely used in the booking process. St. v. Pastos, 269 M 43, 887 P2d 199, 51 St. Rep. 1441 (1994), following Ill. v. Lafayette, 462 US 640, 77 L Ed 2d 65, 103 S Ct 2605 (1983), and Colo. v. Bertine, 479 US 367, 93 L Ed 2d 739, 107 S Ct 738 (1987), distinguishing St. v. Sawyer, 174 M 512, 571 P2d 1131 (1977), and overruling St. v. Sierra, 214 M 472, 692 P2d 1273 (1985), to the extent of any inconsistencies with this decision. Pastos was reaffirmed in St. v. Demontiney, 2014 MT 66, 374 Mont. 211, 324 P.3d 344.

Felony Conviction When Information Only Charged Misdemeanor: The defendant argued that his due process rights had been violated because the information only charged him with misdemeanor possession and he was convicted of felony possession. The Supreme Court held that the information clearly stated that the defendant was being charged with a felony and that the information's reference to the misdemeanor statute was only to indicate that the amount of marijuana in his possession was in excess of the misdemeanor amount. Hawkins v. St., 242 M 348, 790 P2d 990, 47 St. Rep. 783 (1990).

Presumption of Deferred Imposition — Constitutionality: When confronted with an equal protection challenge to 45-9-102(5), the Supreme Court determined the issue with nonconstitutional grounds. Rather, the court relied on factual findings of the lower court as brought out in a postconviction hearing. St. v. Henry, 177 M 426, 582 P2d 321, 35 St. Rep. 1013 (1978).

Constitutionality: This section is not unconstitutionally vague and uncertain due to its failure to require knowledge and intent in relation to possession of dangerous drugs since meaning of term "possession" has been so well defined that it cannot be considered ambiguous. State ex rel. Glantz v. District Court, 154 M 132, 461 P2d 193 (1969).

CORROBORATION

Admission of Unrelated Criminal Activity by Informant — Independent Corroboration Unnecessary: An informant who was known to police told the authorities that Meyer was in possession of illegal explosives after witnessing the explosives being delivered to Meyer. The informant admitted several instances of criminal activity, including use and possession of methamphetamine and being present when the explosives were delivered. Meyer sought to suppress evidence of the explosives because the informant's statements were not corroborated, the informant was not charged with transporting illegal explosives, and the drug charges were unrelated to the explosives investigation. The motion to suppress was denied, and on appeal, the Supreme Court affirmed. Independent corroboration is not required for a reliable informant whose identity is known to law enforcement and whose information is not based on hearsay, and an informant who gives an unequivocal admission against interest is considered reliable without further corroboration. Because corroboration was not necessary, the court declined to address whether admissions unrelated to the underlying offense may be classified as an admission against interest. St. v. Meyer, 2004 MT 272, 323 M 173, 99 P3d 185 (2004), following St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000).

Sufficient Independent Corroboration of Statements of Confidential Informant: A confidential informant told police that St. Marks was engaged in illegal drug distribution with another man. The informant gave details concerning St. Marks' distinctive license plate, where he parked his car in public places, and the fact that he was staying in a particular room in a local motel. Corroboration of these innocent facts alone failed to prove the necessary indicia of suspicious human conduct to substantiate the informant's statements. However, further independent police investigation revealed that St. Marks had been staying at the motel for over 2 months, paid the bill in cash every 2 weeks, and had a home address in the same town as the motel. In the officers' judgment, it was unusual for a person to stay in a motel for long periods when the person has a local address, but it was common for drug dealers to stay in places other than their home to avoid bringing attention to themselves or placing their residence at risk, and distributors of dangerous drugs often have significant amounts of cash on hand. The Supreme Court decided that credence should be given to the officers' judgment because their experience and training provided a reasonable basis for the conclusions regarding St. Marks' behavior. Also, the other man mentioned by the informant was subsequently arrested after being found with a significant quantity of drugs. Thus, after evaluating the totality of the circumstances within the four corners of the search warrant application and excluding certain information that was conceded as being stale, the Supreme Court concluded that the unredacted information supplied in the application, including the subsequent corroboration and investigation by law enforcement, provided sufficient probable cause to support the belief that an offense had been committed and that evidence, contraband, or persons connected with the offense could be found. St. Marks' motion to suppress was properly denied. St. v. St. Marks, 2002 MT 285, 312 M 468, 59 P3d 1113 (2002).

Unproved Statements of Child Informant as Sole Basis for Issuance of Warrant: A child observed marijuana plants growing on Worrall's property and reported it to police. The child's observation was never corroborated by the police. Worrall averred that allowing a search of his property based on the uncorroborated claim of an unproved 11-year-old child, after only a 15-minute interview, was unreasonable and that the District Court erred in finding probable cause for the search warrant because unverified statements of an unproved informant, much less a child informant, could not serve as the sole basis for the issuance of the warrant. Citing St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997), the Supreme Court noted that corroboration of an informant's testimony through other sources is necessary only when the information is hearsay or the informant is anonymous. In this case, the child was not anonymous and the information was based on personal observation rather than hearsay, so corroboration was unnecessary. The court observed that information provided to police that is motivated by good citizenship is a reliable basis for determining probable cause and that nothing in the record indicated that the child's report should be viewed more critically than a similar report from an adult. Thus, the unproved statement of the child informant may serve as the sole basis for issuance of a search warrant. St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968, 56 St. Rep. 225 (1999).

ELECTRONIC MONITORING

Admissible Evidence in Drug Case Obtained Through Informant — Actual Informant Testimony Allowed: A confidential informant wearing a wire purchased drugs from Schwartz, but no search warrant was issued for the electronic monitoring. The state indicated that it would call the informant to testify but would not introduce the results of the electronic monitoring. Schwartz moved to suppress all evidence seized as the result of a search conducted by the informant. The motion was denied, and on appeal, the Supreme Court affirmed. The evidence derived through the informant and not through contemporaneous electric monitoring was admissible. Thus, the District Court was correct in declining to suppress actual testimony by the confidential informant, including identification of Schwartz as the seller and identification of the actual drugs purchased. St. v. Schwartz, 2009 MT 234, 351 M 384, 212 P3d 1060 (2009), followed in St. v. Harlow, 2010 MT 60, 355 Mont. 373, 228 P.3d 446. See also St. v. Hanley, 186 M 410, 608 P2d 104 (1980), St. v. Bassett, 189 M 28, 614 P2d 1054 (1980), and St. v. Deskins, 245 Mont. 158, 799 P.2d 1070 (1999).

Drugs Properly Admitted — Electronic Monitoring Did Not Taint: Carrier, an undercover drug investigator, was outfitted with a concealed microphone and a body monitor during six meetings with the defendant. Court orders permitting the monitoring were obtained for the last three meetings but not for the first three. The defendant argued that the three unauthorized electronic surveillances were used to obtain an order to continue electronic surveillance and that all drugs seized while proceeding under that order should be suppressed. The Supreme Court found that the drugs introduced into evidence were obtained through an informant and not through monitoring and recording. The fact that the monitoring and recording occurred does not affect the admissibility of the evidence. St. v. Bassett, 189 M 28, 614 P2d 1054, 37 St. Rep. 1300 (1980).

Electronic Monitoring: Carrier, an undercover drug investigator, was outfitted with a concealed microphone and a body monitor during six meetings with the defendant. Court orders permitting the monitoring were obtained for the last three meetings but not for the first three. The transcripts of the last three meetings were admitted into evidence over the defendant's objection. On appeal, the Supreme Court said that the application for electronic monitoring authorization was based on Carrier's own personal observations which supplied adequate independent information. The application made no reference to the fact that the earlier conversations were monitored or recorded, and the later recordings were not tainted by the earlier unauthorized recordings. St. v. Bassett, 189 M 28, 614 P2d 1054, 37 St. Rep. 1300 (1980).

CHARGING

Hashish Not Marijuana — Definitions Harmonized: A medical marijuana card that was issued pursuant to the former Medical Marijuana Act as set forth in 50-46-101 through 50-46-210 (now repealed) did not entitle the defendant to possess hashish, which is specifically differentiated in 50-32-101. The Act was clear and unambiguous on its face, and the District Court's interpretation appropriately harmonized the statutes. St. v. Pirello, 2012 MT 155, 365 Mont. 399, 282 P.3d 662.

Felony Conviction When Information Only Charged Misdemeanor: The defendant argued that his due process rights had been violated because the information only charged him with misdemeanor possession and he was convicted of felony possession. The Supreme Court held that the information clearly stated that the defendant was being charged with a felony and that the information's reference to the misdemeanor statute was only to indicate that the amount of marijuana in his possession was in excess of the misdemeanor amount. Hawkins v. St., 242 M 348, 790 P2d 990, 47 St. Rep. 783 (1990).

Harmless Error in Information — Charge Sufficient: Instead of citing 45-9-102(4), the information cited 45-9-102(3). The court rejected appellant's contention that the state failed to prove all elements as charged. In this case, the information properly charged the offense of possession of cocaine in the language of the statute proscribing such possession. The information clearly put the defendant on notice that he was being charged with possession of cocaine. The fact that the information contained the wrong penalty provision did not prejudice defendant or in any way impair his ability to prepare a defense. The information contained harmless error and was therefore sufficient. St. v. Pearson, 217 M 363, 704 P2d 1056, 42 St. Rep. 1253 (1985).

Hashish Not Dangerous Drug: The information charged the defendant with possession of more than 1 gram of hashish in violation of 45-9-102(1). Section 45-9-102(1) refers to the definition of dangerous drug in 50-32-101. Section 50-32-101 did not define hashish. Charging an individual with the possession of hashish, without mentioning its derivation from marijuana, does not charge that individual with a crime. The District Court properly dismissed the information, and the Supreme Court affirmed. St. v. Kelman, 199 M 481, 649 P2d 1292, 39 St. Rep. 1545 (1982).

Possession of Each Drug in Schedules a Separate Crime: It was proper for the County Attorney to charge defendant with three counts for possession of three prohibited drugs. The Legislature intended to provide a distinct crime for each of the drugs listed in the schedules. St. v. Meader, 184 M 32, 601 P2d 386, 36 St. Rep. 1747 (1979).

Separate Offense for Each Drug: When a defendant is in possession of more than one kind of prohibited drug at any one time, he may be prosecuted and convicted of a separate offense for each kind of prohibited drug he possesses. St. v. Meadors, 177 M 100, 580 P2d 903 (1978).

Elements of Crime: Whether several ingredients besides amphetamine are present within a pill is immaterial in a prosecution under this chapter. St. v. Hull, 158 M 6, 487 P2d 1314 (1971).

MISCELLANEOUS CASES

Rule of Lenity Not Applicable — Fair Notice That Hashish Not Medical Marijuana: The definitions of "marijuana" and "usable marijuana" were clear and unambiguous under the former Medical Marijuana Act as set forth in 50-46-101 through 50-46-210 (now repealed). Consequently, the defendant had fair notice that possession of hashish was prohibited under the Act and the rule of lenity did not apply. St. v. Pirello, 2012 MT 155, 365 Mont. 399, 282 P.3d 662.

Visual Identification of Dangerous Drug by Expert Witness Held Sufficient — Daubert Hearing Held Unnecessary: Clark was convicted of criminal possession of dangerous drugs after OxyContin and other prescription drugs for which Clark didn't have a prescription were found in the back seat of his vehicle. Clark contended that the method of identification of the drugs by the state's expert, using the unique coding on the drug containers and a visual inspection, was insufficient, that a chemical analysis should have been done, and that a Daubert hearing (see Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579 (1993)) should have been held at which the analysis and the state's expert testimony would be offered for evidence. Citing St. v. Damon, 205 MT 218, 328 M 276, 119 P3d 1194 (2005), the Supreme Court held that a Daubert hearing was necessary only for assessing expert testimony on novel scientific evidence but that there was nothing novel about the method used by the state's expert to identify the dangerous drugs in Clark's possession. St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

Erratic Driving and Occupants Switching Drivers — Sufficient Particularized Suspicion to Justify Investigative Stop: The fact that an officer observed that the occupants had switched drivers during the time that the officer lost sight of a vehicle and that the vehicle was driving in the center of a gravel road constituted a sufficient particularized suspicion under the totality of the circumstances, including the officer's 27 years of experience, to warrant an investigative stop. St. v. Britt, 2005 MT 101, 327 M 1, 111 P3d 217 (2005).

Failure of Counsel to Argue Included Offenses Under State Law Considered Ineffective Assistance of Counsel: Becker was convicted of criminal possession of dangerous drugs, accountability for criminal production or manufacture of dangerous drugs, and criminal possession of precursors to dangerous drugs. On appeal, Becker argued that he should have been convicted only of criminal production or manufacture by accountability because the other two charges were part of the manufacturing process and that failure to include the other charges violated his due process rights. The Supreme Court declined to address the double jeopardy issue under the plain error doctrine because Becker raised it for the first time on appeal. However, the court found it appropriate to address the issue under Becker's ineffective assistance of counsel claim. Becker's counsel's failure to include all the relevant charges in a dismissal motion and to rely on the proper statutory grounds for dismissal constituted deficient performance under the first prong of the Strickland test. The second Strickland prong was also met because Becker was prejudiced by counsel's deficient performance, inasmuch as there was a reasonable probability that the result of the proceeding would have been different but for counsel's errors. The Supreme Court thus vacated the convictions and remanded for resentencing. St. v. Becker, 2005 MT 75, 326 M 364, 110 P3d 1 (2005), distinguished in St. v. Williams, 2010 MT 58, 355 Mont. 354, 228 P.3d 1127. See also St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001).

Evidence of Illegal Drugs, Ingredients, Materials and Equipment, and Paraphernalia in Apartment and Car and Witnesses' Testimony on Manufacturing as Supporting Drug Offense Convictions: Peace officers found methamphetamine, many of the ingredients of methamphetamine, and materials and equipment used to produce methamphetamine in defendant's apartment and in her boyfriend's car, in which she was a passenger at the time that it was detained for a search. They found marijuana in a cosmetic case in the car, and she admitted that she smoked marijuana. They found drug paraphernalia in both the apartment and the car. Two witnesses testified that she and her boyfriend were producing methamphetamine in her apartment. The evidence sufficiently supported her convictions of operation of an unlawful clandestine laboratory, possession of methamphetamine, possession of marijuana, and possession of drug paraphernalia, and the state did not have to prove that she actually manufactured methamphetamine. A 5-year sentence enhancement for operating the lab within 500 feet of a residence was supported by testimony that her apartment had residential apartments above and below it and on all three floors of the apartment building. St. v. Chase, 2004 MT 375, 325 M 64, 103 P3d 1060 (2004).

Statement Admitting Prior Drug Use Not Considered Evidence of Other Crimes — Admissibility of Statement Under Transaction Rule: When his probation officer searched Lozon's room early one morning, the officer discovered a vial that Lozon admitted contained methamphetamine, but Lozon would not say to whom the vial belonged. However, Lozon did admit taking methamphetamine the previous evening. When the state sought to admit Lozon's statement, Lozon objected on grounds that the statement constituted evidence of prior crimes and that because the state had not provided notice that the statement would be used and the purpose for the evidence, as required in Rule 404, M.R.Ev. (Title 26, ch. 10), it was inadmissible. The trial court admitted the statement under the transaction rule, and Lozon appealed, but the Supreme Court affirmed. Under the transaction rule in 26-1-103, evidence of matters that are inextricably linked to and explanatory of the charged offense is admissible, notwithstanding rules related to the admission of other crimes evidence, and when the evidence at issue is not wholly independent of or unrelated to the charged offense, it is not considered other crimes evidence for which notice of intent to introduce is required. Here, Lozon's statement established Lozon's knowledge and possession of drugs in his room shortly before the search, was closely related to the possession charge, and was therefore admissible. St. v. Lozon, 2004 MT 34, 320 M 26, 85 P3d 753 (2004), followed in St. v. Gittens, 2008 MT 55, 341 M 450, 178 P3d 91 (2008), and St. v. Hill, 2008 MT 260, 345 M 95, 189 P3d 1201 (2008).

Guilty Plea Involving Dangerous Drugs — Mistake in Affidavit Insufficient Basis for Withdrawal of Plea: Barker agreed to plead guilty to an offense involving methamphetamine, a Schedule II drug. The affidavit accompanying the information erroneously identified the drug as a Schedule I drug. Baker sought to withdraw the plea, claiming that he was under a misunderstanding as to the proper schedule of the drug at the time he entered the plea. The Supreme Court held that because the statute under which Barker was charged and the information itself charged Barker only with felony possession of a dangerous drug and because the misidentification of the schedule appeared only in the affidavit, the proper schedule of the drug was not a dispositive factor in the plea agreement and that the mistake did not affect the voluntary nature of the plea. The District Court did not abuse its discretion in refusing to allow a change in plea. St. v. Barker, 257 M 31, 847 P2d 300, 50 St. Rep. 147 (1993).

Failure to Test Suspected Drug Substance: Although it is preferable to have a suspected drug substance tested by the state crime lab, the state's failure to do so does not necessarily render the evidence insufficient to convict a defendant beyond a reasonable doubt. St. v. Salois, 235 M 276, 766 P2d 1306, 45 St. Rep. 2382 (1988), distinguished in St. v. Nichols, 1998 MT 271, 291 M 367, 970 P2d 79, 55 St. Rep. 1122 (1998).

Failure to Republish Schedules: Failure of the Board and the Department to revise and republish schedules as required by 50-32-209 did not result in the decriminalization of dangerous drugs. The Legislature intended the original five schedules to be effective until the Board of Pharmacy and the Department of Health and Environmental Sciences (now Department of Public Health and Human Services) carried out their statutory duty. St. v. Meader, 184 M 32, 601 P2d 386, 36 St. Rep. 1747 (1979).

Finding Marijuana Hallucinogenic — Unnecessary: Marijuana is grouped with hallucinogenic drugs, but this does not call for the trier of fact to make a specific finding as to its hallucinogenic capabilities. The Legislature has made that determination. The determination for the trier of fact is whether the substance introduced at trial is in fact marijuana, as defined by 50-32-101. St. v. Petko, 177 M 229, 581 P2d 425 (1978), followed in St. v. Farnsworth, 240 M 328, 783 P2d 1365, 46 St. Rep. 2165 (1989).

Payment of Fine: The imposition of a condition of probation that requires the payment of a fine having no reasonable association to the crime committed or to public protection is a nullity and of no force or effect. St. v. Babbit, 175 M 433, 574 P2d 998 (1978).

Definitions: Montana does not have two separate drug acts in force. Title 50, ch. 32, is intended to amend and be included as part of Title 45, ch. 9, and term "dangerous drug" as used in 45-9-101 and this section is defined in 50-32-101. State ex rel. Lance v. District Court, 168 M 297, 542 P2d 1211 (1975).

45-9-103. Criminal possession with intent to distribute.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 543, L. 2023. Amendment effective May 18, 2023.

Applicability: Section 7, Ch. 543, L. 2023, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective May 18, 2023.

2021 Amendment: Chapter 576 in (1) near beginning deleted reference to Title 50, chapter 46. Amendment effective January 1, 2022.

Severability: Section 113, Ch. 576, L. 2021, was a severability clause.

2020 Amendment by Initiative: Initiative Measure No. 190 in (1) near beginning inserted "Title 16, chapter 12, or" and after "50-32-101" inserted "greater than permitted or for which a penalty is not specified under Title 16, chapter 12"; deleted former (2) that read: "(2) A person convicted of criminal possession of marijuana or its derivatives the aggregate weight of which does not exceed 60 grams of marijuana or 1 gram of hashish shall be imprisoned in the state prison for a term of not more than 5 years or be fined an amount not to exceed $5,000, or both"; and made minor changes in style. Amendment effective January 1, 2021.

Code Commissioner Correction: In (1) the code commissioner inserted brackets around "in an amount" to indicate that the words were apparently deleted in error.

Severability: Section 55, Initiative Measure No. 190, was a severability clause.

2017 Amendment: Chapter 321 in (2) substituted current text for former text that read: "A person convicted of criminal possession of an opiate, as defined in 50-32-101, with intent to distribute shall be imprisoned in the state prison for a term of not less than 2 years or more than 20 years and may be fined not more than $50,000, except as provided in 46-18-222." Amendment effective July 1, 2017.

Applicability: Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

2013 Amendment: Chapter 135 in (2) substituted "50-32-101" for "50-32-101(19)". Amendment effective October 1, 2013.

2004 Amendment by Initiative: Initiative Measure No. 148, proposed by initiative petition and approved at the general election held November 2, 2004, in (1) at beginning inserted exception clause. Amendment effective November 2, 2004.

Severability: Section 18, I.M. No. 148, was a severability clause.

2003 Amendment: Chapter 114 in (4) after "Practitioners" inserted "as defined in 50-32-101" and after "a professional practice" deleted "as defined by 50-32-101". Amendment effective October 1, 2003.

1999 Amendment: Chapter 432 throughout section substituted "intent to distribute" for "intent to sell"; and made minor changes in style. Amendment effective October 1, 1999.

1987 Amendment: Deleted second sentence of (1) that read: "No person commits the offense of criminal possession with intent to sell marijuana unless he possesses 1 kilogram or more."

1985 Amendment: In (2) changed "50-32-101(18)" to "50-32-101(19)".

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section was not part of the original Dangerous Drug Act, enacted in 1969, but was rather enacted in 1975. The penalties provided under this section are greater than those for mere possession and less than those for criminal sale, at least as to maximum potential sentence. Although an offender under this section could also be charged and sentenced under 45-9-102, this section provides an alternative with relatively heavy sentences aimed primarily at offenders who are in the business of selling dangerous drugs but are apprehended before evidence of any act which could be charged under 45-9-101 is available. Conviction of the offense requires proof of (1) knowing (2) control of a (3) dangerous drug for a sufficient time to be able to terminate control, as well as (4) intent to sell the drug. There is a conclusive presumption of no intent to sell where marijuana is possessed in amounts less than one kilogram. There is a mandatory minimum sentence where an opiate, as defined in § 50-32-101(19), is involved.

The 1977 amendment inserted subsection (2); redesignated former subsections (2) and (3) as subsections (3) and (4); inserted "not otherwise provided for in subsection (2)" in subsection (3); and made minor changes in style.

Case Notes

Convictions for Possession of Dangerous Drugs Vacated Given Convictions for Possession of Dangerous Drugs With Intent to Distribute Same Drugs — Remand for Resentencing: Wing was convicted of criminal distribution of dangerous drugs, two counts of criminal possession of dangerous drugs, and two counts of criminal possession of dangerous drugs with intent to distribute. On appeal, Wing asserted that because the two counts of possession and two counts of possession of dangerous drugs with intent to distribute involved the same drugs, a conviction under all four counts would unconstitutionally permit multiple punishments for the same offense. The Supreme Court agreed and remanded with instructions to vacate Wing's convictions for criminal possession of dangerous drugs and to resentence Wing in accordance with the remaining convictions. St. v. Wing, 2008 MT 218, 344 M 243, 188 P3d 999 (2008).

Sentence Restriction Prohibiting Alcohol Use Sufficiently Related to Defendant's History of Substance Abuse to Warrant Affirmation — Unrelated Casino Restriction Stricken: As conditions of Brotherton's sentence for criminal possession of dangerous drugs with intent to distribute, the District Court prohibited Brotherton's use of alcohol, prohibited him from entering any place where intoxicants were the chief item of sale, and also prohibited him from entering casinos or playing games of chance. Brotherton appealed the conditions on grounds that they were unrelated to the offense, given that his criminal history involved only drugs and not alcohol. The Supreme Court agreed that the casino restriction was improper and remanded with directions that the condition be stricken. However, the court affirmed the alcohol use restriction, given Brotherton's significant history of chemical dependency and the reasonable possibility that Brotherton might substitute alcohol for drugs and thus impede his rehabilitation. St. v. Brotherton, 2008 MT 119, 342 M 511, 182 P3d 88 (2008).

Exigent Circumstances Sufficient to Justify Warrantless Search to Avoid Possible Destruction of Drug Evidence: Law enforcement officers were tipped off that defendant was transporting one-half pound of methamphetamine into the state and tracked defendant to another person's apartment in Corvallis. Officers began surveillance of the apartment and observed two individuals who appeared to be watching the officers. Within a minute, two persons left the apartment, and the officers concluded that their presence was known to persons in the apartment. Shortly thereafter, the officers received a call from an officer in Butte informing them that defendant had called an informant in Butte and told the informant that defendant knew he was being watched and asked the informant to come to Corvallis to help get rid of the drugs. The officers then discussed the possibility that defendant could destroy the drugs before a valid search warrant could be issued in 4 to 7 hours and decided to call for backup and enter the apartment. Upon entering, the officers found defendant and a woman present. Defendant had no drugs on his person, but had $1,500 in his wallet and appeared to be under the influence of methamphetamine. When the warrant eventually arrived, officers found 3 1/2 grams of methamphetamine packaged for sale. Defendant was charged with felony conspiracy to commit criminal distribution of dangerous drugs, felony criminal possession with intent to distribute, felony criminal endangerment, and misdemeanor criminal possession of drug paraphernalia. Defendant pleaded not guilty to all charges and moved to suppress the fruits of the warrantless search. The motion was denied, and defendant was convicted on one confessed count of intent to distribute. On appeal, defendant contended that the warrantless search was unlawful, but the Supreme Court affirmed. The facts that the officers had already witnessed one suspect flee the scene, knew that defendant was aware of the officers' presence, and knew that a third party had been contacted to help defendant get rid of the drugs, combined with the knowledge that procurement of a search warrant would take 4 to 7 hours, established the presence of exigent circumstances sufficient to justify warrantless entry into the apartment to avoid destruction of the alleged one-half pound of methamphetamine. St. v. Ruggirello, 2008 MT 8, 341 M 88, 176 P3d 252 (2008), applying the exigent circumstances test set out in St. v. Stone, 2004 MT 151, 321 M 489, 92 P3d 1178 (2004).

Sufficient Accurate Information to Support Sentence for Distribution of Methamphetamine: Harper was sentenced to 20 years in prison with 10 years suspended and fined $12,000 after pleading guilty to possession of dangerous drugs with intent to distribute. Harper appealed on grounds that the sentencing court based the sentence on inaccurate and insufficient evidence that Harper was the center of the drug operation. Harper had a right to be sentenced based on correct evidence, but also had the affirmative duty to show, beyond mere unsupported contentions, that the alleged misinformation was materially inaccurate and to present information establishing inaccuracies in the presentence investigation report. In this case, the sentencing court did nothing more than consider relevant information relating to the nature and circumstances of the possession of drugs found during the search of Harper's home, including unrefuted information that Harper was at the center of a methamphetamine distribution business conducted from the home. Information in the presentence investigation report simply underscored Harper's involvement in drug distribution and supported that charge to which Harper pleaded guilty. The information was properly before the sentencing court, and the court did not err in imposing a sentence within the statutory parameters. The sentence was affirmed. St. v. Harper, 2006 MT 259, 334 M 138, 144 P3d 826 (2006), followed in St. v. Walker, 2007 MT 205, 338 M 529, 167 P3d 879 (2007), with respect to defendant's affirmative duty to show, beyond mere unsupported contentions, that alleged misinformation in a presentence investigation report was materially inaccurate and to present information establishing inaccuracies in the presentence investigation report.

Voluntariness of Consent to Search — Totality of Circumstances: In determining whether consent to search was made voluntarily and was uncontaminated by coercion or duress, the Supreme Court considers the totality of the circumstances. In this case, Copelton was sitting in a car driven by Garcia, and when asked by officers if they could search the vehicle, Garcia shrugged his shoulders and gestured with his hands in an affirmative manner. The search revealed drugs, and Copelton was arrested for felony possession with intent to distribute. On appeal, Copelton asserted that his motion to suppress the fruits of the search should have been granted because Garcia did not knowingly and voluntarily consent to the warrantless search. A native of Mexico, Garcia had limited education with no instruction regarding the American legal system and a limited understanding of English. Copelton also noted that the officers did not inform Garcia of the right to refuse consent to the search and questioned whether a mere shrug of the shoulders was enough to indicate consent. Nevertheless, the Supreme Court affirmed. Garcia testified that he had prior experiences with law enforcement officers, including prior vehicle searches, that he clearly understood what the officer was asking when the officer requested to search the vehicle, and that he consented to the search because he had nothing to hide. Thus, Garcia's limited foreign education and limited ability to speak and understand English did not impede his ability to knowingly and voluntarily consent to the search. Further, lack of knowledge of the right to refuse consent is not determinative that consent was not voluntary in and of itself, and nonverbal consent can be effective when conduct indicates unequivocal consent. Under the totality of the circumstances, Copelton's motion to suppress was properly denied. St. v. Copelton, 2006 MT 182, 333 M 91, 140 P3d 1074 (2006), following St. v. Snell, 2004 MT 269, 323 M 157, 99 P3d 191 (2004).

Analysis of Federal Knock and Announce Statute — Involvement of Federal Postal Inspector: A postal inspector suspected that a package addressed to Ochadleus contained drugs. The inspector took the package to the Billings DEA office, and a drug-sniffing dog alerted to the package. The inspector obtained a search warrant, and the package was found to contain marijuana. The inspector then obtained a warrant to search the intended destination of the package. The package was delivered by the inspector later that day, and shortly thereafter, state officers executed the search warrant and arrested Ochadleus for possession with intent to distribute. Ochadleus contended that the state officers violated the federal knock and announce statute, 18 U.S.C. 3109, noting that the officers failed to knock. The Supreme Court disagreed. The statute does not directly apply to state law enforcement officers, but rather applies when federal officers are a significant part of a search conducted pursuant to a state warrant, as in this case involving a federal postal inspector and the federal Drug Enforcement Administration. Additionally, the statute does not contain an express requirement that officers actually knock on the door, but rather requires that officers give notice of their authority and purpose. Here, Ochadleus's roommate saw the officers through the window in the door and then backed away. It was reasonable for the officers to assume that the action of backing away was a refusal to admit them, and it would have been futile for the officers to knock before entering. Thus, the federal statute was not violated, the forced entry was lawful, and Ochadleus's conviction was affirmed. St. v. Ochadleus, 2005 MT 88, 326 M 441, 110 P3d 448 (2005).

Brief Detainment of Postal Package for Drug Detection Purposes Not Considered Seizure — Addressee's Possessory Interest in Package Retained: A postal inspector suspected that a package addressed to Ochadleus contained drugs. The inspector took the package to the Billings DEA office, and a drug-sniffing dog alerted to the package. The inspector obtained a search warrant, and the package was found to contain marijuana. The inspector then obtained a warrant to search the intended destination of the package. The package was delivered by the inspector later that day, and shortly thereafter, state officers executed the search warrant and arrested Ochadleus for possession with intent to distribute. Ochadleus contended that the evidence should be suppressed on grounds that because the postal inspector did not have reasonable grounds to subject the package to a canine sniff, detaining the package was an unlawful seizure, but the suppression motion was denied. On appeal, the Supreme Court examined extensive federal case law regarding the detention of mail and noted that under U.S. v. Aldaz, 921 F2d 227 (9th Cir. 1990), postal authorities may seize and detain packages if they have a reasonable suspicion of criminal activity. In this case, the postal inspector had reasonable cause to detain the package when it exhibited characteristics consistent with the Postal Inspection Service's drug package profile, and the inspector's action of briefly detaining the package for a canine sniff did not constitute a seizure because it did not deprive Ochadleus of a possessory interest in the package. St. v. Ochadleus, 2005 MT 88, 326 M 441, 110 P3d 448 (2005). See also U.S. v. Van Leeuwen, 397 US 249 (1970), U.S. v. Banks, 3 F3d 399 (11th Cir. 1993), and U.S. v. Hernandez, 313 F3d 1206 (9th Cir. 2002).

Personal Possession of Pipe Insufficient Probable Cause to Search Vehicle — Evidence in Plain View in Vehicle Sufficient Probable Cause for Subsequent Search of Residence: When Griffin was lawfully arrested for driving without a license, the arresting officer found a pipe in Griffin's pocket that, in the officer's opinion, contained drug residue. The officer then obtained a search warrant for Griffin's truck. When approaching the truck, the officer observed items in plain view in the open truck bed that could be used to manufacture methamphetamine. Pursuant to another search warrant based on the evidence in the truck bed, officers searched Griffin's residence and found a drug lab that was booby-trapped with explosives. Griffin moved to suppress all the evidence because the first search warrant was issued without probable cause. The motion was denied, but on appeal, the Supreme Court agreed that the only evidence supporting the vehicle search warrant—the existence of a pipe on Griffin's person and the fact that Griffin recently exited the truck—provided insufficient probable cause for a warrant to search the truck. Just because a person has a pipe in a pocket that contains untested white residue does not mean that the person's vehicle will contain evidence of a drug offense. However, in this case, the majority of evidence seized from the truck was in plain view in the truck bed. Griffin had no expectation of privacy regarding items in plain view, nor was a warrant required to seize the items in the truck bed. Therefore, any error in issuing the search warrant for the truck was harmless and not prejudicial. Additionally, the lawfully seized evidence in the truck bed was sufficient to support a finding of probable cause for issuance of another warrant to search Griffin's residence. Denial of Griffin's motion to suppress was affirmed. St. v. Griffin, 2004 MT 331, 324 M 143, 102 P3d 1206 (2004).

Probable Cause for Search Warrant for Vehicle Based on Warrantless Canine Search of Exterior of Vehicle, Outstanding Drug Warrant, and Officer's Experience: Officers went to Hart's home to execute an outstanding warrant for felony sale of dangerous drugs and noticed Hart driving away in his van in the opposite direction. The officers initiated a traffic stop and noticed furtive movements from Hart as he moved quickly toward the floorboard, indicating that he was attempting to retrieve a weapon or hide something in the van. Hart refused a request to search the van, but the officers had a particularized suspicion that Hart was in possession of drugs. The officers conducted a canine search of the exterior of the van, and the dog alerted to the presence of drugs. The officers then acquired a warrant to search the van and discovered methamphetamine and marijuana. On appeal, Hart contended that there was insufficient probable cause for a search warrant. The Supreme Court disagreed. Evaluated in light of an officer's knowledge and all relevant circumstances, probable cause to search exists if the facts and circumstances within the officer's personal knowledge are sufficient to warrant a reasonable person to believe that a suspect has committed an offense. In this case, there was sufficient probable cause based on the fact that the officers were attempting to execute an outstanding drug warrant, the officer's experience in using drug-detecting canines, the dog's positive alert, and Hart's furtive movements at the time of the stop. St. v. Hart, 2004 MT 51, 320 M 154, 85 P3d 1275 (2004).

Interpretation of Distribution of Dangerous Drugs: Rathbun was convicted of intent to distribute dangerous drugs and appealed on grounds that there was insufficient evidence to support a guilty verdict because the term "distribute" is not specifically defined in this section or in the criminal code definitions in 45-2-101. The Supreme Court held that the lack of a definition is not a fatal flaw. Rather, the crime of intent to distribute in this section can be interpreted and the legislative intent of the statute discerned based on 45-9-101, which defines the offense of criminal distribution to include one who sells, barters, exchanges, gives away, or offers to sell, barter, exchange, or give away any dangerous drug. Rathbun admitted that he gave away marijuana on occasion. Thus, the elements of this section were met, and the distribution conviction was affirmed. St. v. Rathbun, 2003 MT 210, 317 M 66, 75 P3d 334 (2003).

Proper Consideration of Defendant's Mental State to Justify Sentencing With Department of Corrections Rather Than Department of Public Health and Human Services: Following a drug conviction, the District Court considered Rathbun's mental condition pursuant to 46-14-311 and determined that Rathbun did not meet the burden of proof for commitment to the Department of Public Health and Human Services. Rathbun was instead sentenced to concurrent 10-year sentences with the Department of Corrections, and Rathbun appealed, but the Supreme Court affirmed. The District Court properly considered Rathbun's mental state at the time that the offenses occurred, and the sentences were within the parameters established by statute. Rathbun did not meet the burden of proof under 46-14-311, and the commitment to the Department of Corrections was a proper application of the appropriate commitment regime to avoid cruel and unusual punishment. St. v. Rathbun, 2003 MT 210, 317 M 66, 75 P3d 3334 (2003).

Warrantless Search of Vehicle Exterior by Drug-Sniffing Dog — Expectation of Privacy in Vehicle Parked in Public Area — Particularized Suspicion Required: Following an anonymous tip that Tackitt was involved in drug trafficking and that he had a quantity of marijuana in the trunk of his car, a drug task force officer conducted an exterior canine search of Tackitt's car when it was parked outside Tackitt's residence. The dog alerted to the presence of drugs in the vehicle. The officer checked Tackitt's criminal record and verified some of the public information received in the tip and then obtained a warrant to search the vehicle and Tackitt's residence. The vehicle search revealed no evidence, but during the search of the residence, officers found drugs and paraphernalia. Tackitt moved to suppress on grounds that use of the dog violated the right to privacy. The District Court denied the motion, holding that Tackitt had no reasonable expectation of privacy in the odors emanating from his vehicle while it was parked in an area open to the public or, alternatively, that if particularized suspicion was required for use of the dog, the search in this case was supported by proper particularized suspicion. Tackitt appealed, and the Supreme Court reversed. Pursuant to St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000), Tackitt had an expectation of privacy in the trunk of the vehicle, and the canine sniff did constitute a search. However, the expectation was in no way dependent on where the vehicle was parked, nor did the expectation necessitate a search warrant for the use of the canine to survey the exterior of the vehicle. Federal law allows the use of drug-detecting dogs to sniff closed containers in public areas when police have a particularized suspicion to believe that a crime involving drugs is taking place. Under the greater protection afforded individual privacy under the Montana Constitution, the balance between governmental interests and individual interests is best struck by requiring particularized suspicion as a prerequisite for the use of a drug-sniffing dog. Particularized suspicion must be based on objective data from which an experienced police officer can make the inference that a person is engaged in wrongdoing, and an anonymous tip lacking appropriate corroboration simply cannot qualify as objective data to support a particularized suspicion any more than it can support probable cause. Therefore, because the District Court improperly concluded that there was a particularized suspicion for use of the dog to survey the exterior of Tackitt's vehicle and because the application for the search warrant failed to establish probable cause for the issuance of the warrant, the District Court's denial of the motion to suppress was reversible error. (Note: this holding is limited to the use of drug-sniffing dogs during police investigations and does not apply to the human detection of the odor of drugs.) St. v. Tackitt, 2003 MT 81, 315 M 59, 67 P3d 295 (2003), distinguishing St. v. Scheetz, 286 M 41, 950 P2d 722 (1997), and followed in St. v. Hart, 2004 MT 51, 320 M 154, 85 P3d 1275 (2004).

Justifiable Stop for Daytime Check of Temporary Window Sticker Warranted — Further Police Intrusion Not Warranted Once Limited Purpose of Stop Accomplished: Following weeks of surveillance instigated by a confidential tip intimating drug activities, the Billings police observed no suspicious drug-related activities conducted by defendants, but after receiving a tip that defendants would be driving from Billings to Bozeman to sell marijuana, officers stopped defendants' vehicle because there were no license plates displayed, although a temporary sticker could be seen but not read in the tinted rear window. When the officers approached the vehicle, they noticed that the temporary sticker properly displayed in the window was current. Nevertheless, in a short time, additional officers arrived with a drug-sniffing dog. The dog indicated the presence of drugs, the vehicle was searched, marijuana was found, and defendants were arrested. Defendants contended that the evidence should be suppressed because there was no particularized suspicion to make the stop. The Supreme Court agreed that the investigative stop was warranted because the officers' inability to read the expiration date on the temporary sticker provided an objective basis to infer that the sticker was not valid. However, a quick check of the properly displayed sticker in bright daylight confirmed the sticker's validity. Defendants had committed no traffic offense or violated any other criminal law of which the officers were aware. An investigative stop is a temporary detention that may not last longer than necessary to effectuate the purpose of the stop. Once the limited purpose of the investigative stop was accomplished, no further police intrusion was warranted, and the investigative stop related to drug possession was not justified. The District Court committed reversible error in refusing to suppress the evidence of the subsequent vehicle search. St. v. Martinez, 2003 MT 65, 314 M 434, 67 P3d 207 (2003), following St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137 (1998). See also St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

Release of Victim's Belongings to Family — No Negation of Circumstantial Facts: Buckles was involved in a one-car accident wherein his passenger was killed and drugs were found at the scene. Buckles' blood test indicated traces of drugs, and he was charged with negligent homicide and possession with intent to sell. Buckles contended that the state deliberately suppressed material evidence relevant to the charge of possession with intent to sell (now criminal possession with intent to distribute) when it released the passenger's personal effects to the passenger's mother, claiming that if Buckles had had access to the passenger's belongings before they were released, an expert might have found traces of drugs that would suggest that the passenger, rather than Buckles, possessed the drugs found at the scene. The Supreme Court noted that all the passenger's belongings had been documented and logged and that, even if there were a trace of drugs found in the passenger's belongings, that evidence would not negate the very strong circumstantial facts indicating that the drugs were hidden at the accident scene by Buckles and that they were originally in Buckles' bag. Buckles could have proceeded to trial and established ownership of the items through his own testimony and testimony of the passenger's mother, but this Buckles did not do. The negligent homicide and possession with intent to sell convictions were affirmed. St. v. Buckles, 1999 MT 79, 294 M 95, 979 P2d 177, 56 St. Rep. 331 (1999).

Illegal Search of Person but Lawful Search of Vehicle — Vehicle Search Upheld as Probation Search and Not "Fruit of Poisonous Tree": Deputy Turner watched New make several turns in his vehicle without signaling and, after determining by his vehicle license plate that New was on probation, stopped the vehicle and searched New. Upon discovering drugs in New's pocket, Turner impounded the vehicle. Detective Jacobs questioned New, and New gave Jacobs approval to search the vehicle. Then Jacobs talked to Forsyth, New's probation officer, who conducted the search of New's vehicle with Jacobs. Turner's search of New's pockets was subsequently held illegal but the District Court refused to quash evidence taken from the vehicle as a result of Forsyth's search. The Supreme Court affirmed, holding that the search of the vehicle was not the "fruit of the poisonous tree", the illegal personal search of New, but was justified upon the independent grounds that Forsyth had previously determined that he wanted to search New's vehicle because of pending charges of violations of the conditions of New's probation. St. v. New, 276 M 529, 917 P2d 919, 53 St. Rep. 510 (1996).

Offense on Federal Forest Property — No Reservation of Exclusive Federal Jurisdiction or Preemption by Federal Law: Wagner was observed by federal officials while he was trying to collect marijuana grown in the Kootenai National Forest and was subsequently arrested and convicted under state law for attempted sale of the drug. After conviction, his counsel filed a petition for postconviction relief, alleging that Wagner's former counsel was ineffective for failing to raise a lack of subject matter jurisdiction. Citing section 4 of The Enabling Act and 16 U.S.C. 480, the Supreme Court found that there was no intent by Congress to reserve exclusive federal jurisdiction over national forest property. Citing 21 U.S.C. 903, 21 U.S.C. 841, and cases from other jurisdictions, the Supreme Court also held that there is no conflict between federal drug laws and this section. The Supreme Court therefore concluded that the state courts had jurisdiction over the offense and that Wagner's counsel was not ineffective for failing to raise the issue of lack of jurisdiction. Wagner v. St., 270 M 26, 889 P2d 1189, 52 St. Rep. 61 (1995).

Twenty-Year Sentence for Drug Dealing Not Excessive Sanction: The defendant argued that a 20-year sentence with 5 years suspended and a $30,000 fine constituted excessive sanctions. The Supreme Court noted that the defendant could have been sentenced to 20 years and fined up to $50,000. The Supreme Court held that the trial court had set out sufficient reasons for its sentence and had not abused its discretion. St. v. Paulson, 250 M 32, 817 P2d 1137, 48 St. Rep. 838 (1991).

Intent to Sell Inferred From Evidence: Search of defendant's residence revealed four baggies of marijuana and numerous articles commonly used in drug transactions, including scales, containers, and packaging materials. Intent to sell, which must usually be inferred from an accused's acts because it is seldom subject to direct proof, could be inferred in this case. St. v. Hall, 249 M 366, 816 P2d 438, 48 St. Rep. 774 (1991), followed in St. v. Hulbert, 265 M 317, 877 P2d 25, 51 St. Rep. 526 (1994).

Marijuana in Duffle Bag in Defendant's Closet — Possession Shown: A search revealed marijuana in a duffle bag in defendant's closet. Defendant stated that the bag was his. Defendant shared the residence with another. When a controlled substance is found in a place subject to dominion and control of two persons, possession may be imputed to either or both. In this case, evidence supported the jury's finding of possession. St. v. Hall, 249 M 366, 816 P2d 438, 48 St. Rep. 774 (1991).

Items and Quantity of Marijuana Constituting Evidence of Intent to Sell: Possession of the following quantity of marijuana and other items was held to constitute substantial evidence showing an intent to sell: (1) 23 confiscated plants; (2) three trays of marijuana leaves; (3) a tray containing marijuana buds being cloned; (4) bags of marijuana; (5) a box of drug paraphernalia; (6) a seed catalog; (7) two scales used to weigh marijuana; and (8) items used for cultivation, including timing and electrical devices, fans, vents, grow lights, fertilizer, potting soil, a water pump, a thermometer, and a carbon dioxide canister and hoses. St. v. Garberding, 245 M 356, 801 P2d 583, 47 St. Rep. 2157 (1990), followed in St. v. Hulbert, 265 M 317, 877 P2d 25, 51 St. Rep. 526 (1994).

Possession of Dangerous Drugs as Lesser Included Offense of Possession With Intent to Sell — Instruction on Lesser Offense Required: It was reversible error for the District Court to deny defendant's instruction on the offense of possession of dangerous drugs (now as a lesser included offense of possession of dangerous drugs with intent to sell (now criminal possession with intent to distribute). St. v. Peterson, 227 M 503, 741 P2d 392, 44 St. Rep. 1268 (1987).

Constructive Possession — Dominion and Control: Detectives saw defendant place a garbage bag in his truck and drive away. The officers followed defendant, and although he eluded them briefly, they caught up with him and searched his vehicle. There was no garbage bag in the vehicle so the officers retraced the route of the vehicle and discovered a garbage bag similar to the bag seen in defendant's possession earlier. Supreme Court found facts sufficient to sustain conviction based on theory of constructive possession of marijuana. St. v. Stemple, 198 M 409, 646 P2d 539, 39 St. Rep. 1085 (1982).

Search Warrant Based on Informant's Statement: The court properly granted defendant's motion to suppress evidence seized in the search of his home when the application for a search warrant before the Justice of Peace failed to set forth the underlying circumstances necessary to enable him to independently judge the validity of the informant's conclusion that defendant was in possession of dangerous drugs unlawfully and with intent to sell. St. v. Leistiko, 176 M 434, 578 P2d 1161 (1978).

45-9-104. Fraudulently obtaining dangerous drugs.

Compiler's Comments

2011 Amendment: Chapter 194 inserted (6) regarding failure to disclose receipt of or a prescription for dangerous drugs within prior 30 days; inserted (7) regarding communication of false or incomplete information to procure drugs; and made minor changes in style. Amendment effective October 1, 2011.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Annotator's Note: For general background regarding the law in Montana as to drug offenses and the Dangerous Drug Act of 1969 of which this was a part, see the annotator's note following 45-9-101. This section prohibits the obtaining of dangerous drugs by means of fraud, misrepresentation, impersonation, etc. It should be noted that "obtains", as defined in 45-2-101(38) includes the bringing about of a transfer of interest or possession, whether to the offender or another. So, facilitating the fraudulent obtaining of drugs classified as dangerous in Title 50, ch. 32, is also prohibited under this statute. Although the acts prohibited under this section might well also be prohibited under 45-9-101 or 45-9-102, fraudulent activity was segregated from those offenses because of its effect, regardless of the drug involved, on the integrity of the regulatory system. The penalty for a violation of this section is found in 45-9-106.

The 1977 amendment inserted "as defined in 54-301"; and made minor changes in phraseology, punctuation, and style.

Case Notes

Alternative Sentence for Drug Offense Not Precluded by Persistent Felony Offender Statutes, but Incarceration Not Error: Brendal pleaded guilty to fraudulently obtaining dangerous drugs and was sentenced to 25 years in prison with 15 years suspended. Based on prior convictions for the same offense, the sentencing court designated Brendal as a persistent felony offender and imposed a mandatory 10-year prison sentence. Brendal appealed the sentence on grounds that the sentencing court should have considered a sentence to a drug treatment program pursuant to the alternative sentencing authority in 45-9-202. However, the Supreme Court affirmed. The persistent felony offender statutes do not preclude a District Court from providing an alternative sentence under 45-9-202 for a person convicted of a drug-related offense, as long as the required criteria for imposing an alternative sentence are satisfied. Therefore, although the District Court could have provided an alternative sentence, it was not error to sentence Brendal to incarceration. St. v. Brendal, 2009 MT 236, 351 M 395, 213 P3d 448 (2009). See also St. v. Hinshaw, 2018 MT 49, 390 Mont. 372, 414 P.3d 271.

Alcohol-Related Sentencing Conditions for Fraudulently Obtaining Dangerous Drugs Affirmed: Following conviction for fraudulently obtaining dangerous drugs, Hunter challenged two sentencing conditions that prohibited the possession and consumption of alcohol and that required chemical testing for drugs and alcohol. The Supreme Court affirmed. Prohibiting and monitoring Hunter's consumption of both alcohol and drugs would help prevent Hunter from repeating the same criminal conduct that gave rise to the sentence. A sufficient nexus was established between the offense and the alcohol-related sentence conditions. St. v. Hunter, 2008 MT 395, 347 M 155, 197 P3d 998 (2008), following St. v. Winkel, 2008 MT 89, 342 M 267, 182 P3d 54 (2008). See also St. v. Ashby, 2008 MT 83, 342 M 187, 179 P3d 1164 (2008).

45-9-105. Altering labels on dangerous drugs.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 10, Ch. 746, L. 2023. Amendment effective May 22, 2023.

Severability: Section 15, Ch. 746, L. 2023, was a severability clause.

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Annotator's Note: The offense proscribed by this statute was included as a subsection of the former statute on fraud or deceit. This section must be read in conjunction with 45-9-106 which sets the penalty for an offense under this section. The 1977 amendment added "as defined in 54-301" to the end of the section; and made minor changes in phraseology.

45-9-106. Penalty for fraudulently obtaining dangerous drugs or altering labels of dangerous drugs.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: At end of (2)(a) and (2)(b) inserted "or fined an amount not to exceed $50,000, or both".

1981 Amendment: Deleted "fraudulently obtaining dangerous drugs or" before "altering labels" in (1); and inserted (2) establishing criminal penalties for person convicted of fraudulently obtaining certain dangerous drugs.

Annotator's Note: This section makes the offenses proscribed by 45-9-104 and 45-9-105, Fraudulently Obtaining Dangerous Drugs and Altering Labels on Dangerous Drugs, misdemeanors punishable only by imprisonment in the county jail for a term not to exceed 6 months. This section should, however, be read in conjunction with 45-9-202 which allows the court to commit one convicted under those sections, who is shown to be an excessive or habitual user of dangerous drugs, to the custody of any institution for rehabilitative treatment for not less than 6 months nor more than 2 years.

45-9-107. Criminal possession of precursors to dangerous drugs.

Compiler's Comments

2017 Amendment: Chapter 253 in (1) inserted exception clause; and made minor changes in style. Amendment effective May 3, 2017.

Preamble: The preamble attached to Ch. 253, L. 2017, provided: "WHEREAS, according to data from the United States Centers for Disease Control and Prevention (CDC), more than 28,000 deaths in the United States in 2014 involved opioid-related overdoses. In 2015, nationwide overdose deaths involving opioids rose to more than 33,000. The CDC also reports that deaths involving heroin have more than tripled since 2010, with more than 10,500 persons dying in 2014 and almost 13,000 dying in 2015. More than 60% of the opioid-related overdose deaths in 2015 were attributed to primarily illicit opioids, including heroin, to synthetic opioids other than methadone, or to a mixture of the two. The CDC calls opioid-related deaths a national epidemic; and

WHEREAS, many opioid-related overdose deaths could be prevented by the timely administration of an opioid antagonist, such as naloxone hydrochloride. Naloxone is a prescription medication that, when administered to a person experiencing an opioid-related overdose, restores the person to consciousness and normal breathing. Naloxone has been in use for more than 30 years and is virtually always effective when administered correctly. Furthermore, naloxone is nonaddictive and has no potential for abuse; and

WHEREAS, treatment of a suspected opioid-related drug overdose must be performed by someone other than the person overdosing, and, for this reason, the United States Food and Drug Administration labels naloxone for third-party administration. Naloxone can be successfully administered outside of a clinical setting or facility by friends, family members, or bystanders who have received minimal training in overdose recognition and naloxone administration; and

WHEREAS, it is common for a family member or friend to be the first one to find a person who is experiencing a drug overdose. It is also common for first responders, such as law enforcement officers or firefighters, to be among the first persons on the scene of a reported drug overdose. Studies show widespread success in preventing deaths from opioid-related overdoses through timely administration of naloxone. It is imperative, therefore, that persons who are in a position to render timely assistance to an overdose victim have immediate access to naloxone when it is needed; and

WHEREAS, overdose education and naloxone distribution programs that train family members, friends, and others in a position to assist someone experiencing an opioid-related overdose can effectively reduce opioid overdose death rates. Moreover, naloxone distribution for administration by nonmedical experts can be highly cost-effective; and

WHEREAS, an opioid-related overdose is a medical emergency. After the administration of naloxone, it is critical to summon emergency medical assistance. However, persons who witness an overdose are sometimes reluctant to call 9-1-1 for fear of being arrested and prosecuted for a crime. Thirty-six states and the District of Columbia have passed laws providing limited immunity to persons who call for help when someone has experienced an opioid-related overdose; and

WHEREAS, numerous state and national public health and other organizations support increased access to naloxone, including the American Medical Association, the American Society of Addiction Medicine, the American Pharmacists Association, the United States Conference of Mayors, the National Governors Association, the federal Office of National Drug Control Policy, the American Public Health Association, the Harm Reduction Coalition, the National Association of State Alcohol and Drug Abuse Directors, the American Association of Poison Control Centers, and state and local law enforcement and other organizations representing first responders."

2005 Amendment: Chapter 137 inserted (1)(b) extending offense of criminal possession of precursors to dangerous drugs to person who knowingly possesses anhydrous ammonia with purpose of manufacturing dangerous drugs; and made minor changes in style. Amendment effective March 30, 2005.

1999 Amendment: Chapter 24 in (1) after "possesses" inserted "any material, compound, mixture, or preparation that contains any combination of the following with intent to manufacture dangerous drugs"; in (1)(a) after "(phenylacetone)" deleted "with the intent to manufacture amphetamine or methamphetamine, or both"; in (1)(b) after "cyclohexanone" deleted "at the same time, or a combination product thereof, with the intent to manufacture phencyclidine (PCP)"; inserted (1)(c) through (1)(n) listing additional precursors to dangerous drugs; and made minor changes in style. Amendment effective October 1, 1999.

1989 Amendment: In (1)(a), at beginning, deleted "both" after "(phenylacetone)", deleted "and formamide or hydroxylamine at the same time", and at end inserted "or methamphetamine, or both"; and deleted former (1)(b) that read: "(b) both phenyl-2-propanone (phenylacetone) and methylamine or N-methylformamide at the same time with the intent to manufacture methamphetamine".

1981 Amendment: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Annotator's Note: This section had no counterpart under prior law and was enacted in 1979. It prohibits the possession of the chemical precursors of various dangerous drugs with intent to manufacture the drug. Conviction under this section requires proof of (1) possession, as that term is defined in 45-2-101, of (2) any of the named combinations of chemicals, as well as (3) intent to manufacture. A mandatory minimum sentence of 2 years is imposed by subsection (2) with a potential 20-year maximum sentence upon conviction. This section was enacted as a companion to 45-9-108 which sets forth certain exemptions to the operation of this section.

Case Notes

Conviction of Possession of Precursors Vacated — "Any Combination" in Statute Requires Possession of at Least Two Materials: The defendant was arrested possessing 10 grams of pseudoephedrine, a material used in making methamphetamine, and was charged with and convicted of criminal possession of precursors to dangerous drugs. The defendant appealed, claiming that the state had insufficient evidence to convict him because he possessed only one of the materials listed as a precursor in 45-9-107, and the statute requires the possession of a combination of the precursors. The Supreme Court agreed that the statute clearly requires the possession of a combination of precursors, and not one alone. Because the state did not prove every element of the charged offense, the Supreme Court remanded the case with the order to the District Court to dismiss the charge. St. v. Booth, 2012 MT 40, 364 Mont. 190, 272 P.3d 89.

Criminal Possession of Dangerous Drugs, but Not Possession of Precursors to Dangerous Drugs, Considered Lesser Included Offense of Criminal Production or Manufacture of Dangerous Drugs by Accountability: Becker was convicted of criminal possession of dangerous drugs, accountability for criminal production or manufacture of dangerous drugs, and criminal possession of precursors to dangerous drugs. However, because the production or manufacture of dangerous drugs cannot be a criminal act until the drug has been created, the state had to first prove that Becker or one of his codefendants possessed drugs in order to convict Becker on the charge of producing or manufacturing those same drugs. Read together, 46-1-202(9)(a) and 46-11-410(2)(a) barred Becker's conviction for both criminal possession of dangerous drugs and accountability for criminal production or manufacture of dangerous drugs because criminal possession is a lesser included offense of criminal production or manufacture of dangerous drugs. However, criminal possession of precursors to dangerous drugs is not a lesser included offense of accountability for criminal production or manufacture of dangerous drugs. Thus, the Supreme Court reversed the criminal possession conviction and ordered resentencing on only the criminal possession of precursors and accountability for criminal production or manufacture. St. v. Becker, 2005 MT 75, 326 M 364, 110 P3d 1 (2005). See also St. v. Peterson, 227 M 511, 744 P2d 870 (1987).

Failure of Counsel to Argue Included Offenses Under State Law Considered Ineffective Assistance of Counsel: Becker was convicted of criminal possession of dangerous drugs, accountability for criminal production or manufacture of dangerous drugs, and criminal possession of precursors to dangerous drugs. On appeal, Becker argued that he should have been convicted only of criminal production or manufacture by accountability because the other two charges were part of the manufacturing process and that failure to include the other charges violated his due process rights. The Supreme Court declined to address the double jeopardy issue under the plain error doctrine because Becker raised it for the first time on appeal. However, the court found it appropriate to address the issue under Becker's ineffective assistance of counsel claim. Becker's counsel's failure to include all the relevant charges in a dismissal motion and to rely on the proper statutory grounds for dismissal constituted deficient performance under the first prong of the Strickland test. The second Strickland prong was also met because Becker was prejudiced by counsel's deficient performance, inasmuch as there was a reasonable probability that the result of the proceeding would have been different but for counsel's errors. The Supreme Court thus vacated the convictions and remanded for resentencing. St. v. Becker, 2005 MT 75, 326 M 364, 110 P3d 1 (2005), distinguished in St. v. Williams, 2010 MT 58, 355 Mont. 354, 228 P.3d 1127. See also St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001).

Proper Venue for Prosecution of Common Scheme to Manufacture Methamphetamine in Several Counties — Possession Charge Dismissed for Improper Venue: Following arrest in Sanders County, Galpin was charged in Ravalli County with possession of methamphetamine in Sanders County, operating a methamphetamine lab in Ravalli County, possessing methamphetamine precursors in Ravalli and Missoula Counties, and criminal endangerment in Ravalli County. Citing venue grounds, Galpin questioned the evidence on the endangerment charge and moved to dismiss the possession charge and the Missoula County precursor charge because there was no evidence that the crimes were committed in Ravalli County where the charges were filed. The Supreme Court agreed that possession has but one requisite act, which is possession of the drug itself, and because neither the state's information nor trial testimony established that Galpin possessed methamphetamine anywhere but Sanders County, Ravalli County was not the proper venue for the possession charge, so it was dismissed. However, in pursuit of the common scheme to manufacture methamphetamine, Galpin kept precursors in storage facilities in both Ravalli and Missoula Counties and knowingly or purposely prepared, processed, or manufactured the drug as he traveled between Ravalli and Missoula Counties, so venue was proper in Ravalli County for the precursor charges. Ravalli County was also a proper venue for the criminal endangerment charges based on witness testimony that Galpin manufactured methamphetamine on at least three occasions at the witness's home in Ravalli County when children were present. St. v. Galpin, 2003 MT 324, 318 M 318, 80 P3d 1207 (2003).

45-9-108. Exemptions.

Compiler's Comments

2001 Amendment: Chapter 360 inserted (3) concerning nonapplicability to industrial hemp authorized as an agricultural crop; and made minor changes in style. Amendment effective October 1, 2001.

1983 Amendment: Substituted "board of pharmacy" for "board of pharmacists" twice.

1981 Amendment: Substituted "board of pharmacists" for "board of pharmacy" in (2).

Annotator's Note: This section and 45-9-107, both of which were enacted by the 1979 Legislature, operate together to generally prohibit the possession of certain named combinations of chemical substances with intent to manufacture dangerous drugs (45-9-107) while allowing possession with intent to manufacture by licensed drug manufacturers as well as university students or employees who use the chemicals in the furtherance of teaching or research authorized by the college or university. This section also delegates rulemaking authority to the Board of Pharmacists to authorize others to possess the chemical substances with intent to manufacture.

1979 Statement of Intent: The statement of intent adopted by the Legislature with Chapter 291, L. 1979, enacting these two statutes, sets forth the legislative purpose in delegating this task to the Board of Pharmacists: "A statement of intent is required for this bill in that in section 3 it delegates authority to the Board of Pharmacy to adopt rules.

House Bill 422 defines the offense of criminal possession of precursors to certain dangerous drugs. The bill provides that its provisions do not apply to those persons or businesses which have a legitimate reason for possessing the precursors. It is possible that certain persons, businesses or research facilities may now or at a later date have a legitimate need for these precursors. The purpose for giving rulemaking authority to the Board of Pharmacy is that it can best determine whether a person, business or research facility has a legitimate need for the precursors. It will also alleviate having to amend the statute in future sessions if it appears that someone is entitled to be exempted from the criminal provisions of the statute."

45-9-109. Criminal distribution of dangerous drugs on or near school property — penalty — affirmative defense.

Compiler's Comments

1999 Amendment: Chapter 432 in (1) and (2) substituted "criminal distribution" for "criminal sale"; and made minor changes in style. Amendment effective October 1, 1999.

45-9-110. Criminal production or manufacture of dangerous drugs.

Compiler's Comments

2021 Amendment: Chapter 576 in (1) near beginning and in (3) in two places deleted references to Title 50, chapter 46; and in (3) near beginning of first sentence after "appropriate license" deleted "and endorsement". Amendment effective January 1, 2022.

Severability: Section 113, Ch. 576, L. 2021, was a severability clause.

2020 Amendment by Initiative: Initiative Measure No. 190 in (1) inserted "Title 16, chapter 12"; in (3) near beginning substituted "convicted of production of marijuana" for "convicted of criminal production or manufacture of marijuana" and inserted provisions regarding production of marijuana in an amount greater than permitted or for which a penalty is not specified or manufacturing without appropriate license and endorsement; and made minor changes in style. Amendment effective January 1, 2021.

Severability: Section 55, Initiative Measure No. 190, was a severability clause.

2017 Amendment: Chapter 321 in (2) substituted "dangerous drugs, as defined in 50-32-101" for "a narcotic drug, as defined in 50-32-101(19)(d), or an opiate, as defined in 50-32-101", substituted "not more than 25 years" for "not less than 5 years or more than life", and at end deleted "except as provided in 46-18-222"; deleted former (3) that read: "(3) A person convicted of criminal production or manufacture of a dangerous drug included in Schedule I of 50-32-222 or Schedule II of 50-32-224, except marijuana or tetrahydrocannabinol, who has a prior conviction that has become final for criminal production or manufacture of a Schedule I or Schedule II drug shall be imprisoned in the state prison for a term of not less than 20 years or more than life and may be fined not more than $50,000, except as provided in 46-18-222. Upon a third or subsequent conviction that has become final for criminal production or manufacture of a Schedule I or Schedule II drug, the person shall be imprisoned in the state prison for a term of not less than 40 years or more than life and may be fined not more than $50,000, except as provided in 46-18-222. The penalties provided for in this subsection also apply to the criminal production or manufacture of synthetic cannabinoids listed as dangerous drugs in 50-32-222"; in (3) in first sentence near beginning after "tetrahydrocannabinol" deleted "or a dangerous drug not referred to in subsections (2) and (3)", substituted "not more than 5 years" for "not to exceed 10 years", substituted "an amount not to exceed $5,000" for "not more than $50,000", after "except that if" deleted "the dangerous drug is marijuana and", near end after "state prison" substituted "for a term of not more than 25 years" for "for not less than 2 years or more than life", and deleted last sentence that read: "A person convicted under this subsection who has a prior conviction that has become final for criminal production or manufacture of a drug under this subsection shall be imprisoned in the state prison for a term not to exceed twice that authorized for a first offense under this subsection and may be fined not more than $100,000"; and made minor changes in style. Amendment effective July 1, 2017.

Applicability: Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

2013 Amendment: Chapter 135 in (2) substituted "50-32-101(19)(d)" for "50-32-101(18)(d)" and "50-32-101" for "50-32-101(19)". Amendment effective October 1, 2013.

2011 Amendment: Chapter 156 in (3) inserted last sentence applying penalties to production or manufacture of synthetic cannabinoids. Amendment effective April 8, 2011.

2004 Amendment by Initiative: Initiative Measure No. 148, proposed by initiative petition and approved at the general election held November 2, 2004, in (1) at beginning inserted exception clause. Amendment effective November 2, 2004.

Severability: Section 18, I.M. No. 148, was a severability clause.

2003 Amendment: Chapter 114 in (5) after "Practitioners" inserted "as defined in 50-32-101" and after "a professional practice" deleted "as defined by 50-32-101". Amendment effective October 1, 2003.

Case Notes

Noncardholder Not Exempt from Prosecution for Possession or Cultivation of Marijuana Under Exemption for Being in Vicinity of Registered Medical Marijuana Cardholder's Authorized Use: The defendant was not exempted from prosecution for possession of marijuana solely because she was in the vicinity of authorized use of marijuana by a registered medical marijuana cardholder. On appeal to the Supreme Court, the defendant argued she was protected from prosecution under the Montana Medical Marijuana Act because her partner was a registered medical marijuana cardholder and she could not be prosecuted for constructive possession under 50-46-319(5)(a) (now repealed). The Supreme Court disagreed. Even if she was protected from being found in constructive possession of marijuana, the charges against her were not based only on that constructive possession. Because the defendant engaged in activities related to the production and cultivation of marijuana plants and exercised control over both the plants and the house the plants were found in, the defendant was still subject to prosecution for criminal production or manufacture of dangerous drugs. St. v. Sutton, 2018 MT 143, 391 Mont. 485, 419 P.3d 1201.

Lost Officers Lawfully Present — Motion to Suppress Properly Denied: After two law enforcement officers who were attempting to serve an arrest warrant became lost, they stopped at the defendant's residence in an attempt to determine the home's location and observed marijuana through the defendant's open front door. The defendant was charged with criminal production or manufacture of dangerous drugs and moved to suppress, arguing that because the officers had no reason to enter his property, they were not lawfully in a place where they could see the marijuana in plain view. The District Court denied the motion. On appeal, the Supreme Court affirmed, concluding that the District Court acted within its factfinding province to believe the officers' story about being lost and properly denied the motion to suppress. St. v. Phillips, 2013 MT 317, 372 Mont. 317, 312 P.3d 445.

Warrantless Search of Duffle Bag in Area of Drug Lab Based on Exigent Circumstances: While detoxifying property where a drug lab was found, officers discovered a locked duffle bag sitting on or near contaminated bedding and heard sounds of sloshing liquid and clanging glass or metal within the bag. The officers were concerned with a possible chemical reaction and explosion, so they removed the bag from the premises, laid it on a tarp, and notified the safety officer of the suspect liquids. The safety officer believed that obtaining a search warrant to open the bag would take at least 45 minutes, which posed a potential threat to the safety of the officers and the property and persons in the immediate area, so the bag was opened immediately without a warrant, and drug lab materials were found and removed. Defendant asserted that the search was unlawful on grounds that the officers had no right to even pick up the bag without a warrant because if they suspected that it contained methamphetamine lab materials, then they should have known that disturbing the bag could unleash hazardous fumes and explosive chemicals. The state contended that exigent circumstances existed because the officers were necessarily required to immediately determine if dangerous chemicals were present. The Supreme Court noted that exigent circumstances for conducting a warrantless search exist when it is not practical to secure a warrant. Citing U.S. v. Lloyd, 396 F3d 948 (8th Cir. 2005), the court held that the "dangers created by methamphetamine labs can justify an immediate search because of exigent circumstances due to the volatile nature of such labs". In this case, the existence of exigent circumstances allowed the immediate warrantless search of the duffle bag. St. v. Gomez, 2007 MT 111, 337 M 219, 158 P3d 442 (2007).

Defendant's Drug Precursor Purchases and Officer's Experience — Sufficient Probable Cause for Search Warrant for Drug Lab Under Totality of Circumstances: Dutton moved to suppress the evidence from a search on grounds of staleness and lack of sufficient information to support the warrant. The Supreme Court dismissed the staleness argument after determining that a crimestopper's tip from 9 months before the warrant was issued was timely when coupled with information received 5 months earlier and considerable information that was only days or weeks old at the time of the warrant application. Additionally, when viewing the totality of the circumstances in a practical, common-sense manner, there was sufficient probable cause for the warrant based on an experienced officer's observations of Dutton's activity of purchasing numerous drug precursors used in methamphetamine production as inconsistent with the average consumer. Dutton's motion to suppress was properly denied. St. v. Dutton, 2007 MT 56, 336 M 192, 153 P3d 642 (2007).

Sufficient Evidence of Drug Lab to Send Case to Jury — Motion for Directed Verdict Properly Denied: Following a fire in the camper where Hausauer lived, officers found numerous items consistent with a methamphetamine lab, and Hausauer was charged with purposely or knowingly engaging in the procurement, possession, or use of chemicals, precursors to dangerous drugs, supplies, equipment, or a laboratory for the criminal production or manufacture of dangerous drugs. At trial, Hausauer moved for a directed verdict on grounds that because all of the items could be lawfully purchased and used for purposes other than drug production, the state failed to meet its burden of proving that Hausauer operated a drug lab. The District Court denied the motion, and on appeal, the Supreme Court affirmed. Hausauer's culpability was a question of fact, not a question of law, and was thus appropriate for the jury to decide. A directed verdict of acquittal is appropriate only when there is no evidence to support a guilty verdict. No abuse of discretion results from denial of a motion for a directed verdict of acquittal when the evidence is viewed in a light most favorable to the prosecution and a rational trier of fact could find the elements of a crime beyond a reasonable doubt. St. v. Hausauer, 2006 MT 336, 335 M 137, 149 P3d 895 (2006).

Criminal Possession of Dangerous Drugs, but Not Possession of Precursors to Dangerous Drugs, Considered Lesser Included Offense of Criminal Production or Manufacture of Dangerous Drugs by Accountability: Becker was convicted of criminal possession of dangerous drugs, accountability for criminal production or manufacture of dangerous drugs, and criminal possession of precursors to dangerous drugs. However, because the production or manufacture of dangerous drugs cannot be a criminal act until the drug has been created, the state had to first prove that Becker or one of his codefendants possessed drugs in order to convict Becker on the charge of producing or manufacturing those same drugs. Read together, 46-1-202(9)(a) and 46-11-410(2)(a) barred Becker's conviction for both criminal possession of dangerous drugs and accountability for criminal production or manufacture of dangerous drugs because criminal possession is a lesser included offense of criminal production or manufacture of dangerous drugs. However, criminal possession of precursors to dangerous drugs is not a lesser included offense of accountability for criminal production or manufacture of dangerous drugs. Thus, the Supreme Court reversed the criminal possession conviction and ordered resentencing on only the criminal possession of precursors and accountability for criminal production or manufacture. St. v. Becker, 2005 MT 75, 326 M 364, 110 P3d 1 (2005). See also St. v. Peterson, 227 M 511, 744 P2d 870 (1987).

Failure of Counsel to Argue Included Offenses Under State Law Considered Ineffective Assistance of Counsel: Becker was convicted of criminal possession of dangerous drugs, accountability for criminal production or manufacture of dangerous drugs, and criminal possession of precursors to dangerous drugs. On appeal, Becker argued that he should have been convicted only of criminal production or manufacture by accountability because the other two charges were part of the manufacturing process and that failure to include the other charges violated his due process rights. The Supreme Court declined to address the double jeopardy issue under the plain error doctrine because Becker raised it for the first time on appeal. However, the court found it appropriate to address the issue under Becker's ineffective assistance of counsel claim. Becker's counsel's failure to include all the relevant charges in a dismissal motion and to rely on the proper statutory grounds for dismissal constituted deficient performance under the first prong of the Strickland test. The second Strickland prong was also met because Becker was prejudiced by counsel's deficient performance, inasmuch as there was a reasonable probability that the result of the proceeding would have been different but for counsel's errors. The Supreme Court thus vacated the convictions and remanded for resentencing. St. v. Becker, 2005 MT 75, 326 M 364, 110 P3d 1 (2005), distinguished in St. v. Williams, 2010 MT 58, 355 Mont. 354, 228 P.3d 1127. See also St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001).

Legality of Sentence for Criminal Production or Manufacture of Dangerous Drugs by Accountability: Becker was sentenced to 10 years in prison for accountability for criminal production or manufacture of dangerous drugs. Becker argued on appeal that the 10-year sentence was illegal because this section does not set out a punishment for a first-time offense for accountability for criminal production or manufacture, so no statutory authority existed for the 10-year sentence. Absent that authority, Becker contended that 46-18-212 should apply and that the offense was a misdemeanor punishable by not more than 6 months in the county jail. The Supreme Court agreed that subsections (2) and (3) of this section did not provide an applicable sentence for first-time accountability for a criminal production or manufacture offense. However, this section carries penalties in excess of 1 year in prison, so a violation of the statute is a felony, and the default penalty in 46-18-213, not 46-18-212, applies to violations of this section. Under 46-18-213, a 10-year sentence for a felony was authorized, and Becker's sentence was therefore affirmed. St. v. Becker, 2005 MT 75, 326 M 364, 110 P3d 1 (2005).

Knock and Announce Rule — Exigent Circumstances Exception — Futility Exception — Warrant Requirements: Without knocking and announcing its presence, a SWAT team broke down the doors of a rental home, discovered a methamphetamine lab, and arrested the occupants, including Anyan. Anyan contended that the entry was illegal and that evidence seized should be suppressed. Following a guilty plea, Anyan appealed on grounds of the illegality of the no-knock entry. Absent state statutory or case law, the Supreme Court examined extensive federal precedent, concluding that pursuant to the right of privacy and the right to be free from illegal search and seizure, an officer serving a search warrant must comply with the knock and announce requirement unless there are exigent circumstances that would present a threat of physical violence or the likelihood that evidence would be destroyed. Mere suspicion or evidence that firearms are present in the residence or that a particular resident is armed is not sufficient to create an exigency; rather, there must be specific information to lead the officer to a reasonable conclusion that the presence of firearms raises a concern for officer safety. Another exception to the knock and announce requirement, known as the futility exception, arises when police have a reasonable suspicion that the occupants know of the police presence and purpose prior to entry and that knocking and announcing would be futile. In addition, the decision to make a no-knock entry should ordinarily be made by a neutral and detached magistrate as part of the application for a search warrant, along with any foreknown exigent circumstances justifying a no-knock entry, but an investigating officer may make the decision if unexpected exigent circumstances arise at the scene. The knock and announce rule is flexible, and courts must determine whether an unannounced entry was reasonable under the particular circumstances of each case, including the time that an officer must wait prior to forced entry. However, unless exigent circumstances exist, the failure of officers to knock and announce their presence renders evidence procured during execution of the search warrant inadmissible. Thus, the officers' no-knock entry into Anyan's house violated federal and state constitutional rights to be free from unreasonable search and seizure, and failure of the District Court to suppress the evidence seized during the search was reversible error. St. v. Anyan, 2004 MT 395, 325 M 245, 104 P3d 511 (2004), followed in St. v. Ochadleus, 2005 MT 88, 326 M 441, 110 P3d 448 (2005), in which the Supreme Court reiterated that no-knock entry into a residence is the exception and not the rule. The Anyan futility exception was also applied in St. v. Hill, 2008 MT 260, 345 M 95, 189 P3d 1201 (2008), where officers responding to a domestic disturbance call did not knock but announced their presence through the open door of a trailer and observed defendant moving aggressively toward the back of the trailer, but defendant ignored their order to stop. The officers had a reasonable suspicion that the trailer occupants knew of their presence and purpose prior to entry. A woman screaming in the trailer indicated an ongoing domestic disturbance, and continuing to wait at the open door after defendant failed to respond would have been superfluous, futile, and dangerous. Anyan was overruled by St. v. Neiss, 2019 MT 125, 396 Mont. 1, 443 P.3d 435, to the extent that Anyan and subsequent decisions require prior judicial approval for no-knock entries.

Statute Criminalizing Clandestine Laboratory Not Unconstitutionally Vague or Overbroad: Leeson contended that 45-9-132 is unconstitutionally vague on its face because a person of ordinary intelligence could be in possession of equipment and materials commonly used for other purposes that could be used to manufacture methamphetamine, subjecting that person to arrest for operating a clandestine laboratory. A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that the person's contemplated conduct is forbidden. Leeson did not indicate which terms in 45-9-132 fail to give proper notice. The section requires possession with intent to operate a laboratory, and it would be difficult if not impossible for a person to inadvertently manufacture dangerous drugs purposely or knowingly. Leeson also contended that 45-9-132 is unconstitutionally overbroad because it subjects innocent people to being arrested for possessing certain items that are otherwise legal to possess. A statute may be overbroad if in its reach it prohibits constitutionally protected activity, but the claimed overbreadth must be real and substantial, judged in relation to the statute's plainly legitimate sweep, particularly when conduct and not merely speech is involved. Leeson did not demonstrate how the statute might infringe on a constitutionally protected right in a real or substantial way. Thus, 45-9-132 is not unconstitutionally vague or overbroad. St. v. Leeson, 2003 MT 354, 319 M 1, 82 P3d 16 (2003), following St. v. Nye, 283 M 505, 943 P2d 96 (1997). See also Ward v. Rock Against Racism, 491 US 781 (1989).

Conviction for Production of Methamphetamine and Possession of Property Used to Produce Methamphetamine Not Double Jeopardy — Separate Elements of Each Offense: Minez contended that the possession of glassware and chemicals used to produce methamphetamine was only a form of preparation to commit the offense of producing methamphetamine and that conviction of two offenses for the same act violated double jeopardy protections. The Supreme Court disagreed. The elements of each offense were different, and each required proof of an additional fact not required by the other. Double jeopardy does not apply to conviction for two separate crimes. St. v. Minez, 2003 MT 344, 318 M 478, 82 P3d 1 (2003).

Proper Venue for Prosecution of Common Scheme to Manufacture Methamphetamine in Several Counties — Possession Charge Dismissed for Improper Venue: Following arrest in Sanders County, Galpin was charged in Ravalli County with possession of methamphetamine in Sanders County, operating a methamphetamine lab in Ravalli County, possessing methamphetamine precursors in Ravalli and Missoula Counties, and criminal endangerment in Ravalli County. Citing venue grounds, Galpin questioned the evidence on the endangerment charge and moved to dismiss the possession charge and the Missoula County precursor charge because there was no evidence that the crimes were committed in Ravalli County where the charges were filed. The Supreme Court agreed that possession has but one requisite act, which is possession of the drug itself, and because neither the state's information nor trial testimony established that Galpin possessed methamphetamine anywhere but Sanders County, Ravalli County was not the proper venue for the possession charge, so it was dismissed. However, in pursuit of the common scheme to manufacture methamphetamine, Galpin kept precursors in storage facilities in both Ravalli and Missoula Counties and knowingly or purposely prepared, processed, or manufactured the drug as he traveled between Ravalli and Missoula Counties, so venue was proper in Ravalli County for the precursor charges. Ravalli County was also a proper venue for the criminal endangerment charges based on witness testimony that Galpin manufactured methamphetamine on at least three occasions at the witness's home in Ravalli County when children were present. St. v. Galpin, 2003 MT 324, 318 M 318, 80 P3d 1207 (2003).

Accomplice Facing Charges Related to Different Count From Defendant — Corroboration of Testimony: Byers was charged with conspiracy to manufacture dangerous drugs based on the testimony of three accomplices. The testimony of two of the accomplices was inadmissible under 46-16-213, but testimony was also given by a third accomplice who was charged with complicity with Byers in a different crime. Byers contended that the testimony of the third accomplice was also inadmissible; however, because the third accomplice was facing charges related to acts with Byers on a different count, the corroborative testimony of the third accomplice was proper. St. v. Byers, 2003 MT 83, 315 M 89, 67 P3d 880 (2003).

Evidence Unrelated to Accomplice Testimony Sufficient to Corroborate Drug Lab Operation: Byers was charged with operating a methamphetamine laboratory and conspiracy to manufacture methamphetamine. Two accomplices testified against Byers in exchange for use immunity. Byers asserted that the accomplices' testimony was inadmissible pursuant to 46-16-213, but the Supreme Court disagreed. There was sufficient physical evidence of drug manufacturing to provide independent corroboration of the witnesses' testimony, unrelated to the accomplice testimony, so that a jury could reasonably infer that Byers was involved in the manufacture of methamphetamine. Byers' conviction was affirmed. St. v. Byers, 2003 MT 83, 315 M 89, 67 P3d 880 (2003).

Operating Unlawful Clandestine Laboratory and Manufacturing Dangerous Drugs Considered Separate Offenses — No Equal Protection Violation: Davison was charged with two counts of operating an unlawful clandestine laboratory and one count of possession of dangerous drugs. Davison moved to dismiss the laboratory charges, claiming an equal protection violation because of the disparity in punishment between the laboratory charges and the charge of manufacturing dangerous drugs. The motion was denied, and Davison appealed, contending that disparate punishment for essentially the same crime lacked a rational basis in violation of equal protection guarantees. When reviewing equal protection challenges, the Supreme Court applies one of three levels of scrutiny, including strict scrutiny (if a law affects a suspect class or threatens a fundamental right), intermediate scrutiny (if a law affects a constitutional right that is not found in Art. II, Mont. Const.), and the rational basis test (which requires that a law must be rationally related to a legitimate governmental interest and applies if neither of the first two tests applies). Davison's argument failed because he did not identify a classification that would warrant an equal protection analysis under any of the three recognized levels of scrutiny. The offense of operating an unlawful clandestine laboratory is a separate and distinct crime from the offense of manufacturing dangerous drugs, so an individual convicted under one statute is not similarly situated to an individual convicted under the other statute for equal protection purposes. Further, the state is not required to charge a particular offense when an offender's conduct satisfies the elements of more than one crime. Davison could not show that the crimes affect similarly situated classes in an unequal manner, so the Supreme Court affirmed. St. v. Davison, 2003 MT 64, 314 M 427, 67 P3d 203 (2003).

Sufficient Probable Cause for Search of Vehicle for Suspected Drug Lab: Officers received a tip from Olson's estranged husband that a methamphetamine lab was being operated in Olson's garage. The officers placed the garage under surveillance and saw equipment being loaded into Olson's car that same day. The officers stopped the car for an investigative stop, and an officer informed Olson that he knew that lab equipment was in the trunk. Olson initially denied it, but when the officer expressed concern for Olson and her son, she made incriminating statements and confessed that the lab was in the car. The officers then obtained a search warrant and searched the vehicle and Olson's garage. Olson contended that the warrant application was not supported by probable cause. The Supreme Court applied the standards in Ill. v. Gates, 462 US 213 (1983), and St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), and concluded that Olson's husband was acting as a good citizen and was a reliable informant. The officers had sufficient probable cause to believe that a drug lab was relocated from Olson's garage to the vehicle to support the issuance of the search warrant. St. v. Olson, 2003 MT 61, 314 M 402, 66 P3d 297 (2003).

Traffic Stop Based on Drug Tip Considered Custodial Interrogation — Miranda Warning Required: Officers received a tip from Olson's estranged husband that a methamphetamine lab was being operated in Olson's garage. The officers placed the garage under surveillance and saw equipment being loaded into Olson's car that same day. The officers stopped the car for an investigative stop, and an officer informed Olson that he knew that lab equipment was in the trunk. Olson initially denied it, but when the officer expressed concern for Olson and her son, she made incriminating statements and confessed that the lab was in the car. Olson later sought to suppress the statements because she was not read her Miranda rights before she made the statements. The question was whether Olson was subject to a custodial interrogation that entitled her to receive the Miranda warnings. The District Court held that an interrogation did not occur because Olson was not asked any direct questions. The Supreme Court concluded that although Olson was not under arrest at the time that the statements were made, she was nevertheless subjected to a custodial interrogation. Olson was not free to leave during the conversation, the officer's questions were directed specifically at Olson, no other party was privy to the conversation, and the officer should have known that under the circumstances, his statements were reasonably likely to elicit an incriminating response. Because Olson did not receive Miranda warnings before she was interrogated, the statements that she made were in violation of her constitutional right against self-incrimination and should have been suppressed. St. v. Olson, 2003 MT 61, 314 M 402, 66 P3d 297 (2003), followed in St. v. McKee, 2006 MT 5, 330 M 249, 127 P3d 445 (2006). See also St. v. Staat, 251 M 1, 822 P2d 643 (1991), and St. v. Flack, 260 M 181, 860 P2d 89 (1993).

45-9-111. Imitation dangerous drugs — definitions.

Compiler's Comments

1985 Amendment: In introductory sentence changed "45-9-112" to "45-9-111".

45-9-112. Criminal distribution of imitation dangerous drug — penalty.

Compiler's Comments

1999 Amendment: Chapter 432 throughout section substituted "criminal distribution" for "criminal sale"; and made minor changes in style. Amendment effective October 1, 1999.

45-9-113. Criminal possession of imitation dangerous drug with the purpose to distribute — penalty.

Compiler's Comments

1999 Amendment: Chapter 432 in two places in (1) and in (2) substituted "purpose to distribute" for "purpose to sell"; and made minor changes in style. Amendment effective October 1, 1999.

45-9-114. Criminal advertisement of imitation dangerous drug — penalty.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

45-9-115. Criminal manufacture of imitation dangerous drug — penalty.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

45-9-116. Imitation dangerous drugs — exemptions — rules.

Compiler's Comments

1985 Amendment: In (1) changed "45-9-112" to "45-9-111".

1983 Amendment: In (1)(a) and (2), substituted "board of pharmacy" for "board of pharmacists".

Statement of Intent: The statement of intent attached to Ch. 451, L. 1983, provided: "A statement of intent is required for this bill because it gives the Board of Pharmacists the power to adopt rules authorizing persons to possess or sell imitation dangerous drugs.

It is the intention of the Legislature that the Board should, as it determines necessary, adopt rules authorizing such persons as pharmacists, law enforcement officers and physicians to possess or sell imitation dangerous drugs while acting within the scope of their employment. The rules should authorize possession for sale only by those persons who have bona fide reasons for possession for sale and should not purport to excuse otherwise criminal activity of any type."

45-9-121. Criminal possession of toxic substance — penalty.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

45-9-127. Carrying dangerous drugs on train — penalty.

Compiler's Comments

2021 Amendment: Chapter 576 in (1) deleted reference to Title 50, chapter 46. Amendment effective January 1, 2022.

Severability: Section 113, Ch. 576, L. 2021, was a severability clause.

2020 Amendment by Initiative: Initiative Measure No. 190 in (1) inserted "or Title 16, chapter 12". Amendment effective January 1, 2021.

Severability: Section 55, Initiative Measure No. 190, was a severability clause.

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

2004 Amendment by Initiative: Initiative Measure No. 148, proposed by initiative petition and approved at the general election held November 2, 2004, in (1) at beginning inserted exception clause. Amendment effective November 2, 2004.

Severability: Section 18, I.M. No. 148, was a severability clause.

45-9-130. Mandatory fine for possession and storage of dangerous drugs — disposition of proceeds.

Compiler's Comments

2001 Amendment: Chapter 257 in (2) in two places substituted references to department of revenue for references to state treasurer; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

Effective Date — Applicability: Section 5, Ch. 446, L. 1995, provided: "[This act] [45-9-130] is effective January 1, 1996, and applies to all persons found to have possessed or stored dangerous drugs after December 31, 1995."

Case Notes

Market Rate Determination — Requirement That Smallest Discrete Quantum of Drugs Be Used Without Special Verdict: When the defendant was apprehended and searched, police found four distinct quantities of meth in the car: a trace amount on a pipe, a trace amount in a glass vial, 30 grams in a duffle bag, and 220.99 grams in a postal box. The jury found the defendant guilty of possession of methamphetamine, but there was no special verdict in which the jury identified the specific quantum of drug on which its verdict was based. The District Court sentenced the defendant to a suspended prison sentence, a $5,000 fine for possession, and a $10,000 fine for the 35% market value of the 220.99 grams of meth. The defendant appealed the market value fine. The Supreme Court reversed, finding that when a conviction involves multiple distinct quantities of drugs, the market value fine requires that the factfinder deliver a special verdict identifying the specific drugs and quantities on which the defendant was found guilty. In the absence of such a determination, due process requires that the lowest quantum of drugs identified be used as the basis for the market rate determination. Because in this case the lowest quantum was one of the trace amounts of meth, the District Court was in error. St. v. Wilkes, 2021 MT 27, 403 Mont. 180, 480 P.3d 823.

Discretion by Judge Necessary for Imposing Fines: A woman traveled through Montana with her ex-husband, who was transporting 144 pounds of marijuana. The woman and her ex-husband were arrested and charged with felony drug offenses. The District Court sentenced the woman under 45-9-130 to pay 35% of the market value of the drugs. The District Court was unable under the statute to inquire into the woman's ability to pay. On appeal, the Supreme Court found the statute unconstitutional because the excessive fines clause in the Montana Constitution requires a judge to be able to consider the ability of a defendant to pay a fine and to consider the burden the fine would impose on the defendant, clarifying a previous ruling on 45-9-130 in St. v. Le, 2017 MT 82, 387 Mont. 224, 392 P.3d 607. State v. Yang, 2019 MT 266, 397 Mont. 486, 452 P.3d 897.

Fine Based on Market Value of Confiscated Drugs — Mandatory Penalty Not Subject to Discretionary Authority — Not Grossly Disproportional: The defendant pleaded guilty to criminal possession of dangerous drugs. Under the terms of the plea agreement, the state amended its charge that advised the defendant could face 5 years of imprisonment, be fined up to $50,000, or both. At the change of plea hearing, the District Court advised the defendant that the maximum penalty was 5 years in prison, a $50,000 fine, and, under 45-9-130, an additional 35% penalty of the market value of the drugs he was transporting. The defendant said he understood the possible maximum penalties and entered a plea of guilty. The defendant subsequently objected to the imposition of a fine under 45-9-130, arguing that it violated the "Apprendi doctrine" based on Apprendi v. New Jersey, 530 U.S. 466 (2000), and 46-1-401. The District Court denied the objection, sentencing the defendant to a deferred sentence, a $1,500 fine, and a $15,000 fine pursuant to 45-9-130. On appeal, the Supreme Court affirmed, holding that the fine was a mandatory penalty and therefore not subject to the court's discretionary general sentencing authority. The Supreme Court also found that the defendant did not demonstrate that the fine was grossly disproportional to the gravity of his offense and violated the excessive fine prohibition. St. v. Le, 2017 MT 82, 387 Mont. 224, 392 P.3d 607.

45-9-131. Definitions.

Compiler's Comments

2005 Amendment: Chapter 137 in definition of precursor to dangerous drugs after "means" deleted "any material, compound, mixture, or preparation that contains any combination of the items listed in 45-9-107(1)" and after "45-9-108" inserted language on material, compound, or preparation containing combination of items listed in 45-9-107(1)(a) or anhydrous ammonia; and made minor changes in style. Amendment effective March 30, 2005.

Effective Date: Section 5, Ch. 260, L. 2001, provided: "[This act] is effective July 1, 2001."

Case Notes

Statute Criminalizing Clandestine Laboratory Not Unconstitutionally Vague or Overbroad: Leeson contended that 45-9-132 is unconstitutionally vague on its face because a person of ordinary intelligence could be in possession of equipment and materials commonly used for other purposes that could be used to manufacture methamphetamine, subjecting that person to arrest for operating a clandestine laboratory. A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that the person's contemplated conduct is forbidden. Leeson did not indicate which terms in 45-9-132 fail to give proper notice. The section requires possession with intent to operate a laboratory, and it would be difficult if not impossible for a person to inadvertently manufacture dangerous drugs purposely or knowingly. Leeson also contended that 45-9-132 is unconstitutionally overbroad because it subjects innocent people to being arrested for possessing certain items that are otherwise legal to possess. A statute may be overbroad if in its reach it prohibits constitutionally protected activity, but the claimed overbreadth must be real and substantial, judged in relation to the statute's plainly legitimate sweep, particularly when conduct and not merely speech is involved. Leeson did not demonstrate how the statute might infringe on a constitutionally protected right in a real or substantial way. Thus, 45-9-132 is not unconstitutionally vague or overbroad. St. v. Leeson, 2003 MT 354, 319 M 1, 82 P3d 16 (2003), following St. v. Nye, 283 M 505, 943 P2d 96 (1997). See also Ward v. Rock Against Racism, 491 US 781 (1989).

45-9-132. Operation of unlawful clandestine laboratory — penalties.

Compiler's Comments

2003 Amendment: Chapter 146 in (2) near end after "not to exceed" increased prison term from 20 years to 40 years; in (3) near middle of introductory clause after "not to exceed" increased prison term from 25 years to 50 years; and in (4) near middle after "not to exceed" increased prison term from 40 years to 50 years. Amendment effective October 1, 2003.

Effective Date: Section 5, Ch. 260, L. 2001, provided: "[This act] is effective July 1, 2001."

Case Notes

Signed Arrest Warrant Listing Wrong Offense Considered Inconsequential and Ministerial — Arrest Pursuant to Valid Warrant — Motion to Suppress Properly Denied: Law enforcement executed a search warrant on Torgeson's residence in Mineral County and found a meth lab. Torgeson was charged in Mineral County with operating a clandestine drug laboratory and the District Court issued a warrant for Torgeson's arrest, but the warrant incorrectly named the charged offense as a violation of bail conditions. Torgeson was subsequently located in Missoula County. Missoula County officers verified the Mineral County charges and confirmed that a warrant was outstanding, and went to Torgeson's residence to arrest him. Torgeson was arrested based on the Mineral County warrant and was read his Miranda rights. A search of the residence revealed another meth lab. Torgeson moved to dismiss or suppress statements he made after being given the Miranda warnings because the arrest was based on an invalid arrest warrant from Mineral County. The motion was denied, and on appeal the Supreme Court affirmed. Section 46-6-210 provides that a peace officer may arrest a person when the officer reasonably believes that a warrant for the person has been issued, and 46-6-204 provides that a warrant may not be dismissed because of technical irregularities that do not affect the person's substantial rights. Torgeson described no substantial right that was prejudiced by the erroneous charge stated in the Mineral County warrant. The warrant was in writing, was signed by a District Court judge, and was based on an existing felony charge of operating a clandestine drug laboratory. The name of the person to be arrested, the date of the charge, and the amount of bail were all correctly stated in writing, and a complete record of the proceedings leading to issuance of the warrant existed. The irregularity in the warrant did not affect Torgeson's substantial rights, and under these circumstances Torgeson was arrested pursuant to a valid warrant, so the motion to dismiss or suppress was properly denied. St. v. Torgeson, 2008 MT 295, 345 M 415, 191 P3d 448 (2008), distinguishing St. v. McKee, 1998 MT 110, 288 M 454, 958 P2d 700 (1998).

Warrantless Search of Duffle Bag in Area of Drug Lab Based on Exigent Circumstances: While detoxifying property where a drug lab was found, officers discovered a locked duffle bag sitting on or near contaminated bedding and heard sounds of sloshing liquid and clanging glass or metal within the bag. The officers were concerned with a possible chemical reaction and explosion, so they removed the bag from the premises, laid it on a tarp, and notified the safety officer of the suspect liquids. The safety officer believed that obtaining a search warrant to open the bag would take at least 45 minutes, which posed a potential threat to the safety of the officers and the property and persons in the immediate area, so the bag was opened immediately without a warrant, and drug lab materials were found and removed. Defendant asserted that the search was unlawful on grounds that the officers had no right to even pick up the bag without a warrant because if they suspected that it contained methamphetamine lab materials, then they should have known that disturbing the bag could unleash hazardous fumes and explosive chemicals. The state contended that exigent circumstances existed because the officers were necessarily required to immediately determine if dangerous chemicals were present. The Supreme Court noted that exigent circumstances for conducting a warrantless search exist when it is not practical to secure a warrant. Citing U.S. v. Lloyd, 396 F3d 948 (8th Cir. 2005), the court held that the "dangers created by methamphetamine labs can justify an immediate search because of exigent circumstances due to the volatile nature of such labs". In this case, the existence of exigent circumstances allowed the immediate warrantless search of the duffle bag. St. v. Gomez, 2007 MT 111, 337 M 219, 158 P3d 442 (2007).

Defendant's Drug Precursor Purchases and Officer's Experience — Sufficient Probable Cause for Search Warrant for Drug Lab Under Totality of Circumstances: Dutton moved to suppress the evidence from a search on grounds of staleness and lack of sufficient information to support the warrant. The Supreme Court dismissed the staleness argument after determining that a crimestopper's tip from 9 months before the warrant was issued was timely when coupled with information received 5 months earlier and considerable information that was only days or weeks old at the time of the warrant application. Additionally, when viewing the totality of the circumstances in a practical, common-sense manner, there was sufficient probable cause for the warrant based on an experienced officer's observations of Dutton's activity of purchasing numerous drug precursors used in methamphetamine production as inconsistent with the average consumer. Dutton's motion to suppress was properly denied. St. v. Dutton, 2007 MT 56, 336 M 192, 153 P3d 642 (2007).

Companion's Activity at Defendant's Residence Sufficient to Justify Search of Defendant's Property: Officers obtained a warrant to search Barnaby's residence based in large part on informants' tips that Barnaby's companion, Sheridan, was operating a clandestine drug laboratory at the residence. Barnaby moved to suppress the evidence on grounds that the search warrant was insufficient because evidence of Sheridan's involvement in methamphetamine production did not establish probable cause to search Barnaby's residence. The Supreme Court cited Zurcher v. Stanford Daily, 436 US 547 (1978), St. v. Gray 2001 MT 250, 307 M 124, 38 P3d 775 (2001), and St. v. St. Marks, 2002 MT 285, 312 M 468, 59 P3d 1113 (2002), for the proposition that the critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought. Thus, corroboration of criminal conduct by Barnaby's companion, Sheridan, could be imputed to Barnaby, even though Sheridan's mere presence at the residence did not amount to probable cause to search Barnaby's residence. However, Sheridan's involvement in the production of methamphetamine and continued presence at Barnaby's house, coupled with two independent reports that Sheridan operated a drug lab at the house and a report of suspicious activity at the house since Sheridan's arrival, amounted to a substantial basis for determining whether probable cause supported the issuance of a warrant under the totality of the circumstances. The fact that the warrant application did not include a specific account of the circumstances under which some informants viewed the events or whether two citizens based their reports on personal observations did not preclude a court from finding probable cause. Sufficiency of the warrant was affirmed, and Barnaby's motion to suppress was properly denied. St. v. Barnaby, 2006 MT 203, 333 M 220, 142 P3d 809 (2006).

Reasonable Cause for Search of Probationer's Vehicle for Methamphetamine Lab Under Totality of Circumstances: Two probation officers arrived at Feltman's residence to conduct a search and found dangerous drugs and paraphernalia. While there, Fritz arrived at the residence asking for Feltman. Fritz was told to leave and complied, but returned later. After determining Fritz's identity, the officers discovered that there was an outstanding warrant for Fritz for a probation violation. In an effort to avoid incarceration, Feltman told the officers that there was a drug lab in Fritz's truck. After Fritz was arrested, the officers searched his truck and discovered chemicals for manufacturing methamphetamine. Fritz contended that the search was unreasonable because the truck was not registered in his name and because Feltman's statement was not corroborated. The Supreme Court disagreed, concluding that under the totality of the circumstances, reasonable cause existed for the search of the truck. Officers knew that: (1) Fritz was a probationer who failed to report to his probation officer as required; (2) Fritz was associating with Feltman at a residence where drugs and paraphernalia were found; (3) Feltman provided explicit information about a laboratory in the truck, which she backed up with a reasonable explanation; (4) methamphetamine cooks frequently conceal portable laboratories by using vehicles registered in someone else's name; and (5) the truck was under Fritz's control because he was observed driving it two separate times. St. v. Fritz, 2006 MT 202, 333 M 215, 142 P3d 806 (2006).

Improper Order to Pay Child Support as Condition of Sentence for Possession of Dangerous Drugs: Erickson entered a plea agreement on drug charges, and although it was not part of the agreement, the sentencing court ordered that Erickson also forfeit one-third of his prison earnings as restitution to be paid toward Erickson's delinquent child support. Erickson never invited or acquiesced to the child support order. On appeal, the Supreme Court held that possession of dangerous drugs is a victimless crime for which restitution cannot be owed and also noted that the amount of restitution must be determined and fixed. The court agreed with Erickson that there was no connection between drug crimes and the failure to pay child support, so ordering payment of child support arrearages as restitution was not an appropriate condition of sentencing for a drug crime. However, in this case, the sentencing court made it clear that the order to pay child support was in lieu of requiring Erickson to pay cleanup costs associated with a clandestine drug lab, attorney costs, or jury costs. The sentencing court could have imposed both costs and restitution if not for the imposition of the illegal child support obligation, so the Supreme Court was unable to determine what sentence would have been imposed if the law had been correctly applied. The case was remanded for resentencing on whether Erickson must pay restitution and costs. St. v. Erickson, 2005 MT 276, 329 M 192, 124 P3d 119 (2005).

Remand to Determine Credit for Prejudgment Time Served — Failure to Object Not Fatal to Appeal: The District Court gave Erickson credit for time served on charges for two separate crimes. Erickson did not object to the credit at sentencing, but instead contested the credit on appeal. Following St. v. Eaton, 2004 MT 283, 323 M 287, 99 P3d 661 (2004), the Supreme Court applied the exception to the rule that failure to timely object to a sentence risks waiver of a sentencing issue on appeal because giving Erickson less credit than he was entitled to would violate statutory mandates. A defendant's sentence may be credited with incarceration time only if the incarceration was directly related to the offense for which the sentence was imposed. The record on appeal was unclear regarding whether Erickson's bond was revoked on one of the charges and whether Erickson received proper presentence credit, so the case was remanded to determine whether Erickson was given proper credit for time served for each offense. St. v. Erickson, 2005 MT 276, 329 M 192, 124 P3d 119 (2005), following St. v. Kime, 2002 MT 38, 308 M 341, 43 P3d 290 (2002), and followed in St. v. Henderson, 2008 MT 230, 344 M 371, 188 P3d 1011 (2008). Henderson was followed in St. v. Allison, 2008 MT 305, 346 M 6, 192 P3d 1135 (2008).

On remand, the District Court determined that Erickson's bond was not formally revoked on the first charge and properly credited Erickson with 267 days served on the first charge and for 457 days served from arrest to the sentencing hearing on the second charge. St. v. Erickson, 2008 MT 50, 341 M 426, 177 P3d 1043 (2008).

Evidence of Illegal Drugs, Ingredients, Materials and Equipment, and Paraphernalia in Apartment and Car and Witnesses' Testimony on Manufacturing as Supporting Drug Offense Convictions: Peace officers found methamphetamine, many of the ingredients of methamphetamine, and materials and equipment used to produce methamphetamine in defendant's apartment and in her boyfriend's car, in which she was a passenger at the time that it was detained for a search. They found marijuana in a cosmetic case in the car, and she admitted that she smoked marijuana. They found drug paraphernalia in both the apartment and the car. Two witnesses testified that she and her boyfriend were producing methamphetamine in her apartment. The evidence sufficiently supported her convictions of operation of an unlawful clandestine laboratory, possession of methamphetamine, possession of marijuana, and possession of drug paraphernalia, and the state did not have to prove that she actually manufactured methamphetamine. A 5-year sentence enhancement for operating the lab within 500 feet of a residence was supported by testimony that her apartment had residential apartments above and below it and on all three floors of the apartment building. St. v. Chase, 2004 MT 375, 325 M 64, 103 P3d 1060 (2004).

Personal Possession of Pipe Insufficient Probable Cause to Search Vehicle — Evidence in Plain View in Vehicle Sufficient Probable Cause for Subsequent Search of Residence: When Griffin was lawfully arrested for driving without a license, the arresting officer found a pipe in Griffin's pocket that, in the officer's opinion, contained drug residue. The officer then obtained a search warrant for Griffin's truck. When approaching the truck, the officer observed items in plain view in the open truck bed that could be used to manufacture methamphetamine. Pursuant to another search warrant based on the evidence in the truck bed, officers searched Griffin's residence and found a drug lab that was booby-trapped with explosives. Griffin moved to suppress all the evidence because the first search warrant was issued without probable cause. The motion was denied, but on appeal, the Supreme Court agreed that the only evidence supporting the vehicle search warrant—the existence of a pipe on Griffin's person and the fact that Griffin recently exited the truck—provided insufficient probable cause for a warrant to search the truck. Just because a person has a pipe in a pocket that contains untested white residue does not mean that the person's vehicle will contain evidence of a drug offense. However, in this case, the majority of evidence seized from the truck was in plain view in the truck bed. Griffin had no expectation of privacy regarding items in plain view, nor was a warrant required to seize the items in the truck bed. Therefore, any error in issuing the search warrant for the truck was harmless and not prejudicial. Additionally, the lawfully seized evidence in the truck bed was sufficient to support a finding of probable cause for issuance of another warrant to search Griffin's residence. Denial of Griffin's motion to suppress was affirmed. St. v. Griffin, 2004 MT 331, 324 M 143, 102 P3d 1206 (2004).

Statute Criminalizing Clandestine Laboratory Not Unconstitutionally Vague or Overbroad: Leeson contended that this section is unconstitutionally vague on its face because a person of ordinary intelligence could be in possession of equipment and materials commonly used for other purposes that could be used to manufacture methamphetamine, subjecting that person to arrest for operating a clandestine laboratory. A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that the person's contemplated conduct is forbidden. Leeson did not indicate which terms in this section fail to give proper notice. The section requires possession with intent to operate a laboratory, and it would be difficult if not impossible for a person to inadvertently manufacture dangerous drugs purposely or knowingly. Leeson also contended that this section is unconstitutionally overbroad because it subjects innocent people to being arrested for possessing certain items that are otherwise legal to possess. A statute may be overbroad if in its reach it prohibits constitutionally protected activity, but the claimed overbreadth must be real and substantial, judged in relation to the statute's plainly legitimate sweep, particularly when conduct and not merely speech is involved. Leeson did not demonstrate how the statute might infringe on a constitutionally protected right in a real or substantial way. Thus, this section is not unconstitutionally vague or overbroad. St. v. Leeson, 2003 MT 354, 319 M 1, 82 P3d 16 (2003), following St. v. Nye, 283 M 505, 943 P2d 96 (1997). See also Ward v. Rock Against Racism, 491 US 781 (1989).

Operating Unlawful Clandestine Laboratory and Manufacturing Dangerous Drugs Considered Separate Offenses — No Equal Protection Violation: Davison was charged with two counts of operating an unlawful clandestine laboratory and one count of possession of dangerous drugs. Davison moved to dismiss the laboratory charges, claiming an equal protection violation because of the disparity in punishment between the laboratory charges and the charge of manufacturing dangerous drugs. The motion was denied, and Davison appealed, contending that disparate punishment for essentially the same crime lacked a rational basis in violation of equal protection guarantees. When reviewing equal protection challenges, the Supreme Court applies one of three levels of scrutiny, including strict scrutiny (if a law affects a suspect class or threatens a fundamental right), intermediate scrutiny (if a law affects a constitutional right that is not found in Art. II, Mont. Const.), and the rational basis test (which requires that a law must be rationally related to a legitimate governmental interest and applies if neither of the first two tests applies). Davison's argument failed because he did not identify a classification that would warrant an equal protection analysis under any of the three recognized levels of scrutiny. The offense of operating an unlawful clandestine laboratory is a separate and distinct crime from the offense of manufacturing dangerous drugs, so an individual convicted under one statute is not similarly situated to an individual convicted under the other statute for equal protection purposes. Further, the state is not required to charge a particular offense when an offender's conduct satisfies the elements of more than one crime. Davison could not show that the crimes affect similarly situated classes in an unequal manner, so the Supreme Court affirmed. St. v. Davison, 2003 MT 64, 314 M 427, 67 P3d 203 (2003).

Part 2

Procedural Provisions

45-9-202. Alternative sentencing authority.

Compiler's Comments

2005 Amendment: Chapter 473 in (2)(d)(ii) substituted "department of corrections" for "clerk of the district court" and at end after "account" substituted "established in 46-23-1031" for "in the state special revenue fund to the credit of the department of corrections"; and made minor changes in style. Amendment effective October 1, 2005.

1995 Amendment: Chapter 546 in (2)(c) and (2)(d)(ii) substituted "department of corrections" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment: In (1) substituted "a dangerous drug felony offense under this chapter" for "criminal possession of dangerous drugs, criminal sale of imitation dangerous drugs, criminal possession of imitation dangerous drugs with purpose to sell, fraudulently obtaining dangerous drugs, or altering labels on dangerous drugs, if he is shown to be an excessive or habitual user of dangerous drugs, as defined in 50-32-101, either from the face of the record or by a presentence investigation" and at end, after "be", substituted "sentenced according to the alternatives provided in subsection (2)" for "committed to the custody of any institution for rehabilitative treatment for not less than 6 months or more than 2 years"; and inserted (2) authorizing the court, if it determines from the record or from the presentence report that incarceration of defendant is not appropriate, to impose alternatives outlined in subsections (2)(a) through (2)(e).

Name Change: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

1983 Amendment: Inserted "criminal sale of imitation dangerous drugs, criminal possession of imitation dangerous drugs with purpose to sell".

Annotator's Note: This section provides alternative rehabilitative sentencing authority where defendants are convicted under 45-9-102 (Criminal Possession of Dangerous Drugs), 45-9-104 (Fraudulently Obtaining Dangerous Drugs), 45-9-105 (Altering Labels on Dangerous Drugs), [or 45-9-112 or 45-9-113 (criminal sale of imitation dangerous drug, and criminal possession of imitation dangerous drug with purpose to sell),] and are shown to be excessive or habitual users of dangerous drugs. The legislative purpose is to provide a curative, rather than purely punitive, sentencing possibility where the drug use by the defendant approaches or amounts to addiction. The 1977 amendment inserted "as defined in 54-301" near the middle of the section; and made minor changes in phraseology, punctuation, and style.

Case Notes

Failure to Cite Alternative Sentencing Authority Statute While Arguing for Deferred Sentence — Ineffective Assistance of Counsel: The defendant's attorney recommended the defendant receive a deferral of her sentence after her conviction for criminal possession of dangerous drugs, arguing that the "may not be deferred" language in 46-18-201 was discretionary rather than mandatory, which was clearly incorrect. Because the defendant's counsel cited only 46-18-201, the defendant had no real opportunity to receive a deferred sentence despite the allowance of alternatives provided under the alternative sentencing authority statute in 45-9-202. Because an alternative deferred sentence was not precluded for a defendant with a felony that had occurred over 24 years prior and was not drug-related, and because there was a reasonable probability the District Court would have deferred imposition of sentence if it had been made aware of alternative sentencing options, the defendant received ineffective assistance of counsel at sentencing by her attorney. Thus, the Supreme Court reversed and remanded the case for resentencing. St. v. Wright, 2021 MT 239, 405 Mont. 383, 495 P.3d 435.

Defense Counsel's Incorrect Advice to Court Regarding Sentencing — Sentence Reversed and Remanded for New Sentencing Hearing: The District Court sentenced the defendant to 10 years in prison for possession of methamphetamine as a persistent felony offender after his attorney incorrectly advised the court that it could not defer or suspend the defendant's sentence. The defendant appealed his sentence and claimed that he had received ineffective assistance of counsel. The Supreme Court agreed, ruling that his counsel's performance was deficient and had prejudiced the defendant. The Supreme Court reversed his sentence and remanded the matter for a new sentencing hearing. St. v. Larsen, 2018 MT 211, 392 Mont. 401, 425 P.3d 694.

Alternative Sentence for Drug Offense Not Precluded by Persistent Felony Offender Statutes, but Incarceration Not Error: Brendal pleaded guilty to fraudulently obtaining dangerous drugs and was sentenced to 25 years in prison with 15 years suspended. Based on prior convictions for the same offense, the sentencing court designated Brendal as a persistent felony offender and imposed a mandatory 10-year prison sentence. Brendal appealed the sentence on grounds that the sentencing court should have considered a sentence to a drug treatment program pursuant to the alternative sentencing authority in 45-9-202. However, the Supreme Court affirmed. The persistent felony offender statutes do not preclude a District Court from providing an alternative sentence under 45-9-202 for a person convicted of a drug-related offense, as long as the required criteria for imposing an alternative sentence are satisfied. Therefore, although the District Court could have provided an alternative sentence, it was not error to sentence Brendal to incarceration. St. v. Brendal, 2009 MT 236, 351 M 395, 213 P3d 448 (2009). See also St. v. Hinshaw, 2018 MT 49, 390 Mont. 372, 414 P.3d 271.

District Court Without Jurisdiction to Change Sentence: After sentencing Hanners for possession of marijuana with intent to sell, the lower court suspended the entire sentence pursuant to a recommendation from the Department of Institutions intensive supervision program. The Supreme Court held that at the time of the sentencing, the statute had not been amended to allow for the suspension and therefore the lower court was without jurisdiction to modify the sentence. St. v. Hanners, 254 M 524, 839 P2d 1267, 49 St. Rep. 810 (1992).

45-9-203. Surrender of license.

Compiler's Comments

2021 Amendment: Chapter 576 in (2) after "issued pursuant to" substituted "16-12-203 or 16-12-503" for "50-46-307 or 50-46-308"; in (2)(b) substituted reference to the department of revenue for reference to the department of public health and human services and at end substituted "duties under 16-12-109 or 16-12-523" for duties under 50-46-330"; and made minor changes in style. Amendment effective January 1, 2022.

Severability: Section 113, Ch. 576, L. 2021, was a severability clause.

2016 Amendment by Initiative: Initiative Measure No. 182, proposed by initiative petition and approved at the general election held November 8, 2016, in (2) after "registry identification card" inserted "or license". Amendment effective June 30, 2017.

2015 Amendment: Chapter 55 in (2) substituted "50-46-307" for "50-45-307". Amendment effective October 1, 2015.

2011 Amendment: Chapter 419 inserted (2) relating to surrender of registry identification card for medical use of marijuana; and made minor changes in style. Amendment effective July 1, 2011.

Severability: Section 39, Ch. 419, L. 2011, was a severability clause.

45-9-204. Immunity from liability.

Compiler's Comments

Two-Thirds Vote Required: Section 7, Ch. 802, L. 1991, provided: "Because [section 3] [45-9-204] limits governmental liability, Article II, section 18, of the Montana constitution requires a vote of two-thirds of the members of each house for passage."

45-9-205. Exemption from mandatory minimum sentences.

Compiler's Comments

1999 Amendment: Chapter 52 near beginning substituted "sentencing judge" for "court" and near end substituted "46-18-205(2)" for "46-18-201(5)". Amendment effective October 1, 1999.

Preamble: The preamble attached to Ch. 52, L. 1999, provided: "WHEREAS, the Correctional Standards and Oversight Committee was authorized by the Fifty-Fifth Legislature to conduct a study of correctional standards and to act as a correctional oversight committee; and

WHEREAS, the Committee contracted for a review of Title 46, chapter 18, MCA, sentencing statutes; and

WHEREAS, the Committee found that the statutes providing for sentencing and judgment regarding criminal procedures are confusing and rife with cross-references, internal references, and inconsistent terminology that make the statutes difficult to read and understand; and

WHEREAS, the Committee recommended that a bill be drafted to amend Title 46, chapter 18, MCA, to make nonsubstantive changes to clarify and streamline the statutes to eliminate contradictions, confusion, inconsistent terminology, and excessive internal references.

THEREFORE, the Legislature of the State of Montana finds it appropriate to so amend certain sentencing-related statutes."

1995 Amendment: Chapter 125 substituted "46-18-201(5)" for "46-18-201(4)".

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

45-9-206. Use or possession of property subject to criminal forfeiture — property subject to criminal forfeiture.

Compiler's Comments

2015 Amendment — Code Commissioner Correction: Chapter 421 inserted (2) concerning request for pretrial forfeiture hearing; in (2)(h) deleted former last sentence that read: "An owner's interest in real property is not subject to criminal forfeiture by reason of an act or omission unless it is proved that the act or omission was the owner's or was with the owner's express consent"; deleted former (3) and (4) that read: "(3) A conveyance is not subject to criminal forfeiture under this section unless the owner or other person in charge of the conveyance knowingly used the conveyance to violate or knowingly consented to its use for the purpose of violating 45-9-101, 45-9-103, or 45-9-110 or of 45-4-102 when the object of the conspiracy was a violation of 45-9-101, 45-9-103, or 45-9-110.

(4) Criminal forfeiture under this section of property that is encumbered by a bona fide security interest is subject to that interest if the secured party did not use or consent to the use of the property in connection with a violation of 45-9-101, 45-9-103, or 45-9-110 or of 45-4-102 when the object of the conspiracy was a violation of 45-9-101, 45-9-103, or 45-9-110"; inserted (7) concerning bona fide security interest and burden of proof; inserted (8) concerning an innocent owner; and made minor changes in style. Amendment effective July 1, 2015.

In (3)(c) at beginning the code commissioner deleted "except as provided in subsection (3)" to remove the reference to a deleted subsection.

Saving Clause: Section 15, Ch. 421, L. 2015, was a saving clause.

Severability: Section 16, Ch. 421, L. 2015, was a severability clause.

Applicability: Section 17, Ch. 421, L. 2015, provided: "[This act] applies to forfeiture proceedings begun on or after [the effective date of this act]." Effective July 1, 2015.

Effective Date: Section 3, Ch. 537, L. 1995, provided: "[This act] is effective on passage and approval." Approved April 21, 1995.

Case Notes

Conviction for Production of Methamphetamine and Possession of Property Used to Produce Methamphetamine Not Double Jeopardy — Separate Elements of Each Offense: Minez contended that the possession of glassware and chemicals used to produce methamphetamine was only a form of preparation to commit the offense of producing methamphetamine and that conviction of two offenses for the same act violated double jeopardy protections. The Supreme Court disagreed. The elements of each offense were different, and each required proof of an additional fact not required by the other. Double jeopardy does not apply to conviction for two separate crimes. St. v. Minez, 2003 MT 344, 318 M 478, 82 P3d 1 (2003).

Original Jury Instruction Constituting Law of Case Absent Objection — Erroneous Supplemental Jury Instruction Allowing Finding of Guilt When Only Portion of Property Subject to Forfeiture Composed of Drug Sale Proceeds — Abuse of Discretion in Allowing Conviction Based on Lesser Amount Than Charged: The state charged and prosecuted Crawford for possession of $1,025 in proceeds from an illegal drug sale, thus assuming the burden of proving that Crawford possessed approximately that amount and that it came from drug sales and refuting Crawford's alleged legitimate sources for any portion of that amount. At no time did the state offer evidence that only a portion of the amount came from drug sales or accept that possibility in its closing remarks. In jury instructions, the District Court informed the jury that the state had to prove the elements charged, that Crawford possessed $1,025 derived from drug sales, and that Crawford acted knowingly. During deliberations, the jury became confused as to how the instruction should be applied and sought clarification as to whether Crawford could still be convicted if the jury found that only a portion of the money came from drug sales. The District Court provided a supplemental instruction stating that Crawford could still be convicted on a lesser amount and supplied the jury with a special interrogatory allowing the jury to state the portion of the amount that was considered to be drug proceeds. The jury found that $225 of the $1,025 derived from drug sales, and Crawford was convicted. On appeal, Crawford argued that once given, the initial instruction became the law of the case absent objection and that giving the supplemental instruction was therefore an abuse of discretion. Crawford further contended that allowing the jury to find that only a portion of the amount charged was considered to be drug proceeds constituted an amendment to the information, which prejudiced Crawford by disallowing an adjustment to his defense strategy to rebut the state's reduced burden of proof. The Supreme Court agreed. When the state fails to object to a jury instruction, the instruction becomes the law of the case, whether it includes an unnecessary element or not, and the jury is accordingly bound by it. A supplemental instruction that allowed deviation from the original instruction requiring a finding that Crawford possessed $1,025 in drug sale proceeds was therefore an abuse of discretion. Further, because the jury found that only $225 was attributable to drug sales, the state failed to prove the monetary element of the offense as defined by the original jury instruction, so Crawford's conviction on the count of possession of property subject to forfeiture was reversed. St. v. Crawford, 2002 MT 117, 310 M 18, 48 P3d 706 (2002). See also St. v. Cline, 170 M 520, 555 P2d 724 (1976), and St. v. Hickman, 954 P2d 900 (Wash. 1998).

Catchall Phrase in Warrant — Particularity Requirement — Suppression of Only Articles Seized Pursuant to Invalid Portions of Search Warrant: A lawful search warrant authorized officers to search Hauge's mobile home and seize drugs, drug paraphernalia, records of drug transactions, weapons, and the proceeds of drug transactions, including "anything else of value furnished or intended to be furnished in the exchange of controlled substances". Hauge argued that the catchall phrase "anything else of value" rendered the warrant overbroad and invalid and that any evidence seized pursuant to the warrant must be suppressed. After initially citing the requirement that a search warrant must particularly describe who or what is to be seized, the Supreme Court noted that in St. v. Seader, 1999 MT 290, 297 M 60, 990 P2d 180 (1999), warrant language authorizing seizure of anything else of value was a catchall phrase encompassing everything conceivable, giving officers unbridled discretion to engage in a general exploratory rummaging without any guidance in distinguishing between items that could and could not be seized and that the language rendered the warrant facially overbroad and all fruits of the search inadmissible. However, the court also noted the adoption of the doctrine of severance, explained in U.S. v. Gomez-Soto, 723 F2d 649 (9th Cir. 1984), which provides that invalid portions of a search warrant may be stricken and valid portions preserved and that only articles seized pursuant to the invalid portions of the warrant need be suppressed. In Hauge's case, officers acting pursuant to a lawfully issued and otherwise sufficiently particularized warrant did not seize any property related to the catchall phrase and no criminal charges resulted from the presence of the catchall language in the warrant. The overbroad catchall clause was thus severable, and because no evidence was seized pursuant to the clause, no evidence was subject to suppression. Hauge v. District Court, 2001 MT 255, 307 M 195, 36 P3d 947 (2001). See also St. v. Kuneff, 1998 MT 287, 291 M 474, 970 P2d 556 (1998).

Warrant Authorizing Search for "Anything Else of Value" as Overbroad: Authorities suspected that Seader's van would contain drugs and drug-related evidence, and a search warrant was issued in part authorizing the seizure of "proceeds of drug sales whether in monies, precious metals, property or anything else of value furnished or intended to be furnished in the exchange for the evidence or contraband relating to the use, sale or manufacture of dangerous drugs". Seader moved to suppress the results of the search, including a stolen ATV discovered in the van. The Supreme Court noted that the specificity required of a search warrant may vary depending on the circumstances and the type of items involved and that generic categories or general descriptions of items are not necessarily invalid if a more precise description of items to be seized is not possible. However, the language in this warrant authorizing seizure of "anything else of value" was a catchall phrase encompassing everything conceivable, giving officers unbridled discretion to engage in a general exploratory rummaging in Seader's belongings without any guidance in distinguishing between items that could and could not be seized. The language rendered the warrant facially overbroad and all fruits of the search inadmissible. St. v. Seader, 1999 MT 290, 297 M 60, 990 P2d 180, 56 St. Rep. 1165 (1999). See also Coolidge v. N.H., 403 US 443, 29 L Ed 2d 564, 91 S Ct 2022 (1971), U.S. v. Leary, 846 F2d 592 (10th Cir. 1988), and St. v. Perrone, 834 P2d 611 (Wash. 1992). However, see Hauge v. District Court, 2001 MT 255, 307 M 195, 36 P3d 947 (2001), in which it was held that when faced with a lawfully issued and otherwise sufficiently particularized warrant, the overbroad catchall phrase should be severed and only evidence seized under that clause need be suppressed.

Mere Proximity Insufficient to Establish Connection Between Common Items and Illegal Drug Activity — Burden of Proof Required in Criminal Forfeiture Proceedings: Before the state may criminally convict a citizen and deprive that citizen of property by forfeiture under this section, the state must establish, by direct or circumstantial evidence, a more substantial connection between common household items and illegal drug activity than merely their proximity to one another in a residence. The state must prove not only that the property has the required statutory connection to illegal drug activity, but also that each specific item seized is subject to forfeiture. Criminal forfeiture based on nothing more than a justifiable suspicion cannot be affirmed, nor is a suggestion of guilt by association sufficient to establish beyond a reasonable doubt that a statutory connection exists between the property and the drug activity. The kind and amount of circumstantial evidence offered in the present case were insufficient as a matter of law to warrant the jury's finding of guilt beyond a reasonable doubt. Therefore, defendant's motion to dismiss, on grounds of insufficient evidence that the property was subject to forfeiture, should have been granted. St. v. Hegg, 1998 MT 100, 288 M 254, 956 P2d 754, 55 St. Rep. 391 (1998).

CHAPTER 10
MODEL DRUG PARAPHERNALIA ACT

Part 1
General Provisions

Part Compiler's Comments

Source: This part is based on the Model Drug Paraphernalia Act promulgated by the Drug Enforcement Administration of the United States Department of Justice.

Severability: Section 10, Ch. 481, L. 1981, was a severability section.

Part Case Notes

Constitutionality: With respect to acts prohibited by 45-10-104, this chapter is not overly broad or vague; nor does this chapter violate equal protection principles. The state regulation of drug paraphernalia by this chapter is supported by sufficient authority. Stoianoff v. St., 695 F2d 1214 (1983).

Degree of Clarity Required: Where the drug paraphernalia act was attacked as being unconstitutionally vague, the federal District Court held that standard to be applied to an act regulating commercial activities is different from that applied where the first amendment to the United States Constitution is involved. Stoianoff v. St., 529 F. Supp. 1197, 39 St. Rep. 88 (D.C. Mont. 1981), affirmed 695 F2d 1214 (1983).

Part Law Review Articles

America's Drug War and the Right to Privacy, Stamper, 68 Mont. L. Rev. 285 (2007).

45-10-101. Definitions.

Case Notes

Plain View Doctrine Justifying Seizure of Contraband Pipe During Stop and Frisk Search for Weapons: After Stubbs was stopped on a reasonable suspicion of criminal activity, including speeding, reckless or careless driving, and eluding a peace officer, the officer noticed numerous weapons in the vehicle, providing a reasonable justification for searching Stubbs on the scene. During a pat-down search of Stubbs' clothing, the officer thought that a lump in Stubbs' pocket might be a deadly weapon. After removing the item to make sure that it was not a weapon, the item was in plain view and the incriminating character of the object, a brass pipe, was apparent. Absent any indication that the search was used as a pretext to discover illicit drugs or paraphernalia, the discovery of the pipe was inadvertent and seizure of the contraband was justified. St. v. Stubbs, 270 M 364, 892 P2d 547, 52 St. Rep. 232 (1995), overruled in part in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

45-10-102. Determination of what constitutes paraphernalia.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

45-10-103. Criminal possession of drug paraphernalia.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 723, L. 2023. Amendment effective May 22, 2023.

2021 Amendment: Chapter 576 in (1) near beginning of first sentence deleted reference to Title 50, chapter 46. Amendment effective January 1, 2022.

Severability: Section 113, Ch. 576, L. 2021, was a severability clause.

2020 Amendment by Initiative: Initiative Measure No. 190 near beginning inserted "Title 16, chapter 12". Amendment effective January 1, 2021.

Severability: Section 55, Initiative Measure No. 190, was a severability clause.

2017 Amendment: Chapter 253 in (1) at beginning inserted "50-32-609 or". Amendment effective May 3, 2017.

Preamble: The preamble attached to Ch. 253, L. 2017, provided: "WHEREAS, according to data from the United States Centers for Disease Control and Prevention (CDC), more than 28,000 deaths in the United States in 2014 involved opioid-related overdoses. In 2015, nationwide overdose deaths involving opioids rose to more than 33,000. The CDC also reports that deaths involving heroin have more than tripled since 2010, with more than 10,500 persons dying in 2014 and almost 13,000 dying in 2015. More than 60% of the opioid-related overdose deaths in

2015 were attributed to primarily illicit opioids, including heroin, to synthetic opioids other than methadone, or to a mixture of the two. The CDC calls opioid-related deaths a national epidemic; and

WHEREAS, many opioid-related overdose deaths could be prevented by the timely administration of an opioid antagonist, such as naloxone hydrochloride. Naloxone is a prescription medication that, when administered to a person experiencing an opioid-related overdose, restores the person to consciousness and normal breathing. Naloxone has been in use for more than 30 years and is virtually always effective when administered correctly. Furthermore, naloxone is nonaddictive and has no potential for abuse; and

WHEREAS, treatment of a suspected opioid-related drug overdose must be performed by someone other than the person overdosing, and, for this reason, the United States Food and Drug Administration labels naloxone for third-party administration. Naloxone can be successfully administered outside of a clinical setting or facility by friends, family members, or bystanders who have received minimal training in overdose recognition and naloxone administration; and

WHEREAS, it is common for a family member or friend to be the first one to find a person who is experiencing a drug overdose. It is also common for first responders, such as law enforcement officers or firefighters, to be among the first persons on the scene of a reported drug overdose. Studies show widespread success in preventing deaths from opioid-related overdoses through timely administration of naloxone. It is imperative, therefore, that persons who are in a position to render timely assistance to an overdose victim have immediate access to naloxone when it is needed; and

WHEREAS, overdose education and naloxone distribution programs that train family members, friends, and others in a position to assist someone experiencing an opioid-related overdose can effectively reduce opioid overdose death rates. Moreover, naloxone distribution for administration by nonmedical experts can be highly cost-effective; and

WHEREAS, an opioid-related overdose is a medical emergency. After the administration of naloxone, it is critical to summon emergency medical assistance. However, persons who witness an overdose are sometimes reluctant to call 9-1-1 for fear of being arrested and prosecuted for a crime. Thirty-six states and the District of Columbia have passed laws providing limited immunity to persons who call for help when someone has experienced an opioid-related overdose; and

WHEREAS, numerous state and national public health and other organizations support increased access to naloxone, including the American Medical Association, the American Society of Addiction Medicine, the American Pharmacists Association, the United States Conference of Mayors, the National Governors Association, the federal Office of National Drug Control Policy, the American Public Health Association, the Harm Reduction Coalition, the National Association of State Alcohol and Drug Abuse Directors, the American Association of Poison Control Centers, and state and local law enforcement and other organizations representing first responders."

2009 Amendment: Chapter 156 at beginning of first sentence inserted exception clause; and made minor changes in style. Amendment effective October 1, 2009.

2001 Amendment: Chapter 100 at end inserted third sentence providing presumption of entitlement to deferred sentence for first conviction; and made minor changes in style. Amendment effective October 1, 2001.

Case Notes

Imposition of Jail Term as Condition of Deferred Sentence Not Improper: A defendant was found guilty of criminal possession of drug paraphernalia, and the Justice Court deferred the imposition of the sentence for 6 months on the conditions that the defendant pay specified fines and charges, complete community service, and serve 10 days in the county jail or work for 5 days on the county labor detail program in lieu of the fines and jail time. The defendant appealed to the District Court, asserting that the jail-time condition was inconsistent with the provision in 45-10-103 providing that a first-time offender is presumed to be "entitled to a deferred imposition of sentence of imprisonment". On initial appeal, the District Court affirmed the Justice Court, and the defendant appealed again. The Supreme Court affirmed the District Court, finding that because the imposition of incarceration in a detention center not exceeding 180 days is expressly authorized as a condition of a deferred sentence in 46-18-201, the jail-time provision was a facially legal condition of the sentence. St. v. Thibeault, 2021 MT 162, 404 Mont. 476, 490 P.3d 105.

Burden of Proof — Individual Must Show Medical Marijuana Card — Burden Not on City or State: The Municipal Court and District Court did not err in determining that the defendant had the burden of proving she fit under a statutory exception for criminal possession of drug paraphernalia for individuals in compliance with the Medical Marijuana Act (MMA). Through the MMA, the Legislature created an exception from arrest and prosecution for marijuana-related crimes for individuals who comply with the MMA's regulatory system. In any criminal case, "a defendant who relies upon an exception to a statute made by a proviso or distinct clause, whether in the same section of the statute or elsewhere, has the burden of establishing and showing that he comes within the exception" (U.S. v. Freter, 31 F.3d 783 (9th Cir. 1994), quoted in U.S. v. Guzman-Mata, 579 F.3d 1065 (9th Cir. 2009)). Therefore, to avail herself of the MMA exception the defendant bore the burden of establishing and showing she came within the exception. Unlike St. v. Johnson, 2012 MT 101, 365 Mont. 56, 277 P.3d 1232, the defendant never provided any evidence she had a valid registry card. Therefore, she was not entitled to a rebuttable presumption that she possessed marijuana-related drug paraphernalia in compliance with the MMA, and the city had no presumption to rebut. Consequently, to convict the defendant, the city only needed to prove that the defendant purposely or knowingly possessed with intent to use drug paraphernalia to inhale a dangerous drug. The Municipal Court correctly held that the defendant bore the burden of establishing and showing she came within the MMA exception, and the District Court did not err by affirming the Municipal Court's holding. Missoula v. Shumway, 2019 MT 38, 394 Mont. 302, 434 P.3d 918, citing U.S. v. Guzman-Mata, 579 F.3d 1065 (9th Cir. 2009).

Sufficient Evidence to Support Charges — Verdict Reviewed for Sufficiency, Not Different Result: Sufficient evidence supported the defendant's convictions of criminal possession of drug paraphernalia. When reviewing whether sufficient evidence exists to support a trial court's verdict, the Supreme Court views the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could have found all of the essential elements of the offense beyond a reasonable doubt. The Supreme Court reviews the verdict only to determine whether sufficient evidence exists to support it, not whether the evidence could have supported a different result. Through a police officer's testimony, the city established that (1) the defendant told the police officer she had two marijuana pipes in her purse, (2) the police officer confiscated the pipes, and (3) the police officer observed the pipes contained burned marijuana residue. The city further admitted the marijuana pipes into evidence after the police officer testified they were the same pipes he confiscated from the defendant. Missoula v. Shumway, 2019 MT 38, 394 Mont. 302, 434 P.3d 918, citing St. v. Sutton, 2018 MT 143, 391 Mont. 485, 419 P.3d 1201.

Exigent Circumstances Sufficient to Justify Warrantless Search to Avoid Possible Destruction of Drug Evidence: Law enforcement officers were tipped off that defendant was transporting one-half pound of methamphetamine into the state and tracked defendant to another person's apartment in Corvallis. Officers began surveillance of the apartment and observed two individuals who appeared to be watching the officers. Within a minute, two persons left the apartment, and the officers concluded that their presence was known to persons in the apartment. Shortly thereafter, the officers received a call from an officer in Butte informing them that defendant had called an informant in Butte and told the informant that defendant knew he was being watched and asked the informant to come to Corvallis to help get rid of the drugs. The officers then discussed the possibility that defendant could destroy the drugs before a valid search warrant could be issued in 4 to 7 hours and decided to call for backup and enter the apartment. Upon entering, the officers found defendant and a woman present. Defendant had no drugs on his person, but had $1,500 in his wallet and appeared to be under the influence of methamphetamine. When the warrant eventually arrived, officers found 3 1/2 grams of methamphetamine packaged for sale. Defendant was charged with felony conspiracy to commit criminal distribution of dangerous drugs, felony criminal possession with intent to distribute, felony criminal endangerment, and misdemeanor criminal possession of drug paraphernalia. Defendant pleaded not guilty to all charges and moved to suppress the fruits of the warrantless search. The motion was denied, and defendant was convicted on one confessed count of intent to distribute. On appeal, defendant contended that the warrantless search was unlawful, but the Supreme Court affirmed. The facts that the officers had already witnessed one suspect flee the scene, knew that defendant was aware of the officers' presence, and knew that a third party had been contacted to help defendant get rid of the drugs, combined with the knowledge that procurement of a search warrant would take 4 to 7 hours, established the presence of exigent circumstances sufficient to justify warrantless entry into the apartment to avoid destruction of the alleged one-half pound of methamphetamine. St. v. Ruggirello, 2008 MT 8, 341 M 88, 176 P3d 252 (2008), applying the exigent circumstances test set out in St. v. Stone, 2004 MT 151, 321 M 489, 92 P3d 1178 (2004).

Evidence of Illegal Drugs, Ingredients, Materials and Equipment, and Paraphernalia in Apartment and Car and Witnesses' Testimony on Manufacturing as Supporting Drug Offense Convictions: Peace officers found methamphetamine, many of the ingredients of methamphetamine, and materials and equipment used to produce methamphetamine in defendant's apartment and in her boyfriend's car, in which she was a passenger at the time that it was detained for a search. They found marijuana in a cosmetic case in the car, and she admitted that she smoked marijuana. They found drug paraphernalia in both the apartment and the car. Two witnesses testified that she and her boyfriend were producing methamphetamine in her apartment. The evidence sufficiently supported her convictions of operation of an unlawful clandestine laboratory, possession of methamphetamine, possession of marijuana, and possession of drug paraphernalia, and the state did not have to prove that she actually manufactured methamphetamine. A 5-year sentence enhancement for operating the lab within 500 feet of a residence was supported by testimony that her apartment had residential apartments above and below it and on all three floors of the apartment building. St. v. Chase, 2004 MT 375, 325 M 64, 103 P3d 1060 (2004).

Proper Consideration of Defendant's Mental State to Justify Sentencing With Department of Corrections Rather Than Department of Public Health and Human Services: Following a drug conviction, the District Court considered Rathbun's mental condition pursuant to 46-14-311 and determined that Rathbun did not meet the burden of proof for commitment to the Department of Public Health and Human Services. Rathbun was instead sentenced to concurrent 10-year sentences with the Department of Corrections, and Rathbun appealed, but the Supreme Court affirmed. The District Court properly considered Rathbun's mental state at the time that the offenses occurred, and the sentences were within the parameters established by statute. Rathbun did not meet the burden of proof under 46-14-311, and the commitment to the Department of Corrections was a proper application of the appropriate commitment regime to avoid cruel and unusual punishment. St. v. Rathbun, 2003 MT 210, 317 M 66, 75 P3d 3334 (2003).

Illegal Search of Person but Lawful Search of Vehicle — Vehicle Search Upheld as Probation Search and Not "Fruit of Poisonous Tree": Deputy Turner watched New make several turns in his vehicle without signaling and, after determining by his vehicle license plate that New was on probation, stopped the vehicle and searched New. Upon discovering drugs in New's pocket, Turner impounded the vehicle. Detective Jacobs questioned New, and New gave Jacobs approval to search the vehicle. Then Jacobs talked to Forsyth, New's probation officer, who conducted the search of New's vehicle with Jacobs. Turner's search of New's pockets was subsequently held illegal but the District Court refused to quash evidence taken from the vehicle as a result of Forsyth's search. The Supreme Court affirmed, holding that the search of the vehicle was not the "fruit of the poisonous tree", the illegal personal search of New, but was justified upon the independent grounds that Forsyth had previously determined that he wanted to search New's vehicle because of pending charges of violations of the conditions of New's probation. St. v. New, 276 M 529, 917 P2d 919, 53 St. Rep. 510 (1996).

Evidence of Constructive Possession Held Sufficient — Circumstantial Evidence of Prior Use: Arthun was convicted of constructive possession of marijuana paraphernalia based upon his knowledge of the whereabouts of an unopened package containing marijuana and evidence in his home of marijuana, two marijuana pipes, and two glass bowls of marijuana roaches. The Supreme Court held that when circumstantial evidence is capable of two interpretations, one that supports guilt and one that supports innocence, the trier of fact determines which is most reasonable. St. v. Arthun, 274 M 82, 906 P2d 216, 52 St. Rep. 1133 (1995), followed in St. v. Hall, 1999 MT 297, 297 M 111, 991 P2d 929, 56 St. Rep. 1190 (1999).

Failure to Test Suspected Drug Substance: Although it is preferable to have a suspected drug substance tested by the state crime lab, the state's failure to do so does not necessarily render the evidence insufficient to convict a defendant beyond a reasonable doubt. St. v. Salois, 235 M 276, 766 P2d 1306, 45 St. Rep. 2382 (1988).

Wife's Constructive Possession of Items on Bathroom Shelf When She and Husband Both Use Shelf: Possession of contraband may be either actual or constructive, and constructive possession occurs when a person either controls or has a right to control the contraband. Defendant was an undisputed co-owner of a house in which drug paraphernalia was found, and her husband codefendant testified the paraphernalia had been in the house several days. Pipes were found on a bathroom shelf used by both. Defendant admitted that scales were hers. There was ample evidence to conclude that defendant had constructive possession of the paraphernalia. St. v. Scheffelman, 225 M 408, 733 P2d 348, 44 St. Rep. 357 (1987).

45-10-104. Manufacture or delivery of drug paraphernalia.

Case Notes

Constitutionality: With respect to acts prohibited by 45-10-104, this chapter is not overly broad or vague; nor does this chapter violate equal protection principles. The state regulation of drug paraphernalia by this chapter is supported by sufficient authority. Stoianoff v. St., 695 F2d 1214 (1983).

45-10-105. Delivery of drug paraphernalia to minor.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

45-10-106. Advertisement of drug paraphernalia.

Case Notes

Constitutionality: Because culpability under this section is not based on intent but rather mere knowledge of the propensity of the advertisement to promote sale of objects designed for use as drug paraphernalia, it is unconstitutionally vague as to the conduct proscribed. Stoianoff v. St., 529 F. Supp. 1197, 39 St. Rep. 88 (D.C. Mont. 1981), vacated as to this point on appeal, 695 F2d 1214 (1983), on ground there was no standing to raise an issue as to advertising under this section.

45-10-107. Exemptions.

Compiler's Comments

2021 Amendment: Chapter 576 deleted former (2) that read: "(2) persons acting in compliance with Title 50, chapter 46"; and made minor changes in style. Amendment effective January 1, 2022.

Severability: Section 113, Ch. 576, L. 2021, was a severability clause.

2020 Amendment by Initiative: Initiative Measure No. 190 inserted (3) concerning compliance with Title 16, chapter 12; and made minor changes in style. Amendment effective January 1, 2021.

Severability: Section 55, Initiative Measure No. 190, was a severability clause.

2017 Amendment: Chapter 96 inserted (3) concerning needle and syringe exchange services; and made minor changes in style. Amendment effective March 23, 2017.

2004 Amendment by Initiative: Initiative Measure No. 148, proposed by initiative petition and approved at the general election held November 2, 2004, near end inserted reference to persons in compliance with Title 50, chapter 46. Amendment effective November 2, 2004.

Severability: Section 18, I.M. No. 148, was a severability clause.

2003 Amendment: Chapter 114 after "Practitioners" inserted "as defined in 50-32-101" and after "a professional practice" deleted "as defined by 50-32-101". Amendment effective October 1, 2003.

45-10-104. Manufacture or delivery of drug paraphernalia.

Case Notes

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Severability: Section 113, Ch. 576, L. 2021, was a severability clause.

2020 Amendment by Initiative: Initiative Measure No. 190 inserted (3) concerning compliance with Title 16, chapter 12; and made minor changes in style. Amendment effective January 1, 2021.

Severability: Section 55, Initiative Measure No. 190, was a severability clause.

2017 Amendment: Chapter 59 inserted (3) concerning needle and syringe exchange services; and made minor changes in style. Amendment effective March 23, 2017.

2004 Amendment by Initiative: Initiative Measure No. 148, proposed by initiative petition and approved at the general election held November 2, 2004, near end inserted reference to persons in compliance with Title 50, chapter 46. Amendment effective November 2, 2004.

Severability: Section 15, I.M. No. 148, was a severability clause.

2003 Amendment: Chapter 114 after "Practitioners" inserted "as defined in 50-32-101" and after "a professional practice" deleted "as defined by 50-32-101". Amendment effective October 1, 2003.